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EDITOR
Virender Sharma
Director,
H.P. Judicial Academy,
16 Mile, Shimla-Mandi National Highway, Distt. Shimla

ASSISTANT EDITOR
Dr. Abira Basu
Deputy Director,
H.P. Judicial Academy,
16 Mile, Shimla-Mandi National Highway, Distt. Shimla

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Code of Criminal Procedure, 1973 (Code) – Section 438 – **Indian Penal Code, 1860 (IPC)**- Sections 307, 341, 323, 427, 452, 506 and 34– Pre-arrest bail– Grant of– Circumstances - Complainant alleged that her husband was beaten by accused and his father and as result of assault, her husband sustained injuries– Petitioner contending that he himself was injured in incident and remained hospitalized for a considerable period and cross FIR was registered– Facts revealing, that injuries suffered by petitioner have not been explained by prosecution– Further, petitioner has joined investigation- Held, prima facie, it creates a situation where genesis of occurrence was suppressed by complainant– There is no criminal history of petitioner- Petitioner is a native and permanent resident of Himachal- His presence can always be secured- No purpose will be served by keeping him in judicial

custody– Petition allowed subject to conditions. (Paras 4 to 8) Title: Munim Chand vs. State of Himachal Pradesh, Page- 454

Code of Criminal Procedure, 1973 - Section 439 – Regular bail in case of murder and conspiracy etc.- Grant of- Accused seeking regular bail on medical grounds- Medical Board constituted for his check up reporting of accused suffering from tuberculosis and urinary tract infection- Accused needs constant care- No material suggesting his fleeing from justice and tampering with evidence, if released on bail- Accused directed to be released on conditional bail. (Paras 3, 4 & 6) Title: Manoj Joshi vs. CBI, Page- 73

Code of Criminal Procedure, 1973 – Section 439 – Regular bail- Grant of- Circumstances- Accused alleged of possessing intermediate quantity (200 gms) of charas seeking regular bail- However, previously he was convicted of possessing 107 Kgs of charas and he had served 10 years imprisonment- Held, taking past history of accused into consideration, possibility of his again indulging in same or similar offence, if released on bail cannot be ruled out- Petition dismissed being devoid of any merit. (Paras 4 & 6) Title: Chande Ram vs. State of Himachal Pradesh, Page-340

Code of Criminal Procedure, 1973- Section 439– Regular bail- Grant of- Parameters- Held, object of bail is to secure attendance of accused during trial- Nature of accusation, nature of evidence in support thereof, severity of punishment which conviction will entail, character of accused and circumstances which are peculiar to him, are also relevant. (Paras 10 & 12) Title: Jasdeep Singh vs. State of Himachal Pradesh, Page- 393

Code of Criminal Procedure, 1973 - Section 439 – Regular bail in case registered for kidnapping, rape and for offences under Protection of Children from Sexual Offences Act etc.- Grant of- Circumstances- Held, FIR disclosing case of elopement of victim with some unknown person- In first statement recorded under Section 164 of Code, victim stating of her having gone with her own volition and without any pressure from accused as her parents wanted to get her marriage solemnized against her will- But subsequently changing her stand and getting another statement recorded that accused made her to go with him and also sexually assaulted- Victim changing her stands- Accused in custody since long- Investigation complete and trial yet to commence- Bail granted subject to conditions. (Paras 5, 6 & 11) Title: Ram Kumar vs. State of Himachal Pradesh, Page- 517

Code of Criminal Procedure, 1973 - Section 439 – Regular bail in murder, robbery case- Grant of- Circumstances- On facts, held, case against accused founded on 'last seen' theory based on statement of witness who saw accused visiting victim's house two days prior to alleged incident- Statement of that witness recorded after gap of 13 days and no reason given for its delayed recording - Disclosure statement of accused not leading to discovery of any fact- He is in custody for more than one year and eight months- Accused having no criminal history and permanently residing on address given- Conditional bail granted. (Paras 12 to 14) Title: Tek Chand alias Indu vs. State of Himachal Pradesh, Page- 608

Code of Criminal Procedure, 1973- Section 439 – **Narcotic Drugs and Psychotropic Substances Act, 1985 (Act) –** Sections 2(iii) (a), 20 & 37- Recovery of charas weighing 1 Kg. 210 gms.- Regular bail- Grant of- Accused seeking bail on ground that resin contents of recovered stuff bring it below commercial quantity and rigors of section 37 of Act will not apply- Held, charas is the separated resinous part derived from the flowering tops and leaves of cannabis plants- Law does not make any distinction between charas in crude form vis-â-vis charas in purified form- When charas is in crude form, entire recovered stuff and not the percentage of resin alone in it is to be taken into consideration for determining its quantity- Contraband recovered from accused falls in commercial quantity and rigors of section 37 of Act will apply- Petition dismissed. (Para 9) Title: Shanta Bahadur vs. State of Himachal Pradesh, Page-546

Code of Criminal Procedure, 1973 - Section 439 - **Narcotic Drugs and Psychotropic Substances Act, 1985 (Act) -** Sections 20 & 37**–** Recovery of 2 kg. 10 gm of charas-Bail- Grant of- Accused seeking bail on ground that pure resin contents bring recovered material into less than commercial quantity and rigors of Section 37 of Act are not attracted- Held, if any narcotic drug or substance is found mixed with one or more neutral substance(s), then for purpose of imposition of punishment only pure contents of substance are to be considered- Pure content is reckonable parameter for granting bail- Pure contents of stuff allegedly recovered from accused bring it into less than commercial quantity- Petition allowed- Conditional bail granted. (Paras 14 to 16) Title: Nasir Mohammad vs. State of H.P., Page-51

Code of Criminal Procedure, 1973 - Section 439 – **Narcotic Drugs and Psychotropic Substances Act, 1985 (Act) –** Section 20 & 37 – Recovery of 1.585 kgs of charas - Regular bail- Grnat of- Accused contending that pure contents of contraband (resin) bring it below commercial quantity, being so rigors of Section 37 of Act are not attracted and he should be enlarged on bail- Held, as per Mehboob Khan case, 2014 (2) RCR (Criminal) 447, percentage of resin in cannabis, alone is not charas and prima facie entire recovered contraband is 'charas' irrespective of percentage of resin in it- Recovered contraband falls in commercial category- Rigors of Section 37 of Act apply- Accused not entitled for bail- Petition dismissed. (Paras 7 to 9 & 13) Title: Avtar @ Tari vs. State of Himachal Pradesh, Page- 336

Code of Criminal Procedure, 1973 (Code) – Section 439 **– Narcotic Drugs & Psychotropic Substances Act, 1985 (Act) –** Sections 21 & 22 - Bail- Grant of – Recovery of heroine and codeine phosphate- Held, petitioner in custody since long- He is young man and deserves a chance to reform- Investigation is complete- He is local resident and his presence can always be secured to face trial- Petition allowed- Bail granted subject to conditions. (Paras 5 to 7) Title: Pankaj Kumar vs. State of Himachal Pradesh, Page- 495

Code of Criminal Procedure, 1973 (Code) – Section 439 – **Narcotic Drugs & Psychotropic Substances Act, 1988 (Act) –** Sections 21 & 29 – Bail- Grant of- Foreign national- Relevant considerations- Held, accused involved in dealing of heroine- Offence serious in nature- Accused also a foreign national and if released on bail, he may flee from justice- Difficult to

ensure his presence during trial- Not a fit case for grant of bail to accused- Petition dismissed. (Paras 5 to 7) Title: Nnanna Everistus Chinenye vs. State of Himachal Pradesh, Page- 487

Code of Criminal Procedure, 1973 – Section 439 – **Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989 -** Sections 3(1)(s) – Assault, calling by caste names etc.- Regular bail- Grant of- Circumstances- Complainant and accused, neighbours- Accused, a lady and she already having joined investigation- Nothing incriminatory to be recovered from her- Accused having no criminal history and her presence can always be secured- Petition allowed- Bail granted subject to conditions. (Paras 6 & 8) Title: Meena Kumari alias Matto vs. State of Himachal Pradesh, Page- 427

Code of Criminal Procedure, 1973 - Section 468- Limitation- Commencement- Molestation charge- Held, period of limitation would start to operate from date of incident and not from reporting of incident. (Para 11 to 15) Title: Ravi Kapoor @ Jeetendra vs. State of Himachal Pradesh and another, Page- 283

Code of Criminal Procedure, 1973 - Sections 468 & 482 –Inherent powers- Exercise of- Quashing of proceedings on ground of inordinate delay- Petitioner seeking quashing of molestation case registered against him after 47 years of alleged incident- State resisting petition- Held, complainant failed in explaining inordinate delay in registering FIR after 47 years of alleged incident- Complainant not disclosing details or particulars of incident and allegation is cryptic and vague- Post incident conduct of complainant unnatural- Petition allowed- FIR quashed. (Paras 30 to 32) Title: Ravi Kapoor @ Jeetendra vs. State of Himachal Pradesh and another, Page- 283

Code of Criminal Procedure, 1973 (Code)– Section 482 –Inherent powers- Exercise of- Quashing of FIR- Limitation, if any- Held, High Court may quash any FIR or complaint in exercise of its inherent jurisdiction- Inherent powers so conferred are not affected or limited by Section 320 of Code- On facts, FIR registered by wife against husband quashed pursuant to compromise between parties. (Paras 6 to 11) Title: Dharmender Mathur vs. State of H.P. and others, Page- 246

Code of Criminal Procedure, 1973 – Section 482 - Inherent powers - Exercise of – Quashing of FIR- Petitioner, accused of obstructing constable from discharging her official duties, filing petition for quashing of FIR pursuant to compromise- Permission to withdraw prosecution granted by District Magistrate as well as by Department of complainant- On facts, petition allowed- FIR quashed. (Paras 10 to 14) Title: Ravi Shankar vs. State of Himachal Pradesh and another, Page-305

Code of Criminal Procedure, 1973 – Section 482 – Inherent powers- Exercise of- Quashing of FIR- Principles- Held, in appropriate cases, inherent jurisdiction may be exercised to quash criminal proceedings to prevent abuse of process of Court or to secure ends of justice- But Court must have regard to nature and gravity of offence- Criminal proceedings which

would cause oppression and prejudice may also be quashed- On facts, FIR registered for rash driving and consequent simple injuries ordered to be quashed pursuant to compromise of parties. (Paras 11 to 14 & 17) Title: Chander Mohan Thakur vs. State of Himachal Pradesh & another, Page- 342

Code of Criminal Procedure, 1973 - Section 482 – Inherent powers- Exercise of- Quashing of NBW- Circumstances- Petitioner convicted and sentenced by trial court in a cheque bounce case- Conviction and sentence upheld by Sessions Court- In revision proceedings, accused undertaking to deposit entire compensation amount- However, he not fulfilling this undertaking resulting into issuance of NBW against him- Petition against- Held, since accused was found having deposited entire compensation amount after issuance of NBW, NBW ordered be recalled- Petition allowed. (Paras 9 to 11) Title: Mohan Lal vs. Golf Link Finances & Resorts Pvt. Ltd., Page- 429

Code of Criminal Procedure, 1973 – Section 482 – Inherent powers- Exercise of- Quashing of FIR- Circumstances- Petitioners seeking quashing of FIR registered against them for rioting, causing hurt and criminal intimidation- Held, incident took place on trivial issue of cleaning drain and without any pre-meditation- No weapons were used- No serious injuries were caused- Parties closely related to each other- Compromise also effected between them- Continuing of proceedings will serve no purpose- Petition allowed- FIR and consequent proceedings quashed . (Paras 5 & 12) Title: Namaskari Devi and others vs. State of Himachal Pradesh and another, Page-457

Code of Criminal Procedure, 1973 - Section 482 - Inherent powers- Exercise of- Quashing of FIR- On facts, victim lodging FIR of rape when accused refused to marry her- After registration of FIR, accused marrying her- Parties compromised matter- Accused still in judicial customary and filing petition for quashing of FIR- Held, continuation of proceedings would cause distressing hardship to accused as well as victim without resulting into any fruitful purpose- Petition allowed- FIR quashed. (Para 23) Title: Nitin Dhiman alias Neeraj vs. State of Himachal Pradesh & another, Page- 475

Code of Criminal Procedure, 1973 – Section 482- Inherent powers- Exercise of- Quashing of FIR- Civil dispute/ Civil remedy- Consequences- Held, mere availability of civil remedy to complainant per se cannot be a ground to quash criminal proceedings- The test is whether allegations made in complaint disclose commission of offence or not? - Petitioner-accused by agreeing to sell plot connected by road, which in fact was not so connected, prima facie misrepresented to complainant- Allegations disclose commission of offence of cheating- FIR cannot be quashed- Petition dismissed. (Paras 17, 22 & 23) Title: Sukhdev Singh vs. State of Himachal Pradesh and others, Page-629

Constitution of India, 1950 – Article 14- Payment of excess salary to employee- Recovery by employer- Permissibility and circumstances- Held, employee concerned does not belong to Class-I, Class-II or Class-III category- There was no misrepresentation or fraud on his part in getting himself regularized and receiving salary on basis of said regularization-

Mistake, if any in pay fixation was committed by department itself- Recovery of excess salary sought to be effected from him is impermissible in law. (Para 9) Title: The State of H.P. & Others vs. Devinder Singh, Page-620

Constitution of India, 1950– Articles 14 & 15 – Post-Graduate Medical Education (Amendment) Regulations, 2018- NEET- PG Policy 2017 & Notification dated 20/03/2017- Subsequent Government Notification dated 27.2.2019- Whether subsequent notification will have retrospective operation?- Petitioner qualified NEET on 31.1.2019 and at relevant time, entitled for incentives as per notification dated 20.03.2017- Subsequently another notification issued on 27.2.2019 whereby providing 10% incentive to in-service candidates having rendered service in rural areas of State for requisite period- Petitioner claiming benefit of subsequent Notification dated 27.2.2019- Held, petitioner was well aware at time of applying for NEET about Notification of 2017 which was applicable to her- Now she cannot turn around and insist to claim benefits under subsequent notification- Notification dated 27.2.2019 cannot be made operative retrospectively. (Paras 6 to 8 & 12 to14) Title: Arpna Sharma vs. State of H.P. & others, Page- 228

Constitution of India, 1950 – Articles 14 & 16 – Promotion from back date- Claim of – Writ jurisdiction- Delay- Absence of necessary parties – Consequences- Petitioner filing writ and seeking directions to respondent to promote him from back date i.e. 12.8.99 when 'GC' and 'MR', persons junior to him were promoted- Held, petition is hit by delay and laches of more than 12 years- No plausible reason given for such delay- Neither promotion of other persons challenged nor they are made parties- Promotion of 'GC' and 'MR' in accordance with regulations- Regulations also not challenged by petitioner- Petitioner not similarly situated vis-à-vis 'GC' and 'MR'- Petition dismissed. (Paras 5 to11) Title: Chanan Singh vs. BBMB through its Chairman, Madhya Marg, Chandigarh and others, Page- 1

Constitution of India, 1950- Articles 14 & 16- Promotion to post of driver from feeder cadre of cleaners- Corporation dividing feeder cadre of 'cleaners' and denying promotional chances to cleaners (petitioners) appointed initially on daily wage basis but regularized subsequently against said posts- Whether amounts to reasonable classification?– Hon'ble Single Bench allowing writ – LPA- Corporation contending that cleaners appointed on daily wage basis were regularized against personal posts and such benefit was given to them as 'one time measure' to save their retrenchment- Held, Corporation created artificial classification by treating homogenous class of cleaners in two groups- Such classification has no nexus with object sought to be achieved- Nomenclature adopted by Corporation i.e. 'Personal' and 'Cadre' posts is against all canons of service jurisprudence- Cleaners appointed by whatever mode are cleaners for all intents and purposes- LPA dismissed. (Paras 2 to 5) Title: H.P. State Forest Development Corporation Limited vs. Suraj Bahadur and others, Page- 96

Constitution of India, 1950- Articles 14 & 16- Appointment as Lecturer on taking over of private college by Government- Claim of- Entitlement- Petitioner was serving as Lecturer in private college, when he got selected as Lecturer in School cadre on regular basis- Applying

to college Management for his 'relieving' and extraordinary leave in order to join school cadre- Meanwhile private college taken over along with eligible staff by Government, when he was on so called extra-ordinary leave- Petitioner claiming that he was occupying post of Lecturer in said college on date of issuance of Notification and entitled for taking over his service by State- Petition dismissed by Hon'ble Single Bench- LPA- Held, petitioner never sought permission of Management of college to apply for another job- No extraordinary leave was ever sanctioned in his favour by principal of college- He was relieved by principal pursuant to his written request- He was not on rolls after his relieving from said college- Petitioner not eligible for taking over of his service by Government- LPA dismissed. (Paras 9 to15) Title: Jai Shankar vs. State of H.P. and others, Page- 252

Constitution of India, 1950– Articles 14 & 16– Discrimination in grant of additional increment- Justification- Petitioners alleging discrimination regarding grant of additional increment to them after completion of 20 years of regular service vis-à-vis other employees similarly situated- Respondents contending that it is a Trust being run on donations- Held, rules of State Government specifically made applicable to employees of Trust- Increments are to be given to class-IV employees of all categories irrespective of promotions- No plausible explanation given for adoption of pick and choose method and not following Government instructions- Benefits cannot be denied merely because employees salary is paid out of donations- Petition disposed of with direction to respondents to take decision within two months. (Paras 5 to 8) Title: Shishu Pal and Ors vs. State of HP and Ors., Page- 300

Constitution of India, 1950 – Articles 14 & 16– Appointment against public posts- Mode of- Whether these can be contrary to Recruitment and Promotion Rules? In earlier writ, State was directed to re-engage petitioners as DDT Beldars in next season strictly as per their seniority as existed before disengagement- No direction given to regularize them- Petitioners filing second writ and praying for regularization against Class-IV posts- Petition allowed but similar direction issued regarding their re-engagement- LPA- Held, appointment against public posts are governed by Recruitment and Promotion Rules- Petitioners though figure in seniority list of DDT Beldars, but not eligible under Rules for want of requisite qualification- Petitioners cannot be regularized against class-IV posts- LPA dismissed. (Paras 9 & 10) Title: Jai Singh vs. State of H.P. & ors., Page- 390

Constitution of India, 1950- Articles 14 & 16- Appointment of teacher in Government School by PTA- Government notification dated 27.5.2008- Whether said notification can be applied retrospectively to cancel selections/appointments made prior to that date?- Petitioner selected and appointed in Government School by PTA in 2007- On complaint of unsuccessful candidate (R4), Inquiry Committee finding that selection of petitioner was not in accordance with instructions contained in notification dated 27.5.2008- Appeal of petitioner dismissed by Deputy Commissioner- Civil Writ also dismissed by Hon'ble Single Bench-LPA- Held, Notification dated 27.5.2008 could not have been applied retrospectively to selection made prior to that i.e. in 2007- Inquiry Committee could not have redetermined merit of candidates including petitioner and (R4) on basis of criteria laid down in Government notification dated 27.5.2008- Selection Committee had assessed all aspirants including petitioner and R4 on same yardstick and petitioner since found more meritorious

amongst them, he was selected by it- Committee had adopted reasonable and objective criterion for assessing candidates, then fresh criteria cannot be applied to set aside valid selection- Appointment upheld with all consequential benefits- LPA allowed. (Paras 9 to 13) Title: Kamal Kishore vs. State of H.P. & Others, Page- 399

Constitution of India, 1950 – Articles 14 and 16– Appointment to post of Anganwari worker- Determination of income of candidate- Whether income of individual or aggregate of family is to be considered?- Petitioner appointed as Anganwari worker- Appointment set aside by Competent Authority on representation of another candidate (R4) that income certificate as furnished by petitioner was incorrect as on cut off date i.e. 1.10.2004 - Appellate Authority upholding order of Competent Authority- Challenge thereto by way of writ jurisdiction- Held, as per petitioner's own case, she separated from family on 7.1.2007- On cut of date, she was residing jointly with other members of family- For appointment of Anganwari worker while ascertaining annual income of candidate, it is not solitary income but total income of applicant's family is to be taken into consideration- Certificate furnished by petitioner disclosed only her income and not the aggregate income of her family- Such income certificate was not worth reliance recorded by Authorities- Findings duly borne out from record- Petition dismissed. (Paras 9 & 11) Title: Kavita Devi vs. State of H.P. and others, Page- 408

Constitution of India, 1950- Articles 14 & 16- Office Memorandum dated 27.03.2001 and OM No. 20020/7/80-Estt.(D) dated 29.5.1986- Seniority of person taken on deputation pursuant to his absorption- Held, regular service on same or equivalent grade rendered in parent department would be counted for fixing seniority in the department, he was absorbed- Person appointed earlier on regular basis in parent department cannot be given seniority from date of absorption in department in which he was on deputation. (Paras 5 & 6) Title: Santosh Kumari vs. State of Himachal Pradesh and others, Page- 539

Constitution of India, 1950 – Articles 14 & 16– Regularization of daily wagers- Government policy dated 03.04.2000- Held, Government policy of regularization of daily waged/ contingent paid workers required continuous sercice for 8 years with minimum of 240 days in each calendar year- Petitioner working as Receptionist on daily wage basis from 1994 onwards and had continuously worked for 240 days in each calendar year- He completed eight years continuous service and entitled for regularization as Receptionist from 2002- Order of Administrative Tribunal upheld- Petition challenging it dismissed. (Paras 3 to 6) Title: State of H.P. & ors. vs. Davinder Chauhan, Page- 557

Constitution of India, 1950 – Articles 14 & 16 – Selection against post of Senior Technical Assistant- R&P rules requiring 3 years experience as Technical Assistant in Central/State University or similar other institution/ Government department besides mandatory educational qualification- Expression 'similar other institution'- Meaning of- Whether experience gained by candidate in a private institute is to be counted towards 3 years requisite experience as provided in R&P Rules?- Held, expression 'similar other institution' as used in qualification criteria must be construed liberally to mean any institution alike

Central or State University or other Department of Central/State Government having all teaching faculties and laboratories for requisite purpose- If such facility possesses requisite faculties and laboratories then experience acquired by candidate in such institution cannot be discounted- Experience of candidate has to be computed accordingly- Such experience may be proved by experience certificate of respective institution. (Paras 2 to 4) Title: Sumit Thakur vs. Central University of H.P., Page-603

Constitution of India, 1950- Article 19– Freedom of speech and expression- Reasonable restriction- Right to dharna at specific place only- Whether can be claimed?- Petitioner challenging notification of District Magistrate, Shimla, denotifying venue near Police Station, Chhota Shimla, for holding rallies, demonstration etc.- Petitioner praying for permit for conducting strike at place denotified by District Magistrate- Held, there is no fundamental or statutory right to go on strike- Right to hold dharna is subject to reasonable restrictions- Reasons given for de-notification being obstruction of traffic and inconvenience to public are reasonable- Reasons given for denotification also admitted by petitioner- Alternative site for same enlisted- Petition dismissed. (Paras 5 to 7) Title: Bovel Lal vs. State of Himachal Pradesh and another, Page- 236

Constitution of India, 1950 – Article 215 – Contempt jurisdiction of High Court- Nature of- Held, contempt jurisdiction exercised by High Court is punitive in nature- Court must be satisfied beyond reasonable doubt that there is willful disobedience of Court order by contemnor- Petitioner not bringing cogent evidence regarding position of disputed premises as existed before and as existed after grant of restraint orders for establishing that contemnors continued with construction despite stay- Disobedience of said orders not proved- Petition dismissed. (Paras 3 & 4) Title: Chanchal Kumar vs. Prem Parkash and another, Page- 339

Constitution of India, 1950 – Article 215 – Contempt of court orders- Proof- Held, mere purported disobedience of an order would not per se tantamount to an act of contempt nor any penal action can be initiated against purported contemnors unless orders are actually infringed- When order is amenable to two interpretations and there is no intentional infringement, no contempt is made out- In earlier litigation, High Court directing counting of period spent by petitioner while working on contract basis for all consequential benefits including seniority- Pursuant to subsequent orders of Hon'ble Supreme Court and of High Court in litigation commenced at instance of other affected officials, department prepared seniority list- Subsequent judgment diluted impact of earlier verdict giving consequential benefits to petitioner- No case of contempt of earlier judgment made out- Petition dismissed. (Paras 5 to 9) Title: Chhavinder Kumar Shandil vs. Anil Khachhi, Addl. Chief. Secretary, Page- 356

Constitution of India, 1950 - Article 215 – Contempt of court- Proof- Earlier writ petition disposed of on basis of statement of Police Department that investigation in the matter was complete- As such, Police was directed by court to file charge sheet immediately in the concerned court- However, no charge sheet filed in trial court- Petitioner filing contempt

petition- Facts revealing that charge sheet was filed in court only after issuance of notice of contempt petition to police authorities- Police officers however giving assurance that in future they would be more vigilant and implement court orders in letter and spirit expeditiously- Held, prima facie there has been delay in filing charge sheet in the court as directed vide earlier judgment- But matter closed in view of assurance given by respondents of expeditious compliance of court orders in future. (Paras 4 & 5) Title: Makholi Ram vs. Dr. Monika, Page- 421

Constitution of India, 1950- Article 215– Contempt of court– Proof of- In civil revision High Court directing petitioner (tenant) to vacate premises within four months from date of order- Thereafter, landlord was to initiate and complete construction within one year after obtaining statutory sanctions- Tenant filing contempt petition and alleging disobedience of earlier orders by landlord by not starting and completing construction within time- Held, facts show that tenant himself had not complied with spirit of order and not vacated premises in time- Subsequent part of said order of which contempt is alleged stood rendered ineffective on his failure to vacate premises in terms of order- Petitioner has no locus standi to file contempt petition- Petition dismissed. (Paras 3 to 5) Title: Sanjeev Gupta vs. Pawan Sahni and others, Page- 537

Constitution of India, 1950 – Article 226- Court jurisdiction- Quasi-judicial order- Scope of interference- Held, while exercising writ jurisdiction, High Court cannot upset findings returned by quasi-judicial authorities until unless some perversity on face of record is demonstrated. (Para 10) Title: Kavita Devi vs. State of H.P. and others, Page- 408

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Himachal Pradesh Cooperative Societies Act, 1968 - Sections 93 & 94– **Limitation Act, 1963 (Act)**– Section 5- Application for condonation of delay in filing appeal- Whether Authority can touch merits of case while deciding such application?- Inspector, Co-operative Societies, allowing application of applicant for making her member of Society- Society filing appeal against order before Assistant Registrar (A.R.)- A.R. dismissing appeal being barred by limitation and sufficient cause not shown for condonation of delay- Revision against- Deputy Registrar dismissing revision but also proceeded to decided matter on merits- Petition against- Held, Authority was required to confine itself to validity of order passed on application under Section 5 of Act and not to proceed to make adjudication upon merits of case- Order of Deputy Registrar suffered from gross illegality- Petition allowed- Order set aside- Matter remanded with direction that Registrar himself shall adjudicate it. (Para 1) Title: Ambuja-Darla-Kashlog-Mangoo Transport Co-operative Society Ltd., Darlaghat vs. Shanti Devi and another, Page- 72

Himachal Pradesh Land Records Manual – Para 28.11- Income certificate- Cancellation thereof- Competence of Deputy Commissioner- Held, as per procedure prescribed in the Manual, Deputy Commissioner (Appellate Authority) is not competent to cancel certificate of

income issued in favour of person. (Paras 6 to 8) Title: Leela Devi vs. State of Himachal Pradesh & ors., Page- 68

Himachal Pradesh Land Record Manual- Para 28.11- Income certificate- Cancellation thereof- Competent Authority, who is ? Held, under Himachal Pradesh Land Record Manual, Tehsildar is competent authority to issue income certificate of person- Authenticity and genuineness of such certificate, when questioned is to be decided by same authority (Tehsildar) which has issued it. (Paras 2 to 4) Title: Vandana Kumari vs. State of H.P and others, Page-221

Himachal Pradesh Land Revenue Act, 1954 - Section 45- Record of rights and periodical records- Presumption of truth- Nature of- Held, presumption of truth attached to entries record in jamabandi is rebuttable- Onus lies on party which assails such revenue entries as wrong. (Para 7 & 10) Title: Lekh Ram vs. Chanchal Ram and others, Page- 416

Himachal Pradesh Land Revenue Act, 1954 - Section 45- Record of rights and periodical records- Presumption of truth- Conflicting entries- Held, if there are two conflicting jamabandis on record, then latest jamabandi shall prevail over previous one unless it is shown that latest entry was incorporated without proper procedure. (Para10) Title: Lekh Ram vs. Chanchal Ram and others, Page- 416

HP Urban Rent Control Act, 1987 – Section 14(2)(ii) – Subletting- Proof of- Held on facts, Manager of landlord clearly admitting of tenancy being joint and no separate rent was ever collected from petitioners- Petitioners thus were joint tenants and not sub-tenants. (Para 9) Title: Ranveer Malhotra (since deceased, and, deleted vide order dated 6.4.2017), and, Smt. Parmod Anand vs. Dayawant Singh, Page- 145

Himachal Pradesh Urban Rent Control Act, 1987 – Section 14(3)(c) – Eviction suit on ground of rebuilding and reconstruction- Whether bonafide? Held, suit premises of tenants interconnected and interlinked with entire structure- Coordinate Bench allowed petition of another tenant against eviction order passed on same ground by holding that demolition of existing structure and its reconstruction not possible without getting it vacated by all of its occupants- Petition allowed- Eviction order set aside.(Paras 8 to 10) Title: Ranveer Malhotra (since deceased, and, deleted vide order dated 6.4.2017), and, Smt. Parmod Anand vs. Dayawant Singh, Page- 145

Himachal Pradesh Urban Rent Control Act, 1987 - Section 24 (3) – Appellate jurisdiction- Exercise of- Whether matter can be remanded to Rent Controller by Appellate Authority?- Held, Section 24(3) of Act empowers Appellate Authority to make enquiry itself or through Rent Controller on behalf of said Appellate Authority- No power to remand matter to Rent Controller vests with Appellate Authority- Therefore, it cannot remand rent suit to Rent Controller after setting aside his order for disposal of petition afresh- Order of Appellate Authority remanding matter to Rent Controller is in excess of jurisdiction- Order set aside- Appellate Authority directed to hold further enquiry in the matter. (Paras 2 to 4) Title: Nain

Singh Sharma vs. Champa Devi and others, Page- 222

Hindu Marriage Act, 1955– Sections 7 & 12(c) – Annulment of marriage on ground of obtaining consent by fraud and non-performance of essential ceremonies i.e. saptapadi- Proof- Trial court dismissing wife's petition seeking annulment of marriage- Appeal against- Wife contending her consent was obtained by husband by administering some psychotropic substance and it was fraud played upon her- And essential ceremonies of saptapadi were not performed- Held, photographic evidence of marriage placed on record clearly depict solemnization of marriage in accordance with Hindu rites and saptapadi being performed- Affidavits of parties submitted before S.D.M. containing averments of marriage having taken place in consonance with Hindu rites at Sanatan Dharam Mandir, Shimla- In absence of some medical evidence, bald statement that she was administered some psychotropic substance before marriage ceremonies took place is not sufficient to cause annulment of marriage- Appeal dismissed. (Paras 9 to 11) Title: Neena Kumari vs. Pawan Kumar, Page-466

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Indian Contract Act, 1872- Section 73- Unliquidated damages, whether amounts to debt? Held, unliquidated damages do not take shape of debt until liability is adjudicated and damages are assessed by decree or order of Court or other adjudicatory authority. (Para 19) Title: Himachal Pradesh State Road and other Infrastructure Development Corporation Ltd. vs. M/s C & C Construction Ltd (Arb. Appeal No. 3 of 2019), Page- 61

Indian Easements Act, 1882 – Sections 13 and 15 – **Specific Relief Act, 1963** - Sections 37 and 38 – Easement of passage by necessity as well as prescription- Whether simple suit for permanent prohibitory injunction is maintainable or whether plaintiff is required to seek declaration?- Held, suit for mere injunction on strength of alleged easementary right cannot be maintained- Easementary right becomes enforceable only when it is declared by court of law- Easement does not accrue to person independent of any adjudication- Therefore, plaintiff must seek declaration qua easementary right(s). (Paras 8 to 10) Title: Jaram Singh vs. Santosh and another, Page- 303

Indian Evidence Act, 1872 (Act)- Section 35- Official record- Relevancy- Held, record maintained by Sub-Divisional Magistrate (SDM) in discharge of his official capacity/ duty imbibes mandate of Section 35 of Act. (Para 8) Title: Neena Kumari vs. Pawan Kumar, Page-466

Indian Evidence Act, **1872 -** Section 74 (2) – Public document- Whether registered sale deed is a public document?- Held, registered deed of conveyance though a private document, is construed to be public document since maintained as record in office of Sub-Registrar, in discharge of official duties .(Para 2) Title: Vijay Ram vs. Sukh Ram and others, Page- 173

Indian Evidence Act, **1872 -** Section 76 – Public document- Proof of- Held, registered sale

deed is a public document- Its certified copy can be used to prove existence of original as well as its contents. (Paras 2) Title: Vijay Ram vs. Sukh Ram and others, Page- 173

Indian Forest Act, 1927 – Sections 41 and 42 – Illicit transit of khair wood- Proof- Appeal against acquittal of trial court- Prosecution alleging accused carrying more khair wood (58 quitals) than permitted (40 quintals) under transport permit- Held, transit permit is merely proof that holder is entitled to transport forest produce- No inference can be drawn from it regarding actual khair wood being transported by its holder- In absence of examining witnesses, in whose presence khair wood carried by accused was weighed and found in excess of limit prescribed, accused cannot be held guilty of said offence- Appeal dismissed- Acquittal upheld. (Paras 11 & 12) Title: State of H.P. vs. Purshotam & another, Page- 570

Indian Penal Code, 1860 - Sections 120-B, 419, 420 and 468– Fraud, forgery, use of forged documents under criminal conspiracy- Proof- Trial court convicting accused of obtaining loan from bank for purchase of tractor on forged documents under criminal conspiracy of each other- Appellate court allowing appeal and acquitting accused by setting aside their conviction- Appeal by State- Held, charges of forgery and use of forged documents cannot be proved by testamentary evidence- Rule of best evidence requires proof of said facts by forensic evidence- Signatures and thumb impression on loan applications and hypothecation documents found scribed/ thumb marked by accused "TR"- Prosecution proved its charges against accused- Appeal allowed- Acquittal set aside- Conviction and sentence restored. (Paras 9 to 11) Title: State of H.P. vs. Mehar Singh and another, Page- 562

Indian Penal Code, 1860 - Sections 147, 302, 307, 325, 506 read with 149 – **Arms Act, 1959** – Section 25- Rioting, murder, attempt to murder, criminal intimidation etc.- Proof- Trial Court acquitting all accused of offences they were charged with- Appeal by de-facto complainant- Held, prosecution case portrayed as if complainant tried to remove poles erected by accused party after demarcation was cancelled by Kanungo- And as if accused were allegedly aggressors- Evidence of Patwari however showing that demarcation was never cancelled by Kanungo- And both parties had admitted its correctness- Accused also received injuries on their bodies- No explanation on record as how accused had received those injuries- Evidence also full of contradictions and discrepancies- Prosecution case doubtful- Appeal dismissed- Acquittal upheld. (Paras 13 to19, 22 & 26) Title: Sadiq Mohammad & another vs. Parvej Mohammad, Page- 208

Indian Penal Code, 1860– Section 201 – Concealment and destruction of evidence of commission of offence- Essential ingredients- Held, in order to attract liability under Section 201 of Code, commission of principal offence must be proved in first instance- Upon its being established, prosecution must prove that accused caused disappearance of incriminatory evidence- Murder of "H" by "SK", son of accused duly proved on record- "SK" murdered 'H' because deceased was having illicit relations with present accused, Sudesh Kumari, his mother- Accused making disclosure statements leading to recovery of incriminatory articles- Prosecution proved that accused Sudesh Kumari caused

disappearance of evidence with requisite mens rea. (Paras 9 to 12) Title: Sudesh Kumari vs. State of H.P., Page- 163

Indian Penal Code, 1860 - Sections 279 & 337 – Rash and negligent driving- Proof- Appeal against acquittal of trial court- State contending wrong appreciation of evidence on part of trial court- Facts revealing (i) motor accident having taken place on National Highway (ii) victim was crossing road (iii) speed of offending vehicle was moderate, around 40 to 60 KM/h (iv) victim was struck while crossing road negligently- Held, accused cannot be said to have breached standard of due care and caution while driving vehicle on highway- Accused was also not rash- Acquittal upheld- Appeal dismissed. (Paras 9 & 10) Title: State of H.P. vs. Subhash Chand, Page- 573

Indian Penal Code, 1860 - Sections 323 & 324 read with 34 - Causing injuries with sharp edged weapon in furtherance of common intention of each other- Proof- Appeal against acquittal of trial court- Held, entire case of prosecution based on testimonies of two eye witnesses- Both turning hostile during trial and not supporting prosecution case- Mere presence of signatures of these witnesses on alleged disclosure statement of accused leading to recoveries, is insufficient to prove guilt of accused- Witnesses deposing differently as to the manner of assault i.e. PW2 stating about assault being made with danda whereas PW5 deposing that assault was made by pelting stones as well as regarding participation of different accused- Complainant denying assault upon him with danda- Medical evidence negating injuries with sharp edged weapon allegedly recovered during investigation- Appeal dismissed- Acquittal upheld. (Paras 9 to 11) Title: State of H.P. vs. Basant Lal and another, Page- 559

Indian Penal Code, 1860 – Sections 323, 325 and 504 - Hurt and criminal intimidation- Proof- Trial court acquitting accused of causing simple injuries to "BD" and grievous injuries to "KD"- Appeal by State- On facts, held, "BD" injured denying of having received injuries at hands of accused, rather stating that complainant gave her beating- "KD", another injured denying any such incident having taken place in her presence- Statement of complainant "CL" clearly contradicted by injured "BD" and "KD"- Eye witness turning hostile and denying her presence at time of incident- Prosecution case is of doubtful nature- Appeal dismissed- Acquittal upheld. (Paras 11 to 17) Title: State of Himachal Pradesh vs. Surjan Singh, Page- 599

Indian Penal Code, 1860 - Sections 323, 379 & 411- **Indian Forest Act, 1927**- Sections 41 and 42- Simple hurt, illicit felling of khair trees and transport/receipt of khair logs- Proof- Prosecution alleging illicit cutting of khair trees by accused from Government land and taking of converted logs to kiln of "BR" co-accused- And also their causing simple injuries to complainant "AR" by 'AS' and 'RD' etc.- Trial court convicting accused for various offences but Sessions Court acquitting them in appeal- Appeal by State- Held, complainant a stranged wife of accused No. 1 and residing separately from him- Other co-accused 'RD' is lady with whom accused No. 1 was residing- This fact was known to complainant prior to filing of complaint with police- Statements of witnesses contradictory qua nature of injuries

sustained by 'AR'- Injuries not relatable to period of incident- Material contradictions and inconsistencies occurring in statements of witnesses and no conviction can be based upon such evidence- Appeal dismissed- Acquittal upheld. (Paras 6 to 9) Title: State of Himachal Pradesh vs. Durga Ram & others, Page- 588

Indian Penal Code, 1860 - Section 325 read with 34 – Grievous hurt in furtherance of common intention- Proof of- Trial Court acquitting accused of having caused grievous injuries to 'BP' in furtherance of common intention of each other- Appeal against by State on ground of wrong appreciation of evidence by Trial Court- On facts, held, victim and accused had animosity on account of extraction of sand from river- Mining cases pending against complainant- Both sides not paying any royalty to Government- Land of accused situated close to river bed- Eye witness denying assault on victim on relevant date- No explanation for delay caused in filing FIR though victim crossed from place of incident through Police Post- Vital contradictions in statements of prosecution witnesses- Trial Court rightly appreciated evidence on record while acquitting accused- Appeal dismissed- Acquittal upheld. (Paras 11 to 18) Title: State of H.P. vs. Jaggu Ram and others, Page- 258

Indian Penal Code, 1860 – Sections 325 & 353 read with 34- Grievous hurt and obstruction in discharge of public duties etc.- Proof- Trial Court convicting accused for causing grievous hurt and obstructing public servant in discharge of his duties- Appeal against- Held, eye witnesses (PW1 & PW10) not aware of identities of accused who made assault-But claiming during trial that identities of accused were disclosed to them by some other persons- Their statements under Section 161 of Cr.P.C. lacking this aspect- Weapon of offence recovered at instance of witnesses and not at instance of accused-Contents of FIR incredible-Prosecution failed in proving its case against accused-Appeal allowed- Conviction set aside. (Paras 10 to 14) Title: Partap Singh vs. State of H.P. and others, Page- 47

Indian Penal Code, 1860- Sections 363 & 376- Kidnapping and rape- Proof- Appeal against acquittal of accused - State alleging misappreciation of evidence on part of trial court- Held, no evidence worth name of accused enticing or inducing victim to come along with him- Letters written by victim to accused showing that she was in extreme love with accused and pressing him hard to take her away with him- She was threatening to commit suicide in case accused did not take her with him- Accused took no active part in taking victim with him- Contradictory evidence regarding age of victim i.e. school certificating showing her age below 18 years whereas medical evidence indicating her aged between 17-19 years- Not established that victim was below 18 years of age on date of offence- Acquittal upheld. (Paras 15 to 17) Title: State of Himachal Pradesh vs. Ajay Kumar, Page- 575

Industrial Disputes Act, 1947 (Act) – Sections 2(k) & 10 – 'Industrial dispute'- What is? - Whether dispute regarding transfer of workman from one station to another, is an industrial dispute? Held, individual dispute of workman cannot termed to be an industrial dispute unless workmen as a body or considerable section of them makes common cause with individual workman- 'BS' and 'SK' were individually espousing their cause of illegal transfer by employer before Government- It was their individual dispute and no reference could have been sent by Government to Labour Court under Section 10 of Act for adjudication- Award

of Labour Court on such reference set aside being void abinitio. (Paras 17 to 19, 26 & 32 to 35) Title: Rani Sharma and others vs. State of Himachal Pradesh and another, Page- 523

Industrial Disputes Act, 1947 – Sections 25F, 25G & 25H – Termination of service without notice- Delay in raising dispute- Effect- On finding that workman had raised demand notice after fourteen years of termination, Labour Court denying reinstatement and back wages and directing payment of compensation of Rs. 30000/-- Petition against award- Petitioner-workman praying that since termination of service was without notice, he should be reinstated with all consequential benefits- Held, undue delay and laches on part of workman in raising dispute is relevant factor for denying reinstatement- On facts, compensation enhanced to Rs.60000/-- Petition partly allowed. (Paras 8 to 10) Title: Bhag Mal vs. State of Himachal Pradesh and another, Page- 9

Industrial Disputes Act, 1947 – Sections 25F, 25G & 25 H – Termination of service without notice- Delay in raising dispute- Effect- On finding that workman had raised demand notice after fourteen years of termination, Labour Court denying reinstatement and back wages and directing payment of compensation of Rs. 50000/-- Petition against award- Petitioner-workman praying that since termination of service was without notice, he should be reinstated with all consequential benefits- Held, undue delay and laches on part of workman in raising dispute is relevant factor for denying reinstatement- On facts, compensation enhanced to Rs.80000/- Petition partly allowed. (Paras 8 to 10) Title: Sumfali Devi vs. State of Himachal Pradesh and another, Page- 11

Industrial Disputes Act, 1947 – Sections 25F, 25G & 25 H – Termination of service without notice- Delay in raising dispute- Effect- On finding that workman had raised demand notice after eight years of termination, Labour Court denying reinstatement and back wages and directing payment of compensation of Rs. 50000/-- Petition against award- Petitioner-workman praying that since termination of service was without notice, he should be reinstated with all consequential benefits- Held, undue delay and laches on part of workman in raising dispute is relevant factor for denying reinstatement- Workman stands duly compensated qua reinstatement and back wages by directing payment in lump sum- Petition dismissed. (Paras 8 to 12) Title: Filli Devi vs. The Executive Engineer, HPPWD, Page- 14

Industrial Disputes Act, 1947 – Sections 25F, 25G & 25 H – Termination of service without notice- Delay in raising dispute- Effect- On finding that workman had raised demand notice after sixteen years of termination, Labour Court denying reinstatement and back wages and directing payment of compensation of Rs. 50000/-- Petition against award- Petitioner-workman praying that since termination of service was without notice, he should be reinstated with all consequential benefits- Held, undue delay and laches on part of workman in raising dispute is relevant factor for denying reinstatement- Workman stands duly compensated qua reinstatement and back wages by directing payment in lump sum- Petition dismissed. (Paras 8 to 12) Title: Jamuna Devi vs. The Engineer-in-Chief, HPPWD and another, Page- 18

Industrial Disputes Act, 1947 – Sections 25F, 25G & 25 H – Termination of service without notice- Delay in raising dispute- Effect- On finding that workman had raised demand notice after eight years of termination, Labour Court denying reinstatement and back wages and directing payment of compensation of Rs. 60000/-- Petition against award- Petitioner-workman praying that since termination of service was without notice, he should be reinstated with all consequential benefits- Held, undue delay and laches on part of workman in raising dispute is relevant factor for denying reinstatement- Workman stands duly compensated qua reinstatement and back wages by directing payment in lump sum- Petition dismissed. (Paras 8 to 12) Title: Khem Raj vs. The Executive Engineer, HPPWD, Page- 23

Industrial Disputes Act, 1947 – Sections 25F, 25G & 25H – Termination of service without notice- Delay in raising dispute- Effect- On finding that workman had raised demand notice after seven years of termination, Labour Court denying reinstatement and back wages and directing payment of compensation of Rs. 95000/-- Petition against award- Petitioner-workman praying that since termination of service was without notice, he should be reinstated with all consequential benefits- Held, undue delay and laches on part of workman in raising dispute is relevant factor for denying reinstatement- Workman stands duly compensated qua reinstatement and back wages by directing payment in lump sum- Petition dismissed. (Paras 8 to 12) Title: Kishan Dei vs. The Executive Engineer, HPPWD, Page- 27

Industrial Disputes Act, 1947 – Sections 25F, 25G & 25H – Termination of service without notice- Delay in raising dispute- Effect- On finding that workman had raised demand notice after nine years of termination, Labour Court denying reinstatement and back wages and directing payment of compensation of Rs. 1.00 lakh- Petition against award- Petitioner-workman praying that since termination of service was without notice, he should be reinstated with all consequential benefits- Held, undue delay and laches on part of workman in raising dispute is relevant factor for denying reinstatement- Workman stands duly compensated qua reinstatement and back wages by directing payment in lump sum- Petition dismissed. (Paras 8 to 12) Title: Parkash Chand vs. The Executive Engineer, HPPWD, Page- 32

Industrial Disputes Act, 1947 – Sections 25F, 25G & 25 H – Termination of service without notice- Delay in raising dispute- Effect- On finding that workman had raised demand notice after fifteen years of termination, Labour Court denying reinstatement and back wages and directing payment of compensation of Rs. 30000/- - Petition against award- Petitioner-workman praying that since termination of service was without notice, he should be reinstated with all consequential benefits- Held, undue delay and laches on part of workman in raising dispute is relevant factor for denying reinstatement- Workman stands duly compensated qua reinstatement and back wages by directing payment in lump sum- Petition dismissed. (Paras 8 to 12) Title: Satya Devi vs. The Engineer-in-Chief, HPPWD and another, Page- 36

Industrial Disputes Act, 1947 – Sections 25F, 25G & 25 H – Termination of service without notice- Delay in raising dispute- Effect- On finding that workman had raised demand notice after sixteen years of termination, Labour Court denying reinstatement and back wages and directing payment of compensation of Rs. 50,000/- - Petition against award- Petitioner-workman praying that since termination of service was without notice, he should be reinstated with all consequential benefits- Held, undue delay and laches on part of workman in raising dispute is relevant factor for denying reinstatement- Workman stands duly compensated qua reinstatement and back wages by directing payment in lump sum- Petition dismissed. (Paras 8 to 12) Title: Bimla Devi vs. The Engineer-in-Chief, HPPWD and another, Page- 41

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Joint land- Partition suit- Construction by co-sharer in exclusive possession- Nature and effect- Held, construction raised upon by co-sharer over land in his exclusive possession would not erode factum of joint ownership- Exclusive possession is construable as his holding possession constructively even for other co-sharers not in physical possession thereof. (Paras 10 to 12) Title: Reeta Devi vs. Ravi Kumar, Page-148

Joint land- Partition suit- Construction by co-sharer over land in exclusive possession- Whether raises estoppel against partition of such land? Held, mere raising of construction over land in his exclusive possession by co-sharer does not raise any estoppel against other co-sharers from seeking partition simply by lack of protest or objection with respect to said construction. (Para 9) Title: Reeta Devi vs. Ravi Kumar, Page-148

Judicial discipline- Requirement of - Conduct of trial court deprecated- Trial court dismissing accused's application for leading additional evidence- Accused challenging order before Additional Sessions Judge- Additional Sessions Judge issuing notice to complainant and in meanwhile staying proceedings of trial court- However trial court still closing defence evidence by orders of court- Petition against- Held, order of trial court is not sustainable in law as it is issue of propriety and judicial discipline- Petition allowed- Order set aside with direction to trial court to give one more opportunity to accused to adduce his evidence. (Para 9) Title: M/s Virus through its Prop. Sh. Gaurav Walia and another vs. Ramesh Jaswal, Page- 451

'L'

Land Acquisition Act, 1894 – Sections 11 & 16– Government can take possession of acquired land only after award of compensation is passed by Collector. (Paras 7[a]) Title: Kehar Singh and others vs. The State of Himachal Pradesh & others, Page- 410

Land Acquisition Act, 1894 – Section 16– Taking over of possession of acquired land- Relevancy- Held, acquired land vests in government only on taking of its possession- Till that point of time, land continues to be with original owner and he is free to deal with it as he likes. (Paras 7[a]) Title: Kehar Singh and others vs. The State of Himachal Pradesh & others, Page- 410

Land Acquisition Act, 1894 (Act) – Sections 16 & 48 –**General Clauses Act, 1897 (Act of 1897) –** Section 21 – Whether withdrawal from acquisition after taking possession of land is permissible?- Reference Court executing award passed in favour of landowner- State challenging execution on ground that land is no more required by it and Government is competent to cancel previous notification and withdraw from acquisition- Held, possession of acquired land stands already taken and said land duly vested in Government- After taking possession of land, acquisition cannot be de-notified either under Section 48 of Act or Section 21 of Act of 1897. (Paras 8 to 10) Title: Indian Meteorological Department vs. Asha Pandit and others, Page- 297

Land Acquisition Act, 1894 (Act) - Sections 18 & 30 – **Code of Civil Procedure, 1908**– Order I Rule 10 – Impleadment of additional party in reference proceedings- Permissibility- Held, Act is complete code in itself- A person who has not made any application before Land Acquisition Collector for his impleadment cannot get himself impleaded directly before Reference Court- Reference Court cannot enlarge scope of reference by ordering impleadment of new parties. (Paras 2 & 3) Title: Dinesh Kumar vs. Bachna Ram(now deceased)through his LRs Uma Devi and others, Page- 176

Legal Services Authority Act, 1987- Section 21 - Award of National Lok Adalat – Challenge thereto- Permissibility – Petitioner challenging award of National Lok Adalat on ground that disputed land is his self acquired property and he cannot be asked to surrender it in terms of compromise arrived before it- Held, before Lok Adalats, disputes are settled out of faith and trust than on law and legal parameters without any fraud, coercion and misrepresentation- Parties entered into compromise out of their free will and volition and it was not result of fraud or misrepresentation- Petition dismissed being an abuse of process of law with costs of Rs.25000/-. (Paras 5 to 9) Title: Amar Nath vs. Ganga Devi, Page- 316

Limitation Act, 1963 (Act)- Sections 3 & 17- Time barred suit- Filing of, whether amounts to fraud upon defendant?- Held, mere filing of time barred suit is not a fraud as there are provisions in Act which entitle party to seek enlargement of time by furnishing a fresh cause of action. (Para 17) Title: Rajinder Singh vs. Het Ram Bakhirta and others, Page-511

Limitation Act, 1963- Section 5- Condonation of delay- Sufficient cause- Existence of – Plaintiffs filing RSA after four years and nine months of judgment of First Appellate Court- Seeking condonation of delay on ground that judgment on which Trial Court had passed decree against him stood referred to Larger Bench in view of conflicting judgments of Hon'ble High Court and Larger Bench itself adjourned matter sine die till outcome of Hon'ble Supreme Court in appeal preferred against judgment relied upon by trial court- Facts

showing Hon'ble Supreme Court dismissed appeal against judgment relied upon by Trial Court in January, 2017- Application for condonation of delay in filing RSA moved in July, 2017- Held, no sufficient cause for condonation of delay is made out- Application dismissed. (Paras 8 to 13) Title: Manish Kumar Aggarwal vs. Union of India and another, Page- 263

'M'

Motor Vehicles Act, 1988 – Sections 2(47) & 149(ii)– Motor accident- Claim application- Defences- Driving licence- Validity- Held, driver of offending vehicle having endorsement to drive 'transport vehicle' is also authorized to drive 'light goods vehicle'- Light goods vehicle is a transport vehicle. (Para 6) Title: The Reliance General Insurance Company vs. Aditye & Others, Page- 171

Motor Vehicles Act, 1989 (Act) – Sections 3 and 149- Motor accident- Claim applications- Defences- Driving licence- Validity of- Held, driver authorized to drive HMV does not ipso facto get bestowed with authorization to drive a motor cycle- In such cases, insurer cannot be held liable to indemnify award- Appeal of insurer against award of Claims Tribunal directing it to pay compensation is partly allowed- Award modified- Insurer directed to pay compensation first and recover it from insured. (Para 2) Title: IFCO Tokio General Insurance Company vs. Budhi Singh and others, Page- 628

Motor Vehicle Act, 1988 (Act) – Section 140– No fault liability- Nature of- Held, Section 140 of Act creates statutory liability to pay compensation in circumstances specified therein irrespective of whether claimants were dependent or not on deceased. (Para 3) Title: New India Assurance Company Ltd. vs. Bhuvnesh Thakur and others, Page-127

Motor Vehicles Act, 1988 – Section 149(2)– Motor accident- Claim application- Defences- Validity of driving licence- Proof- Insurer challenging award of Tribunal on ground that driver of offending vehicle was not having valid and effective driving licence to ply it at time of accident- Held, evidence of insurer with respect to driving licence of driver is merely in shape of information gathered by it under RTI Act- Driver of said vehicle not examined as witness nor person who supplied such information under RTI Act- Best evidence not put forth by insurer to prove invalidity of driving licence- Appeal dismissed- Award upheld. (Paras 2 to 4) Title: Reliance General Insurance Co. Ltd. vs. Veena Rana and others, Page-152

Motor Vehicles Act, 1988– Section 166– Motor accident- Death case- Claim application by legal representatives of deceased- Contributory negligence- Proof of- Claims Tribunal allowing application of legal representatives of deceased, a pillion rider on motor-cycle but holding drivers of bus as well as motor cycle negligent in driving leading to such accident- Tribunal fastening liability to the extent of 50% each on them- Appeal and Cross-objections- Held, no specific issue of contributory negligence framed by Tribunal nor driver of bus made any effort to implead driver and insurer of motorcycle as parties to petition before Tribunal- Person on whose statement FIR was registered also not examined- Tribunal went wrong to

fasten liability on basis of contributory negligence of driver of motorcycle. (Paras 3 & 4) Title: Himachal Road Transport Corporation vs. Meeran Devi and others, Page- 106

Motor Vehicle Act, 1988– Section 166– Motor accident- Claim application- Compensation towards "loss of consortium"- Entitlement- Held, when deceased was 'unmarried', his legal representatives are not entitled for compensation under conventional head "loss of consortium". (Paras 5 & 6) Title: Himachal Road Transport Corporation vs. Meeran Devi and others, Page- 106

Motor Vehicle Act, 1988 (Act)– Section 166– Motor Accident- Claim application- Maintainability- Whether legal representatives not financially dependent upon deceased entitled to file application under Section 166 of Act?- Held, liability of insured to pay compensation to legal representatives of deceased does not cease in absence of their dependency on the deceased- Entitlement is the key. (Paras 2 & 3) Title: New India Assurance Company Ltd. vs. Bhuvnesh Thakur and others, Page- 127

Motor Vehicle Act, 1988 (Act) – Section 166 – Motor accident – Death case- Claim application by legal representatives- Compensation under conventional heads- Entitlement- Held, compensation under conventional heads cannot be granted more than what is mandated in Pranay Sethi's case. (Paras 5 & 6) Title: Oriental Insurance Company vs. Veena Devi and others, Page- 129

Motor Vehicles Act, 1988 – Section 166– Motor accident- Death case- Claim application by legal representatives- Increase towards future prospects and compensation under conventional heads- Held, increased on established income of deceased towards future prospects and compensation under conventional heads have to be in accordance with ratio of Pranay Sethi's, case 2017 ACJ 2700. (Paras 2 to 6) Title: Reliance General Insurance Company Ltd. vs. Krishna Devi (since deceased) through her legal heirs and others, Page- 154

Motor Vehicles Act, 1988 – Section 166 – Motor accident- Claim application- Monthly income of housewife- Determination- Held, domestic services rendered by housewife including work done in agricultural and horticultural pursuits need to be monetized- Assessment of income @ Rs.6000/- per month as done by Tribunal not perverse- BPL certificate has no relevance in assessing monetary value of domestic services rendered by housewife. (Paras 4) Title: The Reliance General Insurance Company vs. Aditye & Others, Page- 171

Motor Vehicles Act, 1988 – Section 166 – Motor accident – Death of child- Claim application- Compensation- Determination- Held, in case of death of child falling in age group of 5-10 years, claimants are entitled to consolidated sum of Rs.2.00 lakh- Lata Wadhwa vs. State of Bihar, (2001)8 SCC 197, referred to and relied upon. (Para 4) Title: HDFC ERGO General Insurance Company Ltd. vs. Kaushalya Saini & Others, Page- 379

Motor Vehicles Act, 1988 – Sections 166 – Motor accident – Death of child- Claim application- Compensation under conventional heads- Held, parents are entitled to receive compensation of Rs.80,000/- (Rs.40,000/- each) under head "loss of filial consortium"- Magma General Insurance Co. Ltd. vs. Nanu Ram alias Chuhru Ram & Others, Civil Appeal No.9581 of 2018, referred to and relied upon. (Para 5) Title: HDFC ERGO General Insurance Company Ltd. vs. Kaushalya Saini & Others, Page- 379

Motor Vehicles Act, 1989 – Sections 166– Motor accident – Death case- Income of deceased- Determination- Held, in absence of documentary evidence regarding income of deceased Government notification prescribing minimum wages as applicable on date of death is to be taken into consideration- Tribunal cannot rely upon subsequent notification revising wages and make it operative retrospectively from date of accident. (Paras 3 to 5) Title: National Insurance Company Ltd. vs. Shakuntala Devi and others, Page- 463

Motor Vehicles Act, 1988 – Section 166 – Motor accident – Claim application- Acquittal of driver of offending vehicle for rash driving by Criminal Court- Effect on claim application- Held, mere acquittal of driver of offending vehicle of rash driving by Criminal Court would not constrain Tribunal to accept ocular evidence adduced before it qua accident having been caused because of his rash and negligent driving. (Paras 2 & 3) Title: New India Assurance Company Ltd. vs. Subhash Chand & Others, Page- 470

Motor Vehicles Act, 1989 – Sections 166 – Motor Accident – Claim application- Rash and negligent driving- Findings of Criminal Court- Relevancy- Held, filing of charge sheet before Criminal Court in a case of motor accident would neither distract Tribunal nor create any hindrance in scrutinizing evidence on record and to record findings independent from one recorded by Criminal Court qua rash and negligent driving on part of driver of offending vehicle. (Paras 3 to 6) Title: Oriental Insurance Co. Ltd. vs. Darshna Devi & others, Page- 489

Motor Vehicles Act, 1989 – Sections 166 – Motor Accident – Claim application- Rash and negligent driving- Findings of criminal court- Relevancy- Held, filing of charge sheet before Criminal Court in a case of motor accident would neither distract Tribunal nor create any hindrance in scrutinizing evidence on record and to record findings independent from one recorded by Criminal Court qua rash and negligent driving on part of driver of offending vehicle. (Paras 3 to 6) Title: Oriental Insurance Co. Ltd. vs. Kanta Devi and others, Page- 492

Motor Vehicles Act, 1988 – Section 166– Motor accident- Death case- Claim application by legal representatives- Tribunal dismissing application for want of prosecution but while doing so also making observations on merits of case- Appeal against- Facts revealing that Tribunal had granted four opportunities to claimants to lead evidence but they did not adduce any evidence resulting in dismissal of application for non-prosecution- Held, when Tribunal had dismissed application for non-prosecution, it should not have ventured to make any observation on merits of case- Claimants had lost sole bread earner of their family- One more opportunity granted to them to lead evidence- Order of Tribunal set aside-

Matter remitted to Tribunal. (Paras 3 & 4) Title: Raman Kumari and another vs. Manjeet Singh and another, Page- 522

Motor Vehicles Act, 1989 – Sections 166 – Motor accident – Death case- Income of deceased- Determination- Claimants appealing against award of Tribunal and praying for enhancement of compensation by contending that deceased was mechanic and salary record tendered in evidence ought to have been relied upon by Tribunal- Insurer alleging salary record as forged- Held, salary record of deceased duly proved by employer indicating that he was working as motor mechanic and drawing salary of Rs.12000/- PM- No suggestion to employer that record regarding attendance and salary of deceased is forged- Deceased had regular income and it could not have been computed by Tribunal on basis of wages of unskilled worker. (Para 2) Title: Rita Devi and others vs. Ashish Malhotra and others, Page- 533

Motor Vehicles Act, 1989– Section 166– Motor accident– Claim application- Defences- Contributory negligence- Proof- Insurer of offending vehicle filing appeal against award of Tribunal and submitting that husband of claimant, who was driving scooty and on which claimant was riding on pillion, was also rash and negligent in his driving- And his negligence also contributed in occurrence of accident- Praying that insurer of scooty shall also be made liable to indemnify claimant equally- Held, no efforts were made by appellant to implead insurer and driver of scooty as parties to application before Tribunal- No suggestion put to witnesses regarding contributory negligence during cross-examination- Injured clearly stating that driver of offending vehicle was driving it in a brazen speed- It not being a case of contributory negligence, insurer of scooty cannot be made liable to indemnify award- Appeal dismissed- Award maintained. (Paras 2 to 4) Title: The New India Assurance Co. Ltd. vs. Kaushlya Devi and others, Page- 617

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Narcotic Drugs and Psychotropic Substances Act, 1985 (Act) - Section 18 – Recovery of opium (7.100 Kgs.)- proof- Trial court acquitting accused of allegations that during search of his shop, opium weighing 7.100 Kgs. was recovered from his conscious and exclusive possession- Appeal against- On facts held, 'KS' and 'SS' panch witnesses to search and recovery not supporting prosecution case during trial- Owner of adjoining shop denying presence of accused in his shop at relevant point of time- As per documents, recovery effected from "Rakesh Kant" and not from "Rakesh Kumar"- No evidence that Rakesh Kant and Rakesh Kumar are one and same person- No evidence in whose custody samples sent for examination remained for about 15 days- NCB forms not filled at time of alleged recovery of contraband from shop- This procedure is contrary to standing order 1/89 dated 13 June, 1989- Prosecution case doubtful in nature- Appeal dismissed- Acquittal upheld.(Paras 6 to11 & 17) Title: State of Himachal Pradesh vs. Rakesh Kumar, Page- 592

Narcotic Drugs and Psychotropic Substances Act, 1985 (Act) - Section 18 – Recovery of charas- Procedure for sampling etc.- Standing Order 1/89 dated 13th June, 1989- Whether

mandatory?- Held, instructions contained in Standing Order, though do not have force of law, yet they are intended to guide officers and to see that fair procedure is adopted by Investigating Officers. (Para 13) Title: State of Himachal Pradesh vs. Rakesh Kumar, Page- 592

Narcotic Drugs & Psychotropic Substances Act, 1985 (Act) – Sections 18 & 37 – Recovery of opium- Regular bail- Grnat of- Parameters- State resisting bail on ground that petitioner is already facing trial in another case under Act- Held, petitioner local resident- Material does not indicate that petitioner if released on bail, would tamper with evidence or flee away from justice- Recovered stuff also does not fall in commercial category- Petition allowed- Conditional bail granted. (Para 7) Title: Virender Kumar vs. State of Himachal Pradesh, Page- 190

Narcotic Drugs & Psychotropic Substances Act, 1985 (Act)– Section 20 – Recovery of charas- Proof- Accused challenging his conviction for offence under Section 20 of Act- Held, statements of witnesses qua recovery of contraband from accused clear and consistent- No contradiction in ocular evidence- Signatures on seizure memo not disputed by accused- FSL report stating recovered stuff as 'charas'- Conviction being based on germane record- Appeal dismissed. (Paras 9 to 12) Title: Rohtash and another vs. State of H.P., Page- 156

Narcotic Drugs & Psychotropic Substances Act, 1985 (Act) - Sections 20 & 50 – Recovery of charas during personal search- Whether provisions of Section 50 would be applicable?- Held, where police have reasonable apprehension of accused having some contraband with him, they must comply provisions of Section 50 of Act- Non-compliance with them would vitiate trial. (Paras 18 to 23) Title: State of Himachal Pradesh vs. Deep Ram, Page- 579

Narcotic Drugs and Psychotropic Substances Act, 1985 (Act)– Sections 20, 29 & 37- Regular bail– Rigors of Section 37 of Act- Applicability- Petitioner allegedly supplied charas (3 kg 961 grams) to another accused from whom Police recovered it- Petitioner praying that there is no material except confession of co-accused that he had purchased charas from him (petitioner)- Further, pure resin contents bring recovered material in to less than commercial quantity and rigors of Section 37 of Act not attracted- Held, there is material in shape of CDRS of relevant period between petitioner and person from whom recovery of charas was effected- Also entire recovered substance is to be taken into consideration for determining quantity of substance- Recovered stuff prima-facie falls in commercial quantity- Rigors of Section 37 of Act apply- Petition dismissed. (Paras 13, 17 & 18) Title: Chattar Singh vs. State of Himachal Pradesh, Page- 351

Narcotic Drugs & Psychotropic Substances Act, 1988 – Sections 21, 29 & 37– Recovery of heroine (101.72 grams)- Regular bail – Grant of - Held, charge sheet stands filed in Court- Other accused on bail- Accused not in position to tamper with evidence or flee away from justice- Petitioner cannot be kept behind bars for unlimited period- Petitioner ordered to be released on conditional bail.(Para 7) Title: Dalip Kumar vs. State of Himachal Pradesh, Page- 362

National Legal Services Authority (Lok Adalat) Regulations, 2009– Rule 17– Withdrawal of suit by Counsel before Lok Adalat in absence of plaintiff- Effect- Plaintiff challenging award of Lok Adalat by alleging that she never engaged services of counsel who made suffer statement that matter stood compromised between parties and suit should be withdrawn- Facts revealing that power of attorney executed by plaintiff in favour of advocate who made statement before Lok Adalat for withdrawal of suit on record- Signatory advocate had authority to make statement regarding withdrawal of suit- Statement of advocate made in absence of party is valid- Award cannot be set aside on this ground- Petition dismissed. (Paras 4 & 5) Title: Seema Thakur vs. Tarsem Lal, Page- 541

Negotiable Instruments Act, 1881- Section 138 – Dishonour of cheque– Complaint – Service of statutory notice- 'Refusal to accept' registered article containing notice, whether amounts to 'due service'?- Held, it is only on failure of payment within 15 days after valid service of statutory notice, complaint can be filed- Without valid service of notice, complaint bound to be dismissed- Endorsement to the effect that drawer 'refused to accept' notice, does not amount to valid service unlike Code of Civil Procedure (CPC) where it is considered as valid service- Court cannot draw inference of valid service by invoking provisions of CPC. (Paras 3 & 4) Title: Praveen Kumar vs. Atma Ram, Page- 136

Negotiable Instruments Act, 1881– Section 138– Dishonour of cheque- Complaint- Dismissal of- Appeal against- Held, onus to prove basic ingredients always lies on complainant- Complainant failed to identify accused- Also failed in telling whether accused is author or signatory of cheque in question- Bank return memo not bearing any seal or stamp- Complainant failed to prove basic facts of his case- Complaint rightly dismissed by Trial Court- Appeal dismissed. (Paras 5 to 8) Title: Rajinder Singh Verma vs. Haji B.K. Hanchnmani, Page- 142

Negotiable Instruments Act, 1881 (Act)– Section 138 – Dishonour of chqeue- Complaint- During pendency of complaint, compromise effected between parties and complaint withdrawn- Fresh cheques issued in view of compromise also dishonoured- Fresh complaint qua dishonor of fresh cheques- Trial Court dismissing complaint on ground that offence under Section 138 of Act is not constituted if cheques in question were issued in complainant's favour pursuant to compromise- Appeal against- Held, there was no adjudication qua cheques inter-se parties in earlier proceedings- Subsequent proceedings were not barred on ground that cheques were issued under compromise- Appeal allowed- Judgment set aside- Trial Court directed to revive complaints and proceed further in accordance with law. (Paras 3, 5 to 7) Title: Rana Arun Sen vs. L. R. Kashyap, Page- 240

Negotiable Instruments Act, 1881– Sections 138 & 139– Dishonour of cheque– Complaint– Trial court convicting accused for dishonor of cheque- Additional Sessions Judge upholding conviction- Revision against- Accused pleading that cheque was given to wife of complainant and he (complainant) misused it- Held, issuance of cheque by accused not disputed- No action taken by accused against complainant regarding alleged misuse of cheque by him- No other evidence adduced by accused to prove this factum- Mere bald assertion by accused

that cheque was given to complainant's wife is not sufficient to rebut presumption under Section 139 of Act- Revision dismissed- Conviction upheld. (Paras 4, 10 & 11) Title: Sumeet Kumar vs. Ravi Kumar, Page- 6

Negotiable Instruments Act, 1881 - Sections 138 & 139– Dishonour of cheque- Complaint– Presumption of consideration- Rebuttal- Onus of ?- Held, once issuance of cheque and its dishonor is proved, onus shifts to accused to prove by preponderance of probabilities that cheque was not issued towards consideration in whole or part of debt- Further, held on facts, mere bald assertion in statement recorded under Section 313 of Code of Criminal Procedure, that cheque was issued as 'Security' towards goods supplied by complainant does not discharge this onus- Appeal allowed- Accused convicted. (Paras 9 to 11) Title: M/s Paramount Tech. vs. Sumeti Vij , Page- 119

Negotiable Instruments Act, 1881 (Act)– Sections 138 & 139– Dishonour of cheque- Complaint- Essential requirements- Held, complaint for offence under Section 138 of Act is maintainable on proof of issuance of cheque, return memo, notice of dishonorment to drawer within stipulated period and payment of cheque amount within stipulated period by him to complainant. (Paras 8 & 9) Title: Aarti Goel vs. Ranjeet Shyam, Page- 311

Negotiable Instruments Act, 1881– Sections 138 & 139 – Dishonour of cheque issued in name of a proprietary concern- Complaint, who can file?- Held, sole proprietor of business concern can file complaint in his own name. (Paras 8 & 9) Title: Aarti Goel vs. Ranjeet Shyam, Page- 311

Negotiable Instruments Act, 1881 (Act)– Section 145 (2)– Application for summoning and examining witnesses by accused- Stage, when it would lie- Held, application for summoning witnesses by accused would lie after notice of accusation has been put to him and after affording opportunity to complainant to lead further evidence , if any, in support of his case and not before- First trial will commence and thereafter application is to be undertaken- Allowing accused on his very first appearance to move application under Section 145 of Act, is illegal. (Paras 29 to 32) Title: Pardeep Verma vs. Budh Dev Kalia, Page- 497

Negotiable Instruments Act, 1881 (Act)– Sections 145(2)–Whether provision mandatory?- Held, word 'shall' in Section 145(2) of Act clearly stipulates that when such application has been filed, court must allow it and summon person who can give evidence on affidavit on facts contained therein. (Paras 31 & 32) Title: Pardeep Verma vs. Budh Dev Kalia, Page- 497

Negotiable Instruments Act, 1881 – Section 146– Bank return memo- Presumption thereunder- When can be drawn?- Held, when bank return memo is not containing any seal or stamp of bank which allegedly returned cheque as unpaid, no presumption under Section 146 of Act can be raised against accused. (Para 9) Title: Rajinder Singh Verma vs. Haji B.K. Hanchnmani, Page- 142

Motor Vehicles Act, 1989– Sections 166– Motor accident – Death case- Claim application by legal representative- Income of deceased who was agriculturist-cum-shephered- Determination- Held, income of deceased cannot be computed on surmises- Where no documentary evidence regarding income of deceased is available, Government notification prescribing minimum wages can be considered- Tribunal can take judicial notice of such notification. (Para 5) Title: ICICI Lombard General Insurance Company Ltd. vs. Kala Devi and others, Page- 386

Motor Vehicles Act, 1989– Section 166– Motor accident – Death case- Claim application- Necessary parties- Held, daughters who were already married prior to demise of deceased in motor accident, not being his dependents cannot be arrayed as claimants. (Para 6) Title: ICICI Lombard General Insurance Company Ltd. vs. Kala Devi and others, Page- 386

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Payment of Wages Act, 1936- Sections 15 & 17-A – Direction for furnishing surety etc.- When can be issued? During pendency of proceedings, Commissioner allowing application of workmen and directing employer (Company) to furnish surety or equivalent towards their salary purportedly illegally withheld by Company- Challenge thereto- Held, manufacturing unit of Company lying closed due to strike called by workmen- Question of withholding of salary illegally yet to be decided on merits after adducing evidence- Main case at evidence stage- Requisite material not existing before Commissioner to pass impugned order- Order set aside with direction to Commissioner to conclude proceedings expeditiously- Petition allowed. (Paras 3 & 4) Title: M/s Tube Expansion Equipments Pvt. Ltd. vs. M/s Tube Expansion Worker Union Parwanoo, & others, Page- 70

Protection of Women from Domestic Violence Act, 2005- Section 23– Order of interim maintenance- Execution after decree of divorce- Challenge thereto- Petitioner-husband challenging order of Executing Court directing him to pay arrears of interim maintenance to his wife- Petitioner husband contending that subsequent to order of interim maintenance of Court, there was divorce decree and thereafter order of interim maintenance cannot be executed- Held, order of interim maintenance passed by Court much before passing of decree of divorce- Husband not disputing quantum of arrears of interim maintenance payable under said order- Subsequent passing of decree of divorce did not render execution application infructuous nor absolve liability of petitioner- Petition dismissed. (Para 5) Title: Deepak Sharma vs. Deepti Sharma, Page- 4

Protection of Woman from Domestic Violence Act, 2005 – Section 23(2) **–** Interim maintenance – Quantum of- Challenge thereto- Petitioner husband challenging order of Trial Court as upheld by Appellate Court directing him to pay Rs.4000/- per month as interim maintenance to his wife- Held, petitioner having done Master's degree in Business Administration- Gainfully employed at Ludhiana- Relationship inter-se parties not disputed- Petitioner legally bound to maintain his wife- Award of Rs.4000/- P.M. not unreasonable-

Order not perverse- Petition dismissed. (Paras 5 to 7) Title: Ajay Sharma vs. Shruti Sharma, Page- 314

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Representation of the People Act, 1951 (Act) – Sections 81, 82 & 86 - **Code of Civil Procedure, 1908**- Order VII Rule 11– Rejection of election petition on ground of non-supply of essential documents by petitioner- Whether permissible?- Elected candidate/respondent seeking rejection of petition challenging his election to Legislative Assembly on ground that petitioner did not supply essential documents forming integral part of such petition- Held, documents as referred to do not form integral part of petition- These are merely evidence in case and copies of such documents were not required to be served on respondent/applicant- There is no requirement of law that documents or Schedule should have been served upon respondent- Documents since filed in Court, it is always open to respondent to inspect them and find out allegations made in petition. (Paras 15 to 23) Title: Ramesh Chand vs. Mahender Singh, Page- 76

Representation of the People Act, 1951 (Act) – Sections 81, 82 & 86 - **Code of Civil Procedure, 1908 -** Order VII Rule 11 – Rejection of election petition on technical lacuna- Justification- Held, petition cannot be dismissed at threshold on ground of any technical lacuna so as to frustrate endavour to bring to trial issue on grounds set out in it particularly when no prejudice is alleged or shown to have been caused to respondent by such omission or lacuna. (Paras 26, 27 & 35) Title: Ramesh Chand vs. Mahender Singh, Page- 76

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Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 3 (1) (s) –Regular bail – Grant of- Held, petitioners have already joined investigation- Nothing to be recovered from them- Petitioners aged ladies and not in position to tamper with evidence or flee away from justice- Petitioners ordered to be released on conditional bail. (Paras 5 & 7) Title: Asha Devi vs. State of Himachal Pradesh, Page- 334

Specific Relief Act, 1963- Sections 34 & 39– Suit for declaration and mandatory injunction- Grant of- Plaintiff claiming himself to be co-owner qua suit land, which is abadi-deh and praying for direction to defendant to remove all his encroachments raised by him over it- Trial Court dismissing suit and First Appellate Court upholding decree in appeal- RSA- Held, defendant purchased said abadi-deh land in 1957-58 from "RG" through registered sale deed- He in continuous possession since then- His cowshed existing over said land- Possession also admitted by plaintiff- Plaintiff not original estate holder of that mohal- He himself purchased land in 1994 in that mohal- But without purchasing corresponding share in abadi-deh- Plaintiff cannot claim to be an estate holder qua abadi-deh- RSA dismissed. (Paras 7 to 9) Title: Shankar Dass (since deceased) through his legal heirs vs. Sobia (since deceased) through his legal and others, Page- 160

Specific Relief Act, 1963- Section 38- Permanent prohibitory injunction- Grant of- Plaintiff claiming possession of house pursuant to agreement of parties- Agreement not specifically mentioning any Khasra number in it- Defendant admitting on oath regarding dispute between them pertains to a house- No evidence from his side as to existence of any other house in suit- Recitals in agreement showing transfer of possession of house to plaintiff- Plaintiff entitled for decree of prohibitory injunction. (Paras 8 & 9) Title: Prem Chand vs. Babur Ram and others, Page- 138

Specific Relief Act, 1963 – Section 38 – Permanent prohibitory injunction- Grant of- Essential requirements- Held, person has to prove two things, he is in lawful possession of disputed land and second defendant tried to interfere or disturb such possession- On facts, suit land vacant on spot and taken care by Municipal Body- During settlement it is recorded in possession of 'bartandarans'- Plaintiff not in possession and not entitled for injunction. (Paras 11 to 13) Title: Darshana Devi and another vs. State of Himachal Pradesh, Page- 365

Specific Relief Act, 1963- Section 38- Permanent prohibitory injunction- Entitlement- Necessity of proof of settled possession- Plaintiff filing suit for permanent prohibitory injunction with respect to his own land as well as another land recorded in ownership of State- Lower Courts concurrently denying decree with respect to Govt. land- RSA by plaintiff- Suit land recorded in ownership of State and in possession of right holders of estate- Exclusive possession of plaintiffs over it not recorded- No oral evidence worth credence to prove his possession on said land- Held, plaintiff rightly held not entitled for injunction – RSA dismissed. (Paras10) Title: Lekh Ram vs. Chanchal Ram and others, Page- 416

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Transfer of Property Act, 1882- Section 38- Bonfaide purchaser- Who is? Trial court setting aside sale deed executed by defendant No. 1 (D1) as GPA of plaintiff in favour of defendant No. 2 (D2)- And declining plea of D2 of his being bonafide purchaser for consideration- Appeal against- Held, material on record suggesting D2 having visited tehsil office for verifying subsisting validity of GPA executed in favour of D1 by plaintiff- Inferentially, he had come to know that GPA aforesaid stood rescinded by plaintiff, yet he (D2) opted to get sale deed registered on basis of rescinded GPA- D2 is not a bonafide purchaser of suit land- Appeal dismissed- Decree of lower court upheld. (Para 12) Title: Devinder Bhardwaj and another vs. Ravinder Lal, Page- 635

Transfer of Property Act, 1882 (Act)- Section 53-A- Specific Relief Act, 1963 – Section 38– Part performance- Document unregistered- Effect- Held, agreement to sell if not registered cannot be relied upon by party to claim possessory rights in immovable property under Section 53-A of Act. (Para 10) Title: Lekh Ram (since deceased) through his legal heir Suresh Kumar vs. Krishan Chand (since deceased) through his legal heir and another, Page- 113

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TABLE OF CASES CITED

'A'

A. Madan Mohan vs. K. Chandrasekhara, AIR 1984 SC 871
A.P. SRTC and others vs. G. Srinivas Reddy and others, (2006)3 SCC 674
Abdulrasakh vs. K. P. Mohammed, 2018 (5) SCC 598
Afsar Shaikh and another vs. Soleman Bibi and others, AIR 1976 SC 163
Ajay Maken vs. Adesh Kumar Gupta, 2013(3) SCC 489
Ajenderaprasadji N. Pandey vs. Swami Keshavprakeshdasji N. and others, (2006)12 SCC 1
Amit Ahuja vs. Gian Parkash Bhambri, 2010(93) AIC 488
Anil Ratan Sarkar vs. Hirak Ghosh, 2002 AIR (SC) 1405
Arif Khan alias Agha Khan vs. State of Uttarakhand, AIR 2018 SC 2123
Arun vs. State, (2008) 15 SCC 501
Ashok Chaturvedi and others vs. Shitul H. Chanchani and another, 1998(7) SCC 698
Asit Kumar Kar vs. State of West Bengal and Ors, (2009) 2 SCC 703
Asstt. Engineer, CAD vs. Dhan Kunwar, (2006) 5 SCC 481
Atul Shukla vs. State of M.P. and another, Cr. Appeal No(s). 837 of 2019

'B'

B.K.Narayna Pillai vs. Parameshwaran Pillai and another, (2000)1SCC 712
B.L. Sreedhar and others vs. K.M. Munireddy (dead) and others, 2003(2) SSC 355
B.S. Joshi and others vs. State of Haryana and another, (2003) 4 SCC 675
Bakhtawar Singh and another vs. Sada Kaur and another, (1996)11 SCC 167)
Bal Kishan vs. Om Parkash and another, 1986 SC 1952
Baldev Raj vs. State of H.P.,Cr.MP(M) No. 1144 of 2015, decided on 6.8.2015
Baldev Singh and others vs. Manohar Singh and another, (2006)6SCC 498
Bangalore Development Authority and others vs. R. Hanumaiah and others (2005) 12 SCC 508
Basir-ul-Huq vs. State of West Bengal, AIR 1953 SC 293
Bharat Aluminium Company vs. Kaiser Aluminium Technical Services Inc., (2012)9 SCC 552
Bharti vs. State of Haryana, 2014(4) SCC 14
Brahama Kumaris Ishwariya Vishwa Vidayalya vs. Dev Parkash 2013 (2) RCR (Rent) 32
Brakewel Automatic Components (India) vs. P.R. Selvam Alagappan, 2017 (5) SCC 371

'C'

C. Magesh and others vs. State of Karnataka, (2010) 5 SCC 645
C. Shakunthala and others v. H.P. Udayakumar and another, (2012)2 SCC 294
Central Provinces Transport Service Ltd. Nagpur vs. Raghunath Gopal Patwardhan, AIR 1957 SC 104
Ch. Subbarao vs. Member, Election tribunal, Hyderabad and Ors., 1964 AIR SC 1027

Chandrakant Uttam Chodankar vs. Dayanand Rayu Mandrakar, 2005 (2) SCC 188
Chandrappa vs. State of Karnataka, (2007) 4 SCC 415
Commissioner of Sales Tax, U.P. vs. M/s Auriaya Chamber of Commerce, Allahabad, (1986) 3 SCC 50

'D'

D.N. Banerji vs. P.R. Mukherjee and others, AIR 1953 SC 58
D.Ramanatha Gupta vs. S. Razaack AIR 1982 Karnataka 314
Dalip Singh vs. State of Uttar Pradesh and others, 2010(2) SCC 114
Damodar S. Prabhu vs. Sayed Babalal H., (2010) 5 SCC 663
Dataram Singh vs. State of Uttar Pradesh & Anr., Criminal Appeal No. 227/2018, decided on 6.2.2018
Daulat Ram vs. The Executive Engineer, HPPWD, CWP No. 1887 of 2017 decided on 11th December, 2017
Deena (dead) through LRs. vs. Bharat Singh (dead) through LRs and others, (2002)6 SCC 336
Deepak vs. State of H.P., Cr.MP(M) No. 1408 of 2014, decided on 29.12.2014
Devi Chand vs. State, 1994 (4) S.L.J. 2926
Dhanna vs. State of M.P., (1996) 10 SCC 79
Dharappa vs. Bijapur Coop. Milk Producers Societies Union Ltd., (2007) 9 SCC 109
Dhartipakar Madan Lal Agarwal vs. Shri Rajiv Gandhi, AIR 1987 SC 1577
Dhurandhar Prasad Singh vs. Jai Prakash University and others (2001) 6 SCC 534
Dinesh Kumar vs. State of H.P. and others, 1994 (Suppl.) Shim. L.C. 385
Dr. Arti Dhatwalia vs. State of H.P, (2017) 3 ILR (HP) 27
Dr. Dhruvaram Murlidhar Sonar vs. State of Maharashtra & others, Criminal Appeal No. 1443 of 2018 (Arising out of SLP (Criminal) No. 6532 of 2018), (Division Bench), decided on 22.11.2018
Dura Line India Pvt. Ltd. vs. Bpl Broadband Network Pvt. Ltd 111(2004)DLT 736; 2004(74)DRJ 266
Durgacharan Naik vs. State of Orissa, AIR 1966 SC 1775

'E'

E. Micheal Raj vs. Intelligence Officer, Narcotic Control Bureau, (2008)5 SCC 161

'G'

Gajraj vs. Sudha and others, 1999 (3) SCC 109
Gauri Dutt and Others vs. State of H.P., Latest HLJ 2008 (HP) 36
General Electric Technical Services Company Inc. vs. Punj Sons (P) Ltd. And another, (1991)4 SCC 230
Gian Singh vs. State of Punjab and another (2012) 10 SCC 303
Girish Sarwate vs. State of A.P., 2005(1) R.C.R.(Criminal) 758

Girja Nand vs. State of Himachal Pradesh & Others, CWP No. 93 of 2019 decided on 13.3.2019
Gulab Singh and others vs. Mahender Singh and others 2019 (2) Him L.R. (HC) 1055
Gurbaksh Singh Sibbia vs. State of Punjab, (1980) 2 SCC 565
Gurcharan Singh vs. State (Delhi Administration), (1978) 1 SCC 118

'H'

Harjit Singh vs. State of Punjab, (2011)4 SCC 441
Himachal Pradesh Cricket Association vs. State of Himachal Pradesh, (SC) 2018 (4) Crimes 324
Himadari Chemicals Industries Ltd. vs. Coal Tar Refining Co., (2007)8 SCC 110
Hindustan Tea Company vs. M/s K. Sashikant & Company and Anr., AIR 1987 SC 81
Hira Singh & Anr. vs. Union of India, Cr. Appeal No. 722 of 2017 decided on 3.7.2017

'I'

Indus Mobile Distribution Private Ltd. vs. Datawind Innovations Private Limited, (2017)7 SCC 678

'J'

J.C. Chatterjee and others vs. Shri Sri Krishan Tandon and another, 1972 SC 2526
J.V. Baharuni and another vs. State of Gujarat and another, (2014)10 SCC 494
Jagnarain and others vs. Radhey Shyam Singh and another, AIR 2004 Allahabad 215
Jai Narain Ram Lundia vs. Kedar Nath Khetan and others, AIR 1956 SC 359
Jai Prakash Singh vs. State of Bihar, (2012) 4 SCC 379
Janki Vashdeo Bhojwani and another vs. Indusind Bank Ltd. and others, AIR 2005 SC 439
Jitendra Raghuvanshi and others vs. Babita Raghuvanshi and another, (2013) 4 SCC 58
Juveria Abdul Majid Patni vs. Atif Iqbal Mansoori, (2014) 10 SCC 736

'K'

K.N.Aswathnarayana Setty (dead) through legal representatives and others vs. State of Karnataka and others (2014) 15 SCC 394
Kandapazha Nadar and others vs. Chitraganiammal and others, (2007)7 SCC 65
Karamchand Prem Chand Pvt. Ltd. vs. Commissioner of Income Tax, 1975 101 ITR 46 Guj
Kaushalya Devi Massand vs. Roopkishore Khore, (2011) 4 SCC 593
Khatu Bai and another vs. Khatija Bai and others, AIR 1973 AP 35
Khet Singh vs. Union of India, (2002) 4 SCC 380
Kishan Gopal and another vs. Lata and others, (2014)1 SCC 244
Kishan Singh vs. Gurpal Singh, (2010) 8 SCC 775
Koyal Kumar vs. State of H.P. and others, CWP No. 2632 of 2008, decided on 28.7.2009
Kuldeep Singh Pathania vs. Bikram Singh Jaryal, (2017) 5 SCC 345
Kulwant Singh and others vs. Oriental Insurance Company Limited, 2015) 2 SCC186
Kunstocom Electronics (I) Pvt. Ltd. vs. Gilt Pack Ltd. and another, (2002) 2 SCC 383

'L'

LT. Governor of Himachal Pradesh vs. Sri Avinash Sharma 1970 (2) SCC 149

Lalit Manta vs. State of H.P., Cr.MP(M) No. 1069 of 2011, decided on 28.12.2011

Lata Wadhwa vs. State of Bihar, (2001)8 SCC 197

Liverpool & London Steamship Protection and Indeminity Association Ltd. vs. M.V. Sea Success, 2003 Law Suit (SC) 1156

'M'

M. Karunanidhi vs. H. V. Hande (1983) 2 SCC 473 : (AIR 1983 SC 558)

M/s Flint Group India Pvt. Ltd. vs. M/s Good Morning India Media Pvt. Ltd, CM(M) No. 369 of 2017 and CM Nos. 13049-50/2017

M/s Sudarsan Trading Company vs. The Government of Kerala and Anr, AIR 1989 SC 890

Markfed Vanaspati & Allied Industries vs. Union of India (2007) 7 SCC 679

Madhavrao Jiwaji Rao Scindia vs. Sambhajirao Chandrojirao Angre, 1988 (1) SCC 692

Magma General Insurance Co. Ltd. vs. Nanu Ram Alias Chuhru Ram & others, Civil Appeal No.9581 of 2018

Mahavir vs. Union of India, (2018) 3 SCC 588

Mahesh Chand vs. State of Rajasthan, 1990 SCC 781

Mallikarjun Kodagali vs. State of Karnatka, 2018 SCC OnLine SC 1941

Management of Messers Hotel Samrat vs. Government of NCT & Ors, WP(C) No. 6682/2002

Mandvi Cooperative Bank Ltd. vs. Nimesh B. Thakore, (2010)3 SCC 83

Mangluram Dewangan vs. Surendra Singh and others, (2011)12 SCC 773

Manjuri Bera (Smt) vs. Oriental Insurance Company Ltd. and another, (2007) 10 SCC 643

Manoj Kumar Sharma and others vs. State of Chhattisgarh and another, (2016) 9 SCC 1

Maulana Mohd. Amir Rashadi vs. State of U.P., Criminal Appeal No. 159 of 2012, decided on 16.01.2012

McDermott International Inc. vs. Burn Standard Company Limited and Ors., (2006) 11 SCC 181

Meters and Instruments Private Limited and another vs. Kanchan Mehta, (2018) 1 SCC 560

Milind Shripad Chandurkar vs. Kalim M. Khan and another, (2011)4 SCC 275

Mithilesh Kumar Pandey vs. Baidyanath Yadav and others, 1984 AIR (SC) 305

Mohd. Sahabuddin and another vs. State of Assam, (2012) 13 SCC 491

Muraka Radhey Shyam Ram Kumar vs. Roop Singh Ratore & others, 1964 (3) SCR 573

'N'

Narinder Singh & Ors. vs. State of Punjab & Anr. JT 2014 (4) SC 573

National Insurance Co. Ltd. vs. Pranay Sethi and others, 2017 ACJ 2700

Nitin Gulwant Shah vs. Indian Bank and others, (2012)8 SCC 305

'O'

Omparkash Shivprakash vs. K.I. Kuriakose and others, (1999)8 SCC 633

'P'

P.R. Shah, Shares and Stock Broker (P) Ltd. vs. M/s. B.H.H. Securities (P) Ltd. and others, (2012) 1 SCC 594

Parbatbhai Aahir alias Parbatbhai Bhimsinhbhai Karmur and others vs. State of Gujarat and another, (2017) 9 SCC 641

Parsinni (dead) by LRs and Others vs. Sukhi and others, (1993) 4 SCC 375

Peethani Suryanarayana vs. Repaka Venktata Ramana Kishore and others, (2009)11 SCC 308

Prabhakar vs. Sericulture Deptt., (2015) 15 SCC 1

Prasanta Kumar Sarkar vs. Ashis Chatterjee and Another, (2010) 14 SCC 496

Preeti Gupta and another vs. State of Jharkhand and another, (2010) 7 SCC 667

'R'

R. K. Roja vs. U. S. Rayudu and another, AIR 2016 SC 3283

R.P. Kapur vs. State of Punjab, AIR 1960 SC 866

RC Sharma vs. CBI :2010 SCC online Del 2485

Raghu Raj Singh Rousha vs. Shivam Sundaram Promoters Private Ltd. & anr, (2009)2 SCC 363

Rajasthan Housing Board and others vs. Shri Kishan and others (1993) 2 SCC 84

Rajasthan State Agriculture Mktg. Board vs. Mohan Lal, (2013) 14 SCC 543

Rajendra Singh vs. Usha Rani, 1984 (3) SCC 339

Rajkumar Gurawara (dead) through Lrs vs. S.K.Sarwagi & Company Private Limited and another, (2008)14 SCC 364

Rajvir Singh @ Raju vs. State of Punjab, CRM-M-35080-2018

Rakesh Kumar vs. State of H.P., CWP No. 2735 of 2010, decided on 28.7.2010

Raksha Devi vs. State of H.P. and others and its connected matters, CWP No. 1096 of 2010 decided on 17th May, 2010

Ramji Gupta & Anr. vs. Gopi Krishan Agrawal(D) & Ors., 2013(2) Civil Court Cases 668=2013 (9) SCC 438

Ranen Roy vs. Prakash Mitra, (1998)9 SCC 689

Rashtriya Colliery Mazdoor Sangh vs. Employers, (2017) 1 SCC 264

Ravinder Singh vs. State of H.P. and others, CWP No. 525/2009, decided on 4.8.2009

Ravindra Kumar Madhanlal Goenka vs. Rugmini Ram Raghav Spinners P Ltd, (2009) 11 SCC 536

'S'

S.K. Sinha vs. Videocon International Ltd., 2008(2) SCC 492

S.P. Changalvaraya Naidu vs. Jagannath, 1994 (1) SCC 1

S Iyyapan vs. United India Insurance Company Limited and another, (2013) 7 SCC 62

S. Malla Reddy vs. future Builders Cooperative Housing Society and others, (2013) 9 SCC 349
Saloni Rupam Bhartiya vs. Rupam Prahlad Bhartiya, 2015(4) R.C.R.(Criminal) 172
Sanjay Chandra vs. Central Bureau of Investigation, (2012)1 SCC 49
Sarah Mathew vs. Institute of Cardio Vascular Diseases by its Director Dr. K.M. Cherian and others, (2014) 2 SCC 62
Sarla Verma vs. DTC, (2009)6 SCC 12
Satendra Prasad Jain and others vs. State of U.P. and others (1993) 4 SCC 369
Satya Narain vs. Dhuja Ram, 1974 (4) SCC 237
Shakuntala Sawhney v. Kaushalya Sawhney, (1979) 3 SCR 639
Shyam Sundar Bazaz vs. Sanwarmal Jalan and others, AIR 2005 Jharkhand 109
Siddharam Satlingappa Mhetre vs. State of Maharashtra and others, (2011) 1 SCC 694
Silverline Forum Pvt. Ltd. vs. Rajiv Trust and another, AIR 1998 SC 1754
Sneh Lata Goel vs. Pushplata and others (2019) 3 SCC 594
Sohan Lal vs. Sadhu Ram, Latest HLJ 2003 (HP) 154
Som Nath vs. Gurdev, 2017 (3) Himachal Law Reporter 1413
Special Land Acquisition Officer, Bombay and Others vs. M/S Godrej and Boyce, (1988) 1 SCC 50
State Bank of India vs. Anil Kumar Sharma, 2008 SCC Online HP 228 (2009) 2 BC 374
State vs. Gulam Meer (Madhya Bharat), AIR 1956 (Madhya Bharat) 141
State of Bihar and others vs. Bihar Rajya Bhumi Vikas Bank Samiti, (2018) 9 SCC 472
State of Bihar vs. P. P. Sharma, AIR 1991 SC 1268
State of Haryana and others vs. Bhajan Lal and others, 1992 Supp. (1) SCC 335
State of H.P. vs. Achhru Ram (dead) through LRs, AIR 2011 HP 19
State of H.P. vs. Chander Dev and Others, 2007 (2), Shimla Law Cases 7
State of Himachal Pradesh vs. Desh Raj & another, 2016 (Suppl.) Himachal Law Reporter (DB) 3088
State of H.P. vs. Mehboob Khan, 2013 (3) Shimla 12 Law Reporter (FB) 1834
State of H.P. vs. Mehboon Khan (FB), 2014 (2) RCR (Criminal) 447
State of H.P. vs. Rakesh, Criminal Appeal No. 138 of 2015
State of H.P. vs. Vidya Sagar, 1997 Cri.L.J 3893
State of Karnataka vs. Shrisail Sateeppa Karkalamethi and another, AIR 1994 SC 1244
State of Madhya Pradesh vs. Laxmi Narayan and others, 2019 (4) Scale, 200
State of Punjab vs. Makhan Chand, (2004) 3 SCC 453
State of Punjab and Others vs. Rafiq Masih, (2015) 4 SCC 334
State of Rajasthan vs. Parmanand & another, (2014) 5 SCC 345
State of Rajasthan vs. Shambhu Kewat, (2014) 4 SCC 149
State of U.P. and others vs. Dinesh Singh Chauhan, (2016) 9 SCC 749
Sub-Inspector Roop Lal and another vs. Lt. Governor through Chief Secretary, Delhi and others, (2000) 1 SCC 644
Sumfali Devi vs. State of Himachal Pradesh and another, CWP No. 2861 of 2018 decided on 2.4.2019

Sunil Poddar and others vs. Union Bank of India, 2008 (2) SCC 326
Surinder Kaur vs. Mohinder Pal Singh, ILR (1976) 5
Sutlej Construction vs. Union Territory of Chandigarh, (2018) 1 SCC 718
Swan Gold Mining Ltd. vs. Hindustan Copper Ltd., Civil Appeal No. 9048 of 2014, decided on 22.9.2014

'T'

T.K. Rangarajan vs. Government of T.N. and others, (2003) 6 SCC 581
T. M. Jacob vs. C. Poulose, AIR 1999 SC 1359
T. Phungzathang vs. Hangkhanlian, 2001 (7) JT 439
T. Subramanian vs. State of Tamil Nadu, (2006) 1 SCC 401
The Additional Chief Secretary (PW) & Others vs. Shri Ram Gopal, LPA No. 27 of 2019 decided on 3.4.2019
The Bombay Union of Journalists and others vs. The Hindu, Bombay and another, AIR 1963 SC 318

'U'

U.P. SRTC vs. Ram Singh, (2008) 17 SCC 627
U.P. State Sugar Corporation vs. SUMAC International Ltd., (1997) 1 SCC 568
U. S. Sasidharan vs. K. Karunakaran and Anr., 1990 AIR (SC) 924
Uma Shankar and others vs. R. Hanumaiah (since deceased) through his Legal Representatives and others (2017) 14 SCC 335
Umesh Challiyill vs. K. P. Rajendran, 2008 (11) SCC 740
Union of India vs. Balmukund and others, (2009) 12 SCC 161
Union of India vs. Hardy Exploration and Production, Civil Appeal No.4628 of 2018
Union of India vs. Raman Iron Foundry, AIR 1974 SC 1265

'V'

V. Chandrasekaran and another vs. Administrative Officer and others (2012) 12 SCC 133
Vanga Ramanujayya vs. Atyam Suryanarayan Murthy 2007 (4) ALT 268
Vasudev Dhanjibhai Modi vs. Rajabhai Abdul Rehman and Others, 1970(1) SCC 670
Vidyawati vs. Manmohan and others, 1995 SC 1653
Vijay Prakash Jarath vs. Tej Prakash Jarath, 2016 (11) SCC 800
Vijayander Kumar vs. State of Rajasthan, 2014 (5) 3 SCC 389
Vinod Kumar vs. State of HP, Cr. M.M.O No. 14 of 2019 decided on 8-01-2019
Visakhapatnam Urban Development Authority vs. S.S. Naidu and Others, (2016) 13 SCC 180
Vishnu Agarwal vs. State of Uttar Pradesh and Anr., (2011) 14 SCC 813
Vishwambhar and others vs. Laxminarayan (dead) through LRs, (2001)6 SCC 163
Vishwa Nath vs. State of H.P. and another, Latest HLJ 2016 (HP) Suppl. 250

'W'

Workmen Rastriya Colliery Mazdoor Sangh vs. Bharat Coking Coal Ltd., (2016) 9 SCC 431

'Y'

Y. Suresh Babu vs. State of A.P., 2005 (1) SCC 347
Yogendra Pratap Singh vs. Savitri Pandey, (2014) 10 SCC 713

'Z'

Zahur Haider Zaidi vs. Central Bureau of Investigation, Criminal Appeal No. 605 of 2019 (arising out of SLP (Crl.) No. 2123 of 2018), decided on 5th April, 2019
Zandu Pharmaceutical Works Ltd. and others vs. Mohd. Sharaful Haque and another, (2005) 1 SCC 122

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

Chanan Singh .....Petitioner.

Vs.

BBMB through its Chairman, Madhya Marg, Chandigarh and others .....Respondents.

CWP No.: 5639 of 2011
Date of Decision: 13.03.2019

Constitution of India, 1950 – Articles 14 & 16 – Promotion from back date- Claim of – Writ jurisdiction- Delay- Absence of necessary parties – Consequences- Petitioner filing writ and seeking directions to respondent to promote him from back date i.e. 12.8.99 when 'GC' and 'MR', persons junior to him were promoted- Held, petition is hit by delay and laches of more than 12 years- No plausible reason given for such delay- Neither promotion of other persons challenged nor they are made parties- Promotion of 'GC' and 'MR' in accordance with regulations- Regulations also not challenged by petitioner- Petitioner not similarly situated vis-à-vis 'GC' and 'MR'- Petition dismissed. (Paras 5 to11)

For the petitioner: Mr. Pushpender Kumar, Advocate.
For the respondents: Mr. N.K. Sood, Senior Advocate, with Mr. Aman Sood, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition, the petitioner has prayed for issuance of directions to promote him as Foreman (Pipes and Pumping) from the date persons junior to him were promoted as such with all consequential benefits and also to confer upon him further promotion thereafter, to the post of Special Foreman (Pipes and Pumping) with seniority and all consequential benefits.

2. The case of the petitioner is that he was appointed as a Junior Fitter in BSL Project in July, 1970. Thereafter in June 1978, he was appointed as Hoist Operator. On 13.10.1993, respondent-Board invited applications from Indian Nationals, who belonged to Scheduled Caste and Scheduled Tribe Categories for various posts, which included one post of Assistant Foreman (Pipes and Pumping). Petitioner applied for the same and also appeared before the Selection Board and was selected against the said post. However, to his utter surprise, he was offered appointment as Chargeman Grade-I (Pipes and Pumping) vide office order dated 24.01.1994. Feeling aggrieved, he made a representation on 25.11.1994. His further case is that respondent-Board promoted persons junior to him as Foreman, who were appointed as Chargeman Grade-I in the year 1998 and 1999, whereas petitioner was appointed as Chargeman Grade-1 on 24.01.1994. According to him, one Gian Chand, who was promoted/appointed as Chargeman Grade-I vide order dated 11.08.1998 and one Mast Ram, who was appointed as such vide order dated 24.01.1998, were promoted as Foreman (Pipes and Pumping) vide orders dated 11.08.1998 and 12.08.1999, respectively, whereas promotion was arbitrarily denied to the petitioner. According to him, while promoting persons junior to him, his rightful claim was rejected by the respondents, who promoted him on 13.01.2003. In this background, he filed the writ petition praying for reliefs already mentioned hereinabove.

3. The claim of the petitioner stands refuted by the Board on the ground that petitioner was not selected for the post of Assistant Foreman (Pipes & Pumping) pursuant to his applying for the said post vide application dated 28.12.1993 and was alternatively offered the post of Chargeman Grade-I, which he accepted without objection and unconditionally. It is further mentioned in the reply that earlier also, petitioner had filed CWP No. 319 of 1999, titled as *Chanan Singh Vs. BBMV and others*, in which also, he prayed for setting aside of the order of his appointment as Chargeman Grade-I dated 24.01.1994 and had also prayed that respondents be directed to treat him as appointed against the post of Assistant Fitter Special (Pipes and Pumping) w.e.f. 24.01.1994, which petition was dismissed vide order dated 16.12.2003 and an application filed for restoration of the same was also dismissed on 01.08.2007. As per the respondents, Gian Chand, son of Mangat Ram, who was earlier working as Pipe Fitter, was promoted as Chargeman (Pipes and Pumping) vide order dated 11.08.1999 and thereafter as Foreman (Pipes and Pumping) on 12.08.1999, as he was next in seniority to Mast Ram. Mast Ram prior to his promotion, was working as Fitter (Pipes and Pumping) and he was promoted as Chargeman (Pipes and Pumping) on 24.08.1998 and difference between the case of Gian Chand and Mast Ram, as compared to the case of petitioner, was that these persons stood promoted to the post of Chargeman, whereas petitioner was appointed to the post in issue.

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

5. Petitioner prays for a mandamus directing the respondent-Board to promote him as Foreman (Pipes and Pumping) from the date when persons junior to him were promoted to the said post with all consequential benefits.The so called seniors, parity qua whom is being claimed by the petitioner, are namely Shri Gian Chand and Shri Mast Ram. According to the petitioner, Gian Chand, who was appointed/promoted as Chargeman Grade-I vide order dated 11.08.1998, stood promoted as Foreman (Pipes and Pumping) vide order dated 12.08.1999. Similarly, Mast Ram, who was appointed as Chargeman Grade-1 vide order dated 24.01.1998, was also promoted as Foreman (Pipes and Pumping) vide order dated 12.08.1999. Said persons according to the petitioners were junior to him and grant of promotion to the said persons and denial of the same to the petitioner was an arbitrary act of the Board. Incidentally, neither Shri Gian Chand nor Shri Mast Ram have been impleaded as party respondents in the petition.

6. Be that as it may, record demonstrates that though the petitioner did apply for the post of Assistant Foreman (Pipes and Pumping), however, he was not selected by the Selection Board for the post in issue and was in fact offered the post of Chargeman Grade-1, which he accepted without any condition. He was offered this post vide office order dated 24.01.1994 (Annexure P-1). Record further demonstrates that Gian Chand and Mast Ram were promoted against the post of Foreman in the year 1999.

7. It is petitioner's own case that said two persons were promoted as Foreman (Pipes and Pumping) vide order dated 12.08.1999. It is also a matter of record that the promotions of said two persons were not challenged by the petitioner, when the same were effected. Thereafter, petitioner himself was promoted as Foreman (Pipes and Pumping) in the year 2003. He superannuated as a Special Foreman on 31.03.2008 and till the time he was in service, he did not at any stage, agitate the promotions of Sh. Gian Chand and Mast Ram and it is only after his superannuation that he made a representation to the respondent-Board on 29.01.2009 and present writ petition was filed in the year 2011.

8. There is no cogent explanation given in the petition as to why the promotions of Gian Chand and Mast Ram were not challenged within a reasonable period from the date

when said persons were promoted. Even during the course of arguments, learned counsel for the petitioner could not give any cogent explanation as to why it took more than 12 years for the petitioner to agitate conferment of purported wrong promotions on Mast Ram and Gian Chand and denial of promotion to him.

9. The submission of learned counsel for the petitioner that the delay is not fatal because the petitioner is not claiming any relief against Mast Ram and Gian Chand has no merit. It is but natural that after 12 years, the petitioner could not have had made a prayer for setting aside the promotions conferred upon Mast Ram and Gian Chand in the year 1999 and it was a thoughtful ploy to mould the relief in a manner so as to give the impression that the petitioner was not *per se* challenging the promotions of Mast Ram and Gian Chand, but was claiming parity with the said persons. Thus, the petition is hit by delay and laches, because there is no cogent explanation as to why the petitioner has filed this petition after 12 years from the date when promotions were conferred upon Mast Ram and Gian Chand, who, as already mentioned hereinabove, have not even been impleaded as party respondents.

10. Learned counsel for the petitioner could not dispute that the source of recruitment to the post of Chargeman of the petitioner on one hand and Mast Ram and Gian Chand on other hand was different. Whereas the petitioner stood "appointed" as Chargeman, Mast Ram and Gian Chand were "promoted" against the said post. It is the case of the respondents that because the recruitment to the post of Chargeman of the petitioner and Gian Chand and Mast Ram was from different sources, Gian Chand and Mast Ram stood promoted as Foreman on account of their being promoted to the post of Chargeman, i.e., the feeder post. The explanation of the respondents is that for the purpose of promotion to the post of Foreman, the entire service as Chargeman and Fitter has to be considered and the joint service of Mast Ram and Gian Chand on the said posts was longer keeping in view that Gian Chand and Mast Ram stood promoted as Chargeman from the post of Fitter, whereas as the petitioner stood appointed as Chargeman from the post of Hoist Operator, service rendered by him as Hoist Operator was not to be counted for the purpose of Foreman. This was for the reason that the post of Hoist Operator is not the feeder cadre post of Foreman (Pipes and Pumping). On the other hand, experience on the post of Fitter (Pipes and Pumping) has to be considered and counted for the post of Foreman (Pipes and Pumping) being the feeder cadre post.

11. The reason so assigned by the respondents while justifying the promotions conferred upon Mast Ram and Gian Chand is a valid reason, as it demonstrates that Mast Ram and Gian Chand were promoted in terms of the Regulations. There is no challenge to the Regulations of the Board. Learned counsel for the petitioner has not disputed the Rule position. This clearly demonstrates that the petitioner was not similarly situated as Mast Ram and Gian Chand. That being so, it cannot be said that the respondent-Board has discriminated between similarly situated persons and the petitioner was denied promotions to the post of Foreman (Pipes and Pumping), whereas persons junior to him were promoted. Therefore also, as there is no merit in the contention of the petitioner that Mast Ram and Gian Chand were wrongly promoted as Foreman by ignoring him, this petition is dismissed.

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

Shri Atma Ram & another .....Petitioners.

Versus

Shri Janak Raj .....Respondent.

CMPMO No. 476 of 2018
Decided on : 26.3.2019

Code of Civil Procedure, 1908 - Order VI Rule 17 – Amendment of pleadings- Stage and permissibility- Held, accrual of causes of action subsequent to filing of written statement rear fresh dispute inter-se parties and can be raised in pending suit by way of amendment of plaint. (Para 1)

For the Petitioners: Mr. Satyan Vaidya, Sr. Advocate with Mr. Varun Chauhan, Advocate.
For the Respondent: Mr. Sanjeev Suri, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The defendants/petitioners herein are aggrieved by the dis-affirmative order being recorded upon the respondent's/plaintiff's application, cast under the provisions of order 6 rule 17 CPC, wherethrough, the espoused leave for adding in the plaint, the, paragraph averred therein, hence, stood granted. The application was moved subsequent, to, the aggrieved defendants hence instituting a written-statement to the plaint, (i) even if the afore application was belatedly instituted, and, when rather good and sound cause though was required to be averred in the application, in explication, of, the belated institution of the application, (ii) nonetheless given the purported acts of usurpation, and, invasions, via-a-vis, the suit khasra Numbers, being averred to occur, in the last week of April, 2017, (iii) hence subsequent to the initially instituted plaint, thereupon no explanation was either required to be averred or pleaded, in, the application at hand. The accrual of the causes of action in the plaintiff's suit, for permanent prohibitory injunction, obviously spark or rear a fresh dispute inter-se the contesting litigants, (iv) AND when the afore dispute, was rearable, only in the instant suit, than in any subsequent suit, necessarily for avoiding attraction thereat, of, the baulking mandate of Order 2 Rule 2 CPC, (v) thereupon the espoused leave as granted, vis-a-vis, the afore espoused amendment, hence does not suffer from any illegality or impropriety. Furthermore, also when hence, the accruing of causes of action, vis-a-vis, the suit property are required to be reared in the same suit, hence, for avoiding multiplicity of litigation, inter-se, the legal combatants besides when the aggrieved defendants, would be, permitted to contest the validity, of, the subsequent accruing hence causes of action, and, would also upon the apposite issue struck, in consonance therewith, be permitted to adduce evidence thereon, thereupon when no palpable prejudice would encumber, upon, the defendants/petitioners herein, hence, there is no merit in the petition, and, the same is accordingly dismissed. All pending applications stand disposed of accordingly.

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

Deepak Sharma .....Petitioner.
Vs.
Deepti Sharma .....Respondent.

Cr.MMO No.: 234 of 2018
Date of Decision: 26.03.2019

Protection of Women from Domestic Violence Act, 2005 - Section 23 – Order of interim maintenance- Execution after decree of divorce- Challenge thereto- Petitioner-husband challenging order of Executing Court directing him to pay arrears of interim maintenance to his wife- Petitioner husband contending that subsequent to order of interim maintenance of Court, there was divorce decree and thereafter order of interim maintenance cannot be executed- Held, order of interim maintenance passed by Court much before passing of decree of divorce- Husband not disputing quantum of arrears of interim maintenance payable under said order- Subsequent passing of decree of divorce did not render execution application infructuous nor absolve liability of petitioner- Petition dismissed. (Para 5)

Case referred:
Juveria Abdul Majid Patni vs. Atif Iqbal Mansoori, (2014) 10 SCC 736

For the petitioner:	Mr. Vishwa Bhushan, Advocate.
For the respondent:	Mr. N.K. Thakur, Senior Advocate, with Mr. Divya Raj Singh Thakur, Advocate, for the respondent.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition, the petitioner has prayed for quashing of order dated 27.01.2018, passed by the Court of learned Chief Judicial Magistrate, Una, District Una, H.P. in Cr. MA No. 887/17 and Cr. MA No. 671/2018 in Execution Petition No. 30/2015, titled as *Deepti Sharma Vs. Deepak Sharma,* vide which, two applications filed by the present petitioner stand disposed of.

2. Respondent before this Court had initiated proceedings against the present petitioner under Section 23 of the Protection of Women from Domestic Violence Act, 2005. In these proceedings, vide order dated 15.03.2012, learned Court below ordered interim maintenance to the tune of Rs.4,000/- per month in favour of the respondent herein. It appears that as the said order was not complied by the petitioner, respondent/applicant filed an application for execution and enforcement of order dated 15.03.2012. As on the date when this application was decided, i.e., 27.01.2018, an amount of Rs.1,96,000/- was due from the petitioner to the respondent. Vide impugned order, learned Court below issued directions to the employer of the present petitioner to forward salary of the petitioner to the present respondent by way of draft in lieu of due payment of interim maintenance of Rs.1,96,000/-. Vide same order, another application filed by the petitioner for dismissing the execution on the ground that decree of divorce stood passed on 20.06.2014, was also dismissed on the ground that Execution Petition was for execution of orders/proceedings pertaining to the period earlier to the date of grant of divorce.

3. I have heard learned counsel for the parties and have also gone through the impugned orders.

4. Learned counsel for the petitioner could not dispute that as on the date when the impugned order was passed, an amount of Rs.1,96,000/- was due from him to the

respondent in terms of maintenance granted by the learned Court below. It is not the case of the petitioner that the said order was set aside by any superior Court. No justifiable cause has been espoused by the petitioner before this Court as to why interim maintenance has not been paid. In these circumstances, no perversity can be attributed to the order passed by the learned Court below, wherein, the learned Court below, in order to ensure that the respondent does get the maintenance which the Court has allowed to her, ordered the employer of the present petitioner to forward the salary of the petitioner by way draft in lieu of due payment of interim maintenance of Rs.1, 96,000/-.

5. Similarly, the order passed by the learned Trial Court disallowing the application filed by the petitioner for rejection of the Execution can also not be faulted with. Simply because a decree of divorce stood passed between the parties, same did not render the Execution Petition as infructuous, because the decree of divorce was passed on 20.06.2014, whereas execution was being sought of order(s), which stood passed much before the passing of decree of divorce and which order(s) admittedly were not complied with by the present petitioner. While passing the said order, learned Court below has rightly relied upon the judgment of Hon'ble Supreme Court in ***Juveria Abdul Majid Patni*** Vs. ***Atif Iqbal Mansoori,*** (2014) 10 SCC 736, wherein, Hon'ble Supreme Court has held that act of domestic violence once committed, subsequent decree of divorce would not absolve liability of respondent from offence committed or to deny benefit to which aggrieved person was entitled under the Act.

In view of the observations made hereinabove, as there is no merit in this petition, the same is dismissed.

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

Sh. Sumeet Kumar ....Petitioner.
Versus
Ravi Kumar ....Respondent.

Cr. Rev. No.:168 of 2018.
Decided on: 26.03.2019.

Negotiable Instruments Act, 1881– Sections 138 & 139– Dishonour of cheque– Complaint– Trial court convicting accused for dishonor of cheque- Additional Sessions Judge upholding conviction- Revision against- Accused pleading that cheque was given to wife of complainant and he (complainant) misused it- Held, issuance of cheque by accused not disputed- No action taken by accused against complainant regarding alleged misuse of cheque by him- No other evidence adduced by accused to prove this factum- Mere bald assertion by accused that cheque was given to complainant's wife is not sufficient to rebut presumption under Section 139 of Act- Revision dismissed- Conviction upheld. (Paras 4, 10 & 11)

For the petitioner : Mr. Vivek Chauhan, Advocate.
For the respondent : Nemo.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

This revision petition is directed against the judgment passed by the Court of learned Chief Judicial Magistrate, Solan, in Case No. 875-3 of 2014, dated 31.10.2017, vide which the petitioner has been convicted for commission of offence punishable under Section 138 of the Negotiable Instruments Act and he has been sentenced to undergo simple imprisonment for a period of six months and to pay compensation to the tune of Rs.60,000/- to the complainant and also against the judgment passed by the Court of learned Additional Sessions Judge-1, Solan, in Criminal Appeal No. 29-S/10 of 2017, dated 27.02.2018, vide which appeal filed by the petitioner against the judgment passed by the learned trial Court stood dismissed.

2. Before proceeding further, it is relevant to take note of the fact that on 29.05.2018, when notice was issued in this case, sentence imposed upon the petitioner was suspended subject to the petitioner furnishing personal bond to the tune of Rs.10,000/- with one surety in the like amount to the satisfaction of the learned trial Court as also depositing 25% of the cheque amount, within six weeks from the date of the order. As the petitioner did not comply with the directions issued by this Court, another opportunity was given on 27.12.2018 to deposit the balance compensation amount of Rs.40,000/- till 31.01.2019, however, it is a matter of record that till date said order has not been complied with nor steps have been taken by the petitioner to serve the respondent despite several opportunities.

3. On the request of learned Counsel for the petitioner, the matter is being disposed of on merit today.

4. Brief facts necessary for adjudication of the petition are as under:-

Respondent/complainant (hereinafter referred to as 'complainant') filed a complaint under Section 138 of the Negotiable Instruments Act on the ground that he was an businessman and also running an Electronic items shop under the name and style of M/s Bristo Agencies, near Bus Stand, Solan, HP and petitioner/accused (hereinafter referred to as 'accused') was having cordial business relations with him. As per the complainant, in the month of October, 2013, accused approached him and sought financial help on the pretext that he is in heavy financial constraint and immediately required Rs.52,400/-, which the complainant advanced to the accused as friendly loan in view of good relations and urgency of the accused. The accused had assured to repay the loan amount on or before May, 2014. In the month of May, 2014, when the complainant demanded back his money, the accused issued a cheque bearing No. 970590 dated 30.05.2014, drawn at Yes Bank, Solan, for the said amount in favour of the complainant. When the cheque was presented to the Bank, the same was dishonoured with remarks "drawers signature differs". Immediately upon the receipt of the said information, complainant served the accused with a Legal Notice on 07.08.2014, by way of a registered post. Despite issuance of the said notice, accused failed to make good the amount of the cheque. In these circumstances, complainant invoked the provisions of Section 138 of the Negotiable Instruments Act. Complainant entered the witness as CW3 and tendered in evidence his affidavit Ext. CW3/A. He proved on record Legal Notice Ext. CW3/B, Postal Receipt Ext. CW3/C, Acknowledgment Ext. CW3/D, cheque returning memo Ext. CW3/E and Ext. CW3/F and also cheque Ext. CW2/B. In addition, complainant also examined Sh. Puneet Kumar, Assistant Manager of IDBI Bank, Solan as CW1, Sh. Lucky Gupta, Assistant Manager, Yes Bank, Solan as CW2 and his (complainant's) wife Smt. Renu Gupta as CW4.

5. Issuance of Cheque Ext. CW2/A was admitted by the accused in his statement recorded under Section 313 of the Code of Criminal Procedure, however, his defence was that he had issued the same to the wife of the complainant and the complainant had misused the same.

6. Learned trial Court allowed the complaint and convicted the accused for commission of offence punishable under Section 138 of the Negotiable Instruments Act by holding that whereas the complainant had produced cogent evidence on record to prove his case beyond reasonable doubt, the accused has failed to bring on record any evidence to rebut the statutory presumption of law to prove his case.

7. In appeal, these findings were confirmed by the learned Appellate Court. It held that whereas the complainant had complied with the statutory provisions of Section 138 of the Negotiable Instruments Act, the accused had failed to prove any cogent evidence on record to belie the case of the complainant. Learned Appellate Court took note of the provisions of Section 139 of the Act that unless contrary is proved, it shall be presumed that holder of the cheque has received the same in discharge of whole or part of any debt or liability.

8. Feeling aggrieved by the said judgments passed by both the learned Courts below, the accused has failed this petition.

9. Having heard learned Counsel for the petitioner at a considerable length and perused the impugned judgments as also the record of the case, in my considered view, there is no infirmity with the judgment of conviction passed against the accused by the learned trial Court as confirmed by learned Appellate Court.

10. In the present case, complainant approached the Court aggrieved by dishonouring of a cheque issued in his favour by the accused, which as per the complainant, was issued to him by the accused on account of a debt due to him from the accused. To satisfy the ingredients of Section 138 of the Negotiable Instruments Act, complainant duly proved on record issuance of the cheque by the accused, its being dishonoured on presentation to the Bank, issuance of statutory Legal Notice by the complainant to the accused, non-payment of the cheque amount by the accused to the complainant despite receipt of the said notice.

11. It is a matter of record that the factum of issuance of the cheque has not been disputed by the accused. His defence was that he had given the cheque to wife of the complainant and the same has been misused by him. Except this bald assertion of the accused, there is nothing placed on record by him to substantiate this fact. It is not his case that on account of cheque being misused or abused either by wife of complainant or the present complainant, he either lodged any complaint or took recourse to remedies available to him in law or have replied the Legal Notice sent by the complainant to him calling upon him to make the payment of cheque amount within the statutory period. Onus lay heavily upon the accused to belie the case of the complainant once the complainant had satisfied all the ingredients of Section 138 of the Negotiable Instruments Act. Fact of the matter is that he has not been able to belie the case of the complainant and therefore, in view of presumption envisaged under Section 139 of the Negotiable Instruments Act, both the learned Court below have rightly held that the petitioner was guilty of having committed an offence punishable Section 138 of the Negotiable Instruments Act. Said findings returned by learned Courts below are duly borne out from the record of the case and during the course of arguments, learned Counsel for the petitioner could not convince the Court to the contrary.

Therefore, as this Court does not finds any infirmity with the judgments passed by learned Courts below, this revision petition being devoid of any merit is dismissed. Pending miscellaneous application(s), if any also stand disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE SURYA KANT, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Sh. Bhag Mal ....Petitioner

Versus

State of Himachal Pradesh and another ....Respondents

CWP No. 2860 of 2018
Decided on: 2.4.2019

Industrial Disputes Act, 1947 – Sections 25F, 25G & 25H – Termination of service without notice- Delay in raising dispute- Effect- On finding that workman had raised demand notice after fourteen years of termination, Labour Court denying reinstatement and back wages and directing payment of compensation of Rs. 30000/-- Petition against award- Petitioner-workman praying that since termination of service was without notice, he should be reinstated with all consequential benefits- Held, undue delay and laches on part of workman in raising dispute is relevant factor for denying reinstatement- On facts, compensation enhanced to Rs.60000/-- Petition partly allowed. (Paras 8 to 10)

Cases referred:

Rashtriya Colliery Mazdoor Sangh vs. Employers, (2017) 1 SCC 264

Workmen Rastriya Colliery Mazdoor Sangh vs. Bharat Coking Coal Ltd., (2016) 9 SCC 431

For the petitioner: Mr. Devender K. Sharma, Advocate.

For the respondents: Mr. Ashok Sharma, Advocate General with M/s Ranjan Sharma, Adarsh Sharma, Ritta Goswami, Ashwani Sharma and Nand Lal Thakur, Additional Advocate Generals and Ms. Divya Sood, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral**)**

By way of instant Writ Petition filed under Article 226 of the Constitution of India, petitioner-workman (hereinafter referred to as, "workman") has laid challenge to Award dated 28.3.2017 passed by the Labour Court-cum-Industrial Tribunal, Kangra at Dharamshala, Himachal Pradesh (hereinafter referred to as, "Tribunal") in Reference No. 534/15, whereby learned Tribunal awarded a lump sum compensation of Rs.30,000/- in favour of the workman in lieu of the back wages, seniority, past service benefits as well as other consequential benefits.

2. Precisely the facts as emerge from the record are that the appropriate Government made following reference under Section 10(1) of the Industrial Disputes Act, 1947 (hereinafter referred to as, 'Act') to the Tribunal:

> "Whether the industrial dispute raised by the worker Shri Bhag Mal s/o Shri Dyal Ram, r/o Village Kumharda, P.O. Hyun Pehad, Tehsil Sarkaghat, District Mandi, H.P. before the Executive Engineer, H.P.P.W.D. Division Dharampur, District Mandi, H.P. vide demand notice dated 22.1.2013 regarding his alleged illegal termination of services during year, 2001 suffers from delay and latches? If not, Whether termination of services of Shri Bhag Mal s/o Shri Dyal Ram, r/o Village Kumharda, P.O. Hyun, Pehad, Tehsil Sarkaghat, District Mandi, H.P. by the Executive Engineer, H.P.P.W.D. Division, Dharampur, District Mandi, H.P. during year, 2001 without complying the provisions of the Industrial Disputes Act, 1947, is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above aggrieved workman is entitled to from the above employer?"

3. The workman, in his statement of claim before learned Tribunal below, claimed that he was engaged by the respondent on Daily Wage basis on Muster Roll as Beldar with effect from the year 1998, as such, he continued to work upto the year 2001 and he had completed 240 days. The workman further alleged that his services were unlawfully terminated by the respondents verbally in the year 2001 without issuing one month's notice and retrenchment compensation as envisaged under Section 25-F of Act. The workman stated before the Tribunal that since the respondents had violated provisions of Section 25 of the Act, his oral termination deserves to be set aside. Apart from above, workman also alleged that the principle of, "Last Come, First Go" was also not followed by the respondents at the time of his oral retrenchment as some juniors were retained in service, while terminating his services. Workman further claimed that after his termination, respondents engaged many persons, who worked as Daily Wage Beldars but, at no point in time, opportunity, if any, ever came to be afforded to him for reemployment, as such, action of the respondents is in sheer violation of the provisions of Section 25-H of the Act.

4. Respondents, by way of a detailed reply, refuted the aforesaid claim of the workman on the ground of maintainability as well as delay and laches. While admitting the factum with regard to engagement of the workman as a Daily Wager in the year 1999, respondents claimed that the workman intermittently worked upto April, 1999, whereafter, he himself abandoned the job without completing 240 days. Respondents further claimed that since the petitioner left the job of his own sweet will, there was no occasion for them to comply with the provisions contained under Section 25 of the Act. Respondents sought dismissal of the claim of the workman on the ground of delay and laches and claimed before the Tribunal that since the demand notice was issued by the workman after a period of fourteen years of the alleged retrenchment, no relief, if any, can be granted to the workman.

5. Learned Tribunal below, on the basis of evidence led on record by the respective parties, be it ocular or documentary, though held that the services of the workman were illegally terminated without notice but awarded a lump sum compensation of Rs.30,000/- to the workman in lieu of back wages, seniority, past service benefits and other consequential service benefits. In the aforesaid background, workman has approached this Court in the instant proceedings, seeking direction to the respondents to reinstate him with full back wages, seniority and continuity in service, after setting aside the impugned Award passed by the Tribunal.

6. Having heard learned counsel for the parties and perused the material available on record vis-à-vis the reasoning assigned by learned Tribunal while awarding compensation in lieu of back wages, seniority and past service benefits, this Court is not persuaded to agree with the contention of Mr. Devender K. Sharma, learned counsel for the

workman that since the delay in raising demand notice by the workman had been condoned by the Writ Curt in CWP No. 3603 of 2015, decided on 1.9.2015, the Tribunal could not have denied reinstatement to the workman on the ground of delay in raising the dispute.

7. True it is that vide aforesaid judgment dated 1.9.2015, this Court had directed the Labour Commissioner to make reference to the Tribunal, but definitely, while doing so, this Court never barred/ precluded the respondents from raising the question with regard to delay, in the proceedings to be held before the Tribunal. No doubt, aforesaid judgment passed by the Writ Court never came to be assailed by the respondents, but by way of aforesaid judgment dated 1.9.2015, directions came to be issued to the Labour Commissioner to make reference to the Tribunal for adjudication of dispute, wherein admittedly, respondents could not be precluded from raising plea of delay.

8. Though, in the case at hand, impugned Award itself reveals that the respondents were unable to prove abandonment of job, if any, on the part of the workman, but Man Days Chart, Exhibit RW-1/B, clearly reveals that the workman had worked for 23 days in March, 1999 and 26 days in April, 1999, meaning thereby that he had worked only for 49 days in total prior to the alleged termination. Similarly, evidence available on record suggests that after the termination of the workman, fresh hands were engaged by the respondents despite the petitioner being available for the job. As has been taken note herein above, workman issued demand notice after around fourteen years of alleged retrenchment, by which time, much water had flown under the bridge, as such, learned Tribunal, while keeping in view all relevant factors including the mode and manner of appointment, nature of appointment, length of service, grounds on which termination is set aside and delay in raising the dispute, proceeded to award compensation in lieu of back wages, seniority and past service benefits. Thus, this court sees no reason to interfere with the aforesaid findings, which otherwise appear to be reasonable and justified in the facts and circumstances of the case.

9. The question with regard to competence of the Labour Court to award compensation in such like cases is no more *res integra.* The Apex Court in **Workmen Rastriya Colliery Mazdoor Sangh** v. **Bharat Coking Coal Ltd.**, (2016) 9 SCC 431 and **Rashtriya Colliery Mazdoor Sangh v**. **Employers**, (2017) 1 SCC 264, has dealt with the issue at hand and has proceeded to award compensation to the tune of Rs.4.00 Lakh to each of the workmen in the latter case, as such, argument advanced by Mr. Adarsh Sharma, learned Additional Advocate General that no compensation could have been awarded on account of delay in raising the dispute, deserves outright rejection. However, taking note of the fact that the workman successfully proved on record that his termination was in sheer violation of the provisions of Sections 25-F, 25-G and 25-H of the Act, this Court finds that the compensation of Rs.30,000/- awarded by the Tribunal in favour of the workman is on lower side, which needs to be enhanced.

10. In the light of aforesaid observations, the writ petition at hand is allowed to the extent that the amount of compensation awarded by the Tribunal is enhanced from Rs. 30,000/- to Rs. 60,000/-. Rest of the Award is upheld. The writ petition stands disposed of in the aforesaid terms, alongwith all pending miscellaneous applications.

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BEFORE HON'BLE MR. JUSTICE SURYA KANT, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Smt. Sumfali Devi ....Petitioner

Versus
State of Himachal Pradesh and another ...Respondents

CWP No. 2861 of 2018
Decided on: 2.4.2019

Industrial Disputes Act, 1947 – Sections 25F, 25G & 25 H – Termination of service without notice- Delay in raising dispute- Effect- On finding that workman had raised demand notice after fourteen years of termination, Labour Court denying reinstatement and back wages and directing payment of compensation of Rs. 50000/-- Petition against award- Petitioner-workman praying that since termination of service was without notice, he should be reinstated with all consequential benefits- Held, undue delay and laches on part of workman in raising dispute is relevant factor for denying reinstatement- On facts, compensation enhanced to Rs.80000/- Petition partly allowed. (Paras 8 to 10)

Cases referred:
Rashtriya Colliery Mazdoor Sangh vs. Employers, (2017) 1 SCC 264
Workmen Rastriya Colliery Mazdoor Sangh vs. Bharat Coking Coal Ltd., (2016) 9 SCC 431

For the petitioner: Mr. Devender K. Sharma, Advocate.
For the respondents: Mr. Ashok Sharma, Advocate General with M/s Ranjan Sharma, Adarsh Sharma, Ritta Goswami, Ashwani Sharma and Nand Lal Thakur, Additional Advocate Generals and Ms. Divya Sood, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral**)**

By way of instant Writ Petition filed under Article 226 of the Constitution of India, petitioner-workman (hereinafter referred to as, "workman") has laid challenge to Award dated 29.3.2017 passed by the Labour Court-cum-Industrial Tribunal, Kangra at Dharamshala, Himachal Pradesh (hereinafter referred to as, "Tribunal") in Reference No. 536/2015, whereby learned Tribunal awarded a lump sum compensation of Rs.50,000/- in favour of the workman in lieu of the back wages, seniority, past service benefits as well as other consequential benefits.

2. Precisely the facts as emerge from the record are that the appropriate Government made following reference under Section 10(1) of the Industrial Disputes Act, 1947 (hereinafter referred to as, 'Act') to the Tribunal:

> "Whether the industrial dispute raised by the worker Smt. Sumfali Devi, W/O Shri Sukh Ram, R/O Village Konsal, P.O. Pehad, Tehsil Sarkaghat, District Mandi, H.P. before the Executive Engineer, H.P.P.W.D. Division Dharampur, District Mandi, H.P. vide demand notice dated 02.02.2013 regarding her alleged illegal termination of services during year, 2000 suffers from delay and latches? If not, Whether termination of services of Smt. Sumfali Devi W/O Shri Sukh Ram, R/O Village Konsal, P.O. Pehad, Tehsil Sarkaghat, District Mandi, H.P. by the Executive Engineer, H.P.P.W.D. Division Dharampur, District Mandi, H.P. during year, 2000 without complying the provisions of the Industrial Disputes Act, 1947, is legal and

justified? If not, what amount of back wages, seniority, past service benefits and compensation the above aggrieved workman is entitled to from the above employer?"

3. The workman, in her statement of claim before learned Tribunal below, claimed that she was engaged by the respondent on Daily Wage basis on Muster Roll as Beldar with effect from November, 1998, as such, she continued to work upto the year 1999 and she had completed 240 days. The workman further alleged that her services were unlawfully terminated by the respondents verbally in the year 1999 without issuing one month's notice and retrenchment compensation as envisaged under Section 25-F of Act. The workman stated before the Tribunal that since the respondents had violated provisions of Section 25 of the Act, her oral termination deserves to be set aside. Apart from above, workman also alleged that the principle of, "Last Come, First Go" was also not followed by the respondents at the time of her oral retrenchment as some juniors were retained in service, while terminating her services. Workman further claimed that after her termination, respondents engaged many persons, who worked as Daily Wage Beldars but, at no point in time, opportunity, if any, ever came to be afforded to the workman for reemployment, as such, action of the respondents is in sheer violation of the provisions of Section 25-H of the Act.

4. Respondents, by way of a detailed reply, refuted the aforesaid claim of the workman on the ground of maintainability as well as delay and laches. While admitting the factum with regard to engagement of the workman as a Daily Wager in January, 1999, respondents claimed that the workman intermittently worked upto September, 1999, whereafter, she herself abandoned the job without completing 240 days. Respondents further claimed that since the petitioner left the job of her own sweet will, there was no occasion for them to comply with the provisions contained under Section 25 of the Act. Respondents sought dismissal of the claim of the workman on the ground of delay and laches and claimed before the Tribunal that since the demand notice was issued by the workman after a period of fourteen years of the alleged retrenchment, no relief, if any, can be granted to the workman.

5. Learned Tribunal below, on the basis of evidence led on record by the respective parties, be it ocular or documentary, though held that the services of the workman were illegally terminated without notice but awarded a lump sum compensation of Rs.50,000/- to the workman in lieu of back wages, seniority, past service benefits and other consequential service benefits. In the aforesaid background, workman has approached this Court in the instant proceedings, seeking direction to the respondents to reinstate her with full back wages, seniority and continuity in service, after setting aside the impugned Award passed by the Tribunal.

6. Having heard learned counsel for the parties and perused the material available on record vis-à-vis the reasoning assigned by learned Tribunal while awarding compensation in lieu of back wages, seniority and past service benefits, this Court is not persuaded to agree with the contention of Mr. Devender K. Sharma, learned counsel for the workman that since the delay in raising demand notice by the workman had been condoned by the Writ Curt in CWP No. 3603 of 2015, decided on 1.9.2015, the Tribunal could not have denied reinstatement to the workman on the ground of delay in raising the dispute.

7. True it is that vide aforesaid judgment dated 1.9.2015, this Court had directed the Labour Commissioner to make reference to the Tribunal, but definitely, while doing so, this Court never barred/ precluded the respondents from raising the question with regard to delay, in the proceedings to be held before the Tribunal. No doubt, aforesaid

judgment passed by the Writ Court never came to be assailed by the respondents, but by way of aforesaid judgment dated 1.9.2015, directions came to be issued to the Labour Commissioner to make reference to the Tribunal for adjudication of dispute, wherein admittedly, respondents could not be precluded from raising plea of delay.

8. Though, in the case at hand, impugned Award itself reveals that the respondents were unable to prove abandonment of job, if any, on the part of the workman, but Man Days Chart, Exhibit RW-1/B, clearly reveals that the workman had worked for 29 days in January, 1999, 22 days in February, 1999, 27 days in March, 1999, 26 days in April, 1999, 31 days in May, 1999, 26 days in June, 1999, 27 days in July, 1999, 24 days in August, 1999 and 30 days in September, 1999, meaning thereby that she had worked only for 242 days in total prior to the alleged termination. Similarly, evidence available on record suggests that after the termination of the workman, fresh hands were engaged by the respondents despite the petitioner being available for the job. As has been taken note herein above, workman issued demand notice after around fourteen years of alleged retrenchment, by which time, much water had flown under the bridge, as such, learned Tribunal, while keeping in view all relevant factors including the mode and manner of appointment, nature of appointment, length of service, grounds on which termination is set aside and delay in raising the dispute, proceeded to award compensation in lieu of back wages, seniority and past service benefits. Thus, this court sees no reason to interfere with the aforesaid findings, which otherwise appear to be reasonable and justified in the facts and circumstances of the case.

9. The question with regard to competence of the Labour Court to award compensation in such like cases is no more *res integra.* The Apex Court in **Workmen Rastriya Colliery Mazdoor Sangh** v. **Bharat Coking Coal Ltd.**, (2016) 9 SCC 431 and **Rashtriya Colliery Mazdoor Sangh v**. **Employers**, (2017) 1 SCC 264, has dealt with the issue at hand and has proceeded to award compensation to the tune of Rs.4.00 Lakh to each of the workmen in the latter case, as such, argument advanced by Mr. Adarsh Sharma, learned Additional Advocate General that no compensation could have been awarded on account of delay in raising the dispute, deserves outright rejection. However, taking note of the fact that the workman successfully proved on record that his termination was in sheer violation of the provisions of Sections 25-F, 25-G and 25-H of the Act, this Court finds that the compensation of Rs.50,000/- awarded by the Tribunal in favour of the workman is on lower side, which needs to be enhanced.

10. In the light of aforesaid observations, the writ petition at hand is allowed to the extent that the amount of compensation awarded by the Tribunal is enhanced from Rs.50,000/- to Rs.80,000/-. Rest of the Award is upheld. The writ petition stands disposed of in the aforesaid terms, alongwith all pending miscellaneous applications.

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BEFORE HON'BLE MR. JUSTICE SURYA KANT, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Smt. Filli Devi ...Petitioner

Versus

The Executive Engineer, HPPWD ...Respondent

CWP No. 442 of 2019
Decided on: 9.4.2019

Industrial Disputes Act, 1947 – Sections 25F, 25G & 25 H – Termination of service without notice- Delay in raising dispute- Effect- On finding that workman had raised demand notice after eight years of termination, Labour Court denying reinstatement and back wages and directing payment of compensation of Rs. 50000/-- Petition against award- Petitioner-workman praying that since termination of service was without notice, he should be reinstated with all consequential benefits- Held, undue delay and laches on part of workman in raising dispute is relevant factor for denying reinstatement- Workman stands duly compensated qua reinstatement and back wages by directing payment in lump sum- Petition dismissed. (Paras 8 to 12)

Cases referred:

Asstt. Engineer, CAD vs. Dhan Kunwar, (2006) 5 SCC 481
Daulat Ram vs. The Executive Engineer, HPPWD, CWP No. 1887 of 2017 decided on 11th December, 2017
Dharappa vs. Bijapur Coop. Milk Producers Societies Union Ltd., (2007) 9 SCC 109
Girja Nand vs. State of Himachal Pradesh & Others, CWP No. 93 of 2019 decided on 13.3.2019
Mahavir vs. Union of India, (2018) 3 SCC 588
Prabhakar vs. Sericulture Deptt., (2015) 15 SCC 1
Rajasthan State Agriculture Mktg. Board vs. Mohan Lal, (2013) 14 SCC 543
Rashtriya Colliery Mazdoor Sangh vs. Employers, (2017) 1 SCC 264
Sumfali Devi vs. State of Himachal Pradesh and another, CWP No. 2861 of 2018 decided on 2.4.2019
The Additional Chief Secretary (PW) & Others vs. Shri Ram Gopal, LPA No. 27 of 2019 decided on 3.4.2019
U.P. SRTC vs. Ram Singh, (2008) 17 SCC 627
Workmen Rastriya Colliery Mazdoor Sangh vs. Bharat Coking Coal Ltd., (2016) 9 SCC 431

For the petitioner:	Mr. Rahul Mahajan, Advocate.
For the respondent:	Mr. Ashok Sharma, Advocate General with M/s Adarsh Sharma and Nand Lal Thakur, Additional Advocates General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral**)**

By way of instant Writ Petition filed under Article 226 of the Constitution of India, petitioner-workman (hereinafter referred to as, "workman") has laid challenge to Award dated 1.11.2017 passed by the Labour Court-cum-Industrial Tribunal, Kangra at Dharamshala (HP) (hereinafter referred to as, "Tribunal") in Ref No. 65/2016, whereby learned Tribunal awarded a lump sum compensation of Rs.50,000/- in favour of the workman in lieu of the back wages, seniority, past service benefits as well as other consequential service benefits.

2. Precisely the facts as emerge from the record are that the Appropriate Government made following reference under Section 10(1) of the Industrial Disputes Act, 1947 (hereinafter referred to as, 'Act') to the Tribunal:

> "Whether the industrial dispute raised by the worker Smt. Filli Devi W/O Shri Jagat Ram, R/O Village Findpar, P.O. Mindhal, Tehsil Pangi, District

> Chamba, H.P. before the Executive Engineer, I.P.H./H.P.P.W.D. Division, Killar, Tehsil Pangi, District Chamba, H.P. vide demand notice dated 6.1.2012 regarding her alleged illegal termination of services during September, 2004 suffers from delay and laches? If not, Whether termination of the services of Smt. Filli Devi W/O Shri Jagat Ram, R/O Village Findpar, P.O. Mindhal, Tehsil Pangi, District Chamba, H.P. during September, 2004 without complying the provisions of the Industrial Disputes Act, 1947, is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above aggrieved workman is entitled to from the above employer?"

3. The workman claimed before learned Tribunal that she was engaged by the authorities on daily wage basis on Muster Roll in the year 1986. She continued to work till September, 2004, as such, she had completed 160 days in each calendar year as per the criteria prescribed for tribal area of Pangi. The workman alleged that her services were unlawfully terminated by the respondent verbally with effect from September, 2004 without issuing one month's notice and retrenchment compensation, as envisaged under Section 25F of the Act. The workman claimed before learned Tribunal that since the respondent violated provisions of Section 25 of the Act, her oral termination deserves to be set aside. While placing on record factum with regard to retention of her juniors at the time of her retrenchment, workman also alleged that the principle of '*last come, first go'* was also not followed by the respondent. She further claimed that after her termination, respondent engaged many persons, who subsequently worked as daily wage *Beldars* but at no point in time, opportunity, if any, was ever afforded to her for re-employment, as such, action of the respondent, which is in sheer violation of the provisions contained under Section 25H of the Act, deserves to be quashed and set aside.

4. Per contra, respondent by way of a written reply to the aforesaid claim put forth by the workman, refuted the same on the ground of maintainability as well as delay and laches. Though the respondent admitted the factum with regard to workman's engagement in the respondent-Department as a Daily Wager from the year 1991, but claimed that she intermittently worked upto the year 2004, whereafter, she herself abandoned the job, as such, there was no obligation on its part to comply with the provisions contained under Section 25 of the Act. Respondent prayed for dismissal of the claim of the workman on the ground of delay and laches and claimed before learned Tribunal that since demand notice was issued after a considerable delay of eight years of the alleged retrenchment, no relief, if any, can be granted to the workman.

5. Learned Tribunal, on the basis of pleadings as well as evidence adduced on record by respective parties arrived at a conclusion that the services of the workman were illegally terminated without notice but having taken note of the fact that the workman raised dispute after eight years of her alleged retrenchment, awarded a lump sum compensation of `50,000/- to the workman in lieu of back wages, seniority, past service benefits as well as consequential service benefits. In the aforesaid background, the workman has approached this Court in the instant proceedings praying for her reinstatement with full back wages, seniority and continuity in service.

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

7. After a close scrutiny of the material available on record vis-à-vis reasoning assigned by learned Tribunal, while awarding compensation to the workman in lieu of back wages, seniority and past service benefits, this Court is not inclined to accept the contention

raised by Mr. Rahul Mahajan, learned counsel for the workman that since the workman had successfully proved on record that her services were illegally terminated in violation of Section 25F of the Act, learned Tribunal could not deny reinstatement on account of delay in raising the demand notice, especially in view of judgment dated 23.11.2015, rendered by the Writ Court in CWP No. 4404 of 2015. Though, a careful perusal of aforesaid judgment reveals that this Court had directed the Labour Commissioner to make a reference to the Tribunal despite there being considerable delay of eight years, but while doing so, this Court definitely did not preclude/bar the respondent from raising the question with regard to delay in the proceedings to be held before the Tribunal. In the aforesaid Writ Petition, the workman had laid challenge to the action of the Labour Commissioner in not making reference and this Court having taken note of the explanation rendered on record by the workman, had only directed the Labour Commissioner to make reference to the Labour Court.

8. A careful perusal of the specific reference made under Section 10(1) of the Act, which has been taken note herein above, itself reveals that the question with regard to delay and laches was required to be decided by the Tribunal while considering the claim of the workman. It is not in dispute that at no point in time, dispute, if any, was ever raised by the workman qua specific reference made to the Labour Court by the Appropriate Government, rather, the workman by way of filing claim, made an attempt to justify the delay caused in making the reference, as such, there appears to be no force in the argument of Mr. Rahul Mahajan, learned counsel for the workman that the learned Tribunal could not have gone into the question of delay and laches, while ascertaining the claim of the workman. The Apex Court, in **Prabhakar** v. **Sericulture Deptt.** (2015) 15 SCC 1, while specifically dealing with the question of delay in raising the dispute by the workman under the Act *ibid*, has held that since there is no period of limitation prescribed under the Industrial Disputes Act, for raising dispute but if such a dispute is raised after a long period, it is to be seen whether such a dispute still exists. In the aforesaid background, Apex Court has held that notwithstanding the fact that the law of limitation does not apply, it is to be shown by the workman that there is a dispute *in praesenti* and, for that purpose, he has to demonstrate that even if considerable period has elapsed and there are laches and delays, such delay has not resulted into making such dispute seized to exist. Apex Court has further held that if because of such a delay, dispute no longer remains alive and is to be treated as 'dead', then it would be non-existent dispute, which cannot be referred. In the aforesaid judgment, Apex Court concluded that 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 the proceedings under the Act *ibid*. However, the policy of industrial adjudication is that very stale claims should not be generally encouraged or allowed unless there is a satisfactory explanation for the delay. By way of aforesaid judgment, Apex Court ordered that if a Court finds that the dispute still exists though raised belatedly, it is always permissible for the Court to take the aspect of delay into consideration and mould the relief. In such cases, it is open for the Court to either grant reinstatement with back wages or lesser back wages or grant compensation instead of reinstatement. Reliance in this regard is also placed upon following judgments rendered by Apex Court, viz.; **Rajasthan State Agriculture Mktg. Board** v. **Mohan Lal** (2013) 14 SCC 543; **U.P. SRTC** v. **Ram Singh** (2008) 17 SCC 627; **Dharappa** v. **Bijapur Coop. Milk Producers Societies Union Ltd.** (2007) 9 SCC 109; **Asstt. Engineer, CAD** v. **Dhan Kunwar** (2006) 5 SCC 481 and **Mahavir** v. **Union of India** (2018) 3 SCC 588. Similar view has been taken by this Court in **Girja Nand** v. **State of Himachal Pradesh & Others**, CWP No. 93 of 2019 decided on 13.3.2019; **Smt. Sumfali Devi** v. **State of Himachal Pradesh and another**, CWP No. 2861 of 2018 decided on 2.4.2019 and; **The Additional Chief Secretary (PW) & Others** v. **Shri Ram Gopal**, LPA No. 27 of 2019 decided on 3.4.2019. The long and short of the matter is very

well expressed by the maxim, *vigilantibus non dormientibus jura subveniunt*, that is to say, the law assists those that are vigilant with their rights, and not those that sleep thereupon.

9. Though, in the case at hand, impugned Award itself reveals that the respondent failed to prove abandonment of job by the workman but the Man Days chart, Exhibit RW1/B clearly reveals that the workman had worked for 29 days in the year 1991, 18.5 days in the year 1996, 9 days in the year 2003 and 113 days in the year 2004. Thus, the workman had actually worked for 183 ½ days till the date of her alleged termination. Similarly, the evidence available on record reveals that after the termination of the workman, fresh hands were engaged by the respondent despite the petitioner being available for the job, but, as has been taken note herein above, workman issued demand notice after around eight years of the alleged retrenchment, by which time, much water had flown under the bridge, as such, learned Tribunal, while keeping in view all relevant factors including the mode and manner of appointment, nature of appointment, length of service, grounds on which termination is set aside and delay in raising the dispute, proceeded to award compensation in lieu of back wages, seniority and past service benefits. Thus, this court sees no reason to interfere with the aforesaid findings, which otherwise appear to be reasonable and justified in the facts and circumstances of the case.

10. Learned counsel for the workman relies upon a judgment passed by a Coordinate Bench of this Court in **Sh. Daulat Ram** v. **The Executive Engineer, HPPWD**, CWP No. 1887 of 2017 and other connected matters, decided on 11th December, 2017, whereby it has been held that the reinstatement cannot be denied merely on the ground of delay. With utmost respect, we find that may be the binding judgments of Supreme Court have not been considered in the above mentioned cases by the Coordinate Bench of this Court. That apart, the judgment is not based upon *ratio decidendi* of the binding judgments of Supreme Court and is primarily based upon the discretion exercised by the Court. We are thus unable to follow the same, rather, being bound by the dictum of the Supreme Court in the cases referred to supra, we do not find any reason to interfere with the Award passed by learned Tribunal.

11. The question with regard to competence of the Labour Court to award compensation in such like cases is no more *res integra.* The Apex Court in **Workmen Rastriya Colliery Mazdoor Sangh** v. **Bharat Coking Coal Ltd.**, (2016) 9 SCC 431 and **Rashtriya Colliery Mazdoor Sangh v**. **Employers**, (2017) 1 SCC 264, has dealt with the issue at hand and has proceeded to award compensation to the tune of Rs. 4.00 Lakh to each of the workmen in the latter case, as such, argument advanced by Mr. Adarsh Sharma, learned Additional Advocate General that no compensation could have been awarded on account of delay in raising the dispute, deserves outright rejection.

12. In the light of aforesaid observations, the Award passed by learned Tribunal calls for no interference by this Court, which is accordingly upheld. The writ petition is dismissed. All pending miscellaneous applications also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE SURYA KANT, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Smt. Jamuna Devi ....Petitioner

Versus

The Engineer-in-Chief, HPPWD and another ...Respondents

CWP No. 448 of 2019
Decided on: 9.4.2019

Industrial Disputes Act, 1947 – Sections 25F, 25G & 25 H – Termination of service without notice- Delay in raising dispute- Effect- On finding that workman had raised demand notice after sixteen years of termination, Labour Court denying reinstatement and back wages and directing payment of compensation of Rs. 50000/-- Petition against award- Petitioner-workman praying that since termination of service was without notice, he should be reinstated with all consequential benefits- Held, undue delay and laches on part of workman in raising dispute is relevant factor for denying reinstatement- Workman stands duly compensated qua reinstatement and back wages by directing payment in lump sum- Petition dismissed. (Paras 8 to 12)

Cases referred:

Asstt. Engineer, CAD vs. Dhan Kunwar, (2006) 5 SCC 481
Daulat Ram vs. The Executive Engineer, HPPWD, CWP No. 1887 of 2017 decided on 11th December, 2017
Dharappa vs. Bijapur Coop. Milk Producers Societies Union Ltd., (2007) 9 SCC 109
Girja Nand vs. State of Himachal Pradesh & Others, CWP No. 93 of 2019 decided on 13.3.2019
Mahavir vs. Union of India, (2018) 3 SCC 588
Prabhakar vs. Sericulture Deptt., (2015) 15 SCC 1
Rajasthan State Agriculture Mktg. Board vs. Mohan Lal, (2013) 14 SCC 543
Rashtriya Colliery Mazdoor Sangh vs. Employers, (2017) 1 SCC 264
Sumfali Devi vs. State of Himachal Pradesh and another, CWP No. 2861 of 2018 decided on 2.4.2019
The Additional Chief Secretary (PW) & Others vs. Shri Ram Gopal, LPA No. 27 of 2019 decided on 3.4.2019
U.P. SRTC vs. Ram Singh, (2008) 17 SCC 627;
Workmen Rastriya Colliery Mazdoor Sangh vs. Bharat Coking Coal Ltd., (2016) 9 SCC 431

For the petitioner — Mr. Rahul Mahajan, Advocate.
For the respondents: — Mr. Ashok Sharma, Advocate General with M/s Adarsh Sharma and Nand Lal Thakur, Additional Advocates General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral**)**

By way of instant Writ Petition filed under Article 226 of the Constitution of India, petitioner-workman (hereinafter referred to as, "workman") has laid challenge to Award dated 613/2016 passed by the Labour Court-cum-Industrial Tribunal, Kangra at Dharamshala (HP) (hereinafter referred to as, "Tribunal") in Ref No. 613/2016, whereby learned Tribunal awarded a lump sum compensation of Rs.50,000/- in favour of the workman in lieu of the back wages, seniority, past service benefits as well as other consequential service benefits.

2. Precisely the facts as emerge from the record are that the Appropriate Government made following reference under Section 10(1) of the Industrial Disputes Act, 1947 (hereinafter referred to as, 'Act') to the Tribunal:

> "Whether alleged termination of services of Smt. Jamuna Devi W/o Sh. Bidhi Chand Vill. Strehar, PO Dharampur, Tehsil, Sarkaghat, Distt. Mandi, H.P. during 9/1999 by (1) the Engineer-in-Chief, HPPWD, Nirman Bhawan, Shimla, (2) the Executive Engineer, HPPWD, -Division Dharampur, Distt. Mandi, H.P. who had worked as beldar on daily wages basis during 11/1998 to 12/1998 & 1/1999 to 9/1999 only for 210.5 days, and has raised her industrial dispute vide demand notice dated 15.6.2015 after more than 15 years, without complying with the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, keeping in view of working period stated as above and delay of more than 15 years in raising the industrial dispute, what amount of back wages, seniority, past service benefits and compensation the above ex-worker is entitled to from the above employer/management?"

3. The workman claimed before learned Tribunal that she was engaged by the authorities on daily wage basis on Muster Roll with effect from 11/1998. She continued to work till 9/1999, as such, she had completed 240 days. The workman alleged that her services were unlawfully terminated by the respondents verbally with effect from 9/1999 without issuing one month's notice and retrenchment compensation, as envisaged under Section 25F of the Act. The workman claimed before learned Tribunal that since the respondents violated provisions of Section 25 of the Act, her oral termination deserves to be set aside. While placing on record factum with regard to retention of her juniors at the time of her retrenchment, workman also alleged that the principle of '*last come, first go'* was also not followed by the respondents. She further claimed that after her termination, respondents engaged many persons, who subsequently worked as daily wage *Beldars* but at no point in time, opportunity, if any, was ever afforded to her for re-employment, as such, action of the respondents, which is in sheer violation of the provisions contained under Section 25H of the Act, deserves to be quashed and set aside.

4. Per contra, respondents by way of a written reply to the aforesaid claim put forth by the workman, refuted the same on the ground of maintainability as well as delay and laches. Though the respondents admitted the factum with regard to workman's engagement in the respondent-Department as a Daily Wager with effect from 11/1998, but claimed that she intermittently worked upto 9/1999, whereafter, she herself abandoned the job, as such, there was no obligation on its part to comply with the provisions contained under Section 25 of the Act. Respondents prayed for dismissal of the claim of the workman on the ground of delay and laches and claimed before learned Tribunal that since demand notice was issued after a considerable delay of sixteen years of the alleged retrenchment, no relief, if any, can be granted to the workman.

5. Learned Tribunal, on the basis of pleadings as well as evidence adduced on record by respective parties arrived at a conclusion that the services of the workman were illegally terminated without notice but having taken note of the fact that the workman raised dispute after sixteen years of her alleged retrenchment, awarded a lump sum compensation of `50,000/- to the workman in lieu of back wages, seniority, past service benefits as well as consequential service benefits. In the aforesaid background, the workman has approached this Court in the instant proceedings praying for her reinstatement with full back wages, seniority and continuity in service.

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

7. After a close scrutiny of the material available on record vis-à-vis reasoning assigned by learned Tribunal, while awarding compensation to the workman in lieu of back wages, seniority and past service benefits, this Court is not inclined to accept the contention raised by Mr. Rahul Mahajan, learned counsel for the workman that since the workman had successfully proved on record that her services were illegally terminated in violation of Section 25F of the Act, learned Tribunal could not deny reinstatement on account of delay in raising the demand notice, especially in view of judgment dated 20.12.2012, rendered by the Writ Court in CWP No. 8315 of 2012. Though, a careful perusal of aforesaid judgment reveals that this Court had directed the Labour Commissioner to make a reference to the Tribunal despite there being considerable delay of sixteen years, but while doing so, this Court definitely did not preclude/bar the respondents from raising the question with regard to delay in the proceedings to be held before the Tribunal. In the aforesaid Writ Petition, the workman had laid challenge to the action of the Labour Commissioner in not making reference and this Court having taken note of the explanation rendered on record by the workman, had only directed the Labour Commissioner to make reference to the Labour Court.

8. A careful perusal of the specific reference made under Section 10(1) of the Act, which has been taken note herein above, itself reveals that the question with regard to delay and laches was required to be decided by the Tribunal while considering the claim of the workman. It is not in dispute that at no point in time, dispute, if any, was ever raised by the workman qua specific reference made to the Labour Court by the Appropriate Government, rather, the workman by way of filing claim, made an attempt to justify the delay caused in making the reference, as such, there appears to be no force in the argument of Mr. Rahul Mahajan, learned counsel for the workman that the learned Tribunal could not have gone into the question of delay and laches, while ascertaining the claim of the workman. The Apex Court, in **Prabhakar** v. **Sericulture Deptt.** (2015) 15 SCC 1, while specifically dealing with the question of delay in raising the dispute by the workman under the Act *ibid*, has held that since there is no period of limitation prescribed under the Industrial Disputes Act, for raising dispute but if such a dispute is raised after a long period, it is to be seen whether such a dispute still exists. In the aforesaid background, Apex Court has held that notwithstanding the fact that the law of limitation does not apply, it is to be shown by the workman that there is a dispute *in praesenti* and, for that purpose, he has to demonstrate that even if considerable period has elapsed and there are laches and delays, such delay has not resulted into making such dispute seized to exist. Apex Court has further held that if because of such a delay, dispute no longer remains alive and is to be treated as 'dead', then it would be non-existent dispute, which cannot be referred. In the aforesaid judgment, Apex Court concluded that 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 the proceedings under the Act *ibid*. However, the policy of industrial adjudication is that very stale claims should not be generally encouraged or allowed unless there is a satisfactory explanation for the delay. By way of aforesaid judgment, Apex Court ordered that if a Court finds that the dispute still exists though raised belatedly, it is always permissible for the Court to take the aspect of delay into consideration and mould the relief. In such cases, it is open for the Court to either grant reinstatement with back wages or lesser back wages or grant compensation instead of reinstatement. Reliance in this regard is also placed upon following judgments rendered by Apex Court, viz.; **Rajasthan State Agriculture Mktg. Board** v. **Mohan Lal** (2013) 14 SCC 543; **U.P. SRTC** v. **Ram Singh** (2008) 17 SCC 627; **Dharappa** v. **Bijapur Coop. Milk Producers Societies Union Ltd.**

(2007) 9 SCC 109; **Asstt. Engineer, CAD** v. **Dhan Kunwar** (2006) 5 SCC 481 and **Mahavir** v. **Union of India** (2018) 3 SCC 588. Similar view has been taken by this Court in **Girja Nand** v. **State of Himachal Pradesh & Others**, CWP No. 93 of 2019 decided on 13.3.2019; **Smt. Sumfali Devi** v. **State of Himachal Pradesh and another**, CWP No. 2861 of 2018 decided on 2.4.2019 and; **The Additional Chief Secretary (PW) & Others** v. **Shri Ram Gopal**, LPA No. 27 of 2019 decided on 3.4.2019. The long and short of the matter is very well expressed by the maxim, *vigilantibus non dormientibus jura subveniunt*, that is to say, the law assists those that are vigilant with their rights, and not those that sleep thereupon.

9. Though, in the case at hand, impugned Award itself reveals that the respondents failed to prove abandonment of job by the workman but the Man Days chart, Exhibit RW1/B clearly reveals that the workman had worked for 49 days in the year 1998 and 161 ½ days in the year 1999. Thus, the workman had actually worked for 210 ½ days till the date of her alleged termination. Similarly, the evidence available on record reveals that after the termination of the workman, fresh hands were engaged by the respondents despite the petitioner being available for the job, but, as has been taken note herein above, workman issued demand notice after around sixteen years of the alleged retrenchment, by which time, much water had flown under the bridge, as such, learned Tribunal, while keeping in view all relevant factors including the mode and manner of appointment, nature of appointment, length of service, grounds on which termination is set aside and delay in raising the dispute, proceeded to award compensation in lieu of back wages, seniority and past service benefits. Thus, this court sees no reason to interfere with the aforesaid findings, which otherwise appear to be reasonable and justified in the facts and circumstances of the case.

10. Learned counsel for the workman relies upon a judgment passed by a Coordinate Bench of this Court in **Sh. Daulat Ram** v. **The Executive Engineer, HPPWD**, CWP No. 1887 of 2017 and other connected matters, decided on 11th December, 2017, whereby it has been held that the reinstatement cannot be denied merely on the ground of delay. With utmost respect, we find that may be the binding judgments of Supreme Court have not been considered in the above mentioned cases by the Coordinate Bench of this Court. That apart, the judgment is not based upon *ratio decidendi* of the binding judgments of Supreme Court and is primarily based upon the discretion exercised by the Court. We are thus unable to follow the same, rather, being bound by the dictum of the Supreme Court in the cases referred to supra, we do not find any reason to interfere with the Award passed by learned Tribunal.

11. The question with regard to competence of the Labour Court to award compensation in such like cases is no more *res integra.* The Apex Court in **Workmen Rastriya Colliery Mazdoor Sangh** v. **Bharat Coking Coal Ltd.**, (2016) 9 SCC 431 and **Rashtriya Colliery Mazdoor Sangh v**. **Employers**, (2017) 1 SCC 264, has dealt with the issue at hand and has proceeded to award compensation to the tune of Rs. 4.00 Lakh to each of the workmen in the latter case, as such, argument advanced by Mr. Adarsh Sharma, learned Additional Advocate General that no compensation could have been awarded on account of delay in raising the dispute, deserves outright rejection.

12. In the light of aforesaid observations, the Award passed by learned Tribunal calls for no interference by this Court, which is accordingly upheld. The writ petition is dismissed. All pending miscellaneous applications also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE SURYA KANT, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Shri Khem Raj ....Petitioner
Versus
The Executive Engineer, HPPWD ...Respondent

CWP No. 443 of 2019
Decided on: 9.4.2019

Industrial Disputes Act, 1947 – Sections 25F, 25G & 25 H – Termination of service without notice- Delay in raising dispute- Effect- On finding that workman had raised demand notice after eight years of termination, Labour Court denying reinstatement and back wages and directing payment of compensation of Rs. 60000/-- Petition against award- Petitioner-workman praying that since termination of service was without notice, he should be reinstated with all consequential benefits- Held, undue delay and laches on part of workman in raising dispute is relevant factor for denying reinstatement- Workman stands duly compensated qua reinstatement and back wages by directing payment in lump sum- Petition dismissed. (Paras 8 to 12)

Cases referred:

Asstt. Engineer, CAD vs. Dhan Kunwar, (2006) 5 SCC 481
Daulat Ram vs. The Executive Engineer, HPPWD, CWP No. 1887 of 2017 decided on 11th December, 2017
Dharappa vs. Bijapur Coop. Milk Producers Societies Union Ltd., (2007) 9 SCC 109
Girja Nand vs. State of Himachal Pradesh & Others, CWP No. 93 of 2019 decided on 13.3.2019
Mahavir vs. Union of India, (2018) 3 SCC 588
Prabhakar vs. Sericulture Deptt., (2015) 15 SCC 1
Rajasthan State Agriculture Mktg. Board vs. Mohan Lal, (2013) 14 SCC 543
Rashtriya Colliery Mazdoor Sangh vs. Employers, (2017) 1 SCC 264
Sumfali Devi vs. State of Himachal Pradesh and another, CWP No. 2861 of 2018 decided on 2.4.2019
The Additional Chief Secretary (PW) & Others vs. Shri Ram Gopal, LPA No. 27 of 2019 decided on 3.4.2019
U.P. SRTC vs. Ram Singh, (2008) 17 SCC 627;
Workmen Rastriya Colliery Mazdoor Sangh vs. Bharat Coking Coal Ltd., (2016) 9 SCC 431

For the petitioner: Mr. Rahul Mahajan, Advocate.
For the respondent: Mr. Ashok Sharma, Advocate General with M/s Adarsh Sharma and Nand Lal Thakur, Additional Advocates General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral**)**

By way of instant Writ Petition filed under Article 226 of the Constitution of India, petitioner-workman (hereinafter referred to as, "workman") has laid challenge to Award dated 16.10.2017 passed by the Labour Court-cum-Industrial Tribunal, Kangra at Dharamshala (HP) (hereinafter referred to as, "Tribunal") in Ref No. 118/2016, whereby

learned Tribunal awarded a lump sum compensation of Rs.60,000/- in favour of the workman in lieu of the back wages, seniority, past service benefits as well as other consequential service benefits.

2. Precisely the facts as emerge from the record are that the Appropriate Government made following reference under Section 10(1) of the Industrial Disputes Act, 1947 (hereinafter referred to as, 'Act') to the Tribunal:

> "Whether the industrial dispute raised by the worker Shri Khem Raj S/O Shri Gulab Chand, R/O Village Findpar, P.O. Midhal, Tehsil Pangi, District Chamba, H.P. before the Executive Engineer, Killar Division, H.P.P.W.D., Killar, Tehsil Pangi, District Chamba, H.P. vide demand notce dated 6.1.1.2012 regarding his alleged illegal termination of service during May, 2004 suffers from delay and latches? If not, Whether termination of the services of Shri Khem Raj S/O Shri Gulab Chand, R/O Village Findpar, P.O. Midhal, Tehsil Pangi, District Chamba, H.P. by the Executive Engineer, Killar Division, H.P.P.W.D., Killar, Tehsil Pangi, District Chamba, H.P. during May, 2004 without complying the provisions of the Industrial Disputes Act, 1947, is legal and justified. If not, what amount of back wages, seniority, past service benefits and compensation the above aggrieved workman is entitled to from the above employer?"

3. The workman claimed before learned Tribunal that he was engaged by the authorities on daily wage basis on Muster Roll during the year 1997. He continued to work till May, 2004, as such, he had completed 160 days in each calendar year as per the criteria prescribed for tribal area of Pangi. The workman alleged that his services were unlawfully terminated by the respondent verbally from May, 2004 without issuing one month's notice and retrenchment compensation, as envisaged under Section 25F of the Act. The workman claimed before learned Tribunal that since the respondent violated provisions of Section 25 of the Act, his oral termination deserves to be set aside. While placing on record factum with regard to retention of his juniors at the time of his retrenchment, workman also alleged that the principle of '*last come, first go'* was also not followed by the respondent. He further claimed that after his termination, respondent engaged many persons, who subsequently worked as daily wage *Beldars* but at no point in time, opportunity, if any, was ever afforded to him for re-employment, as such, action of the respondent, which is in sheer violation of the provisions contained under Section 25H of the Act, deserves to be quashed and set aside.

4. Per contra, respondent by way of a written reply to the aforesaid claim put forth by the workman, refuted the same on the ground of maintainability as well as delay and laches. Though the respondent admitted the factum with regard to workman's engagement in the respondent-Department as a Daily Wager from the year 1994, but claimed that he intermittently worked upto the year 2004, whereafter, he himself abandoned the job, as such, there was no obligation on its part to comply with the provisions contained under Section 25 of the Act. Respondent prayed for dismissal of the claim of the workman on the ground of delay and laches and claimed before learned Tribunal that since demand notice was issued after a considerable delay of eight years of the alleged retrenchment, no relief, if any, can be granted to the workman.

5. Learned Tribunal, on the basis of pleadings as well as evidence adduced on record by respective parties arrived at a conclusion that the services of the workman were illegally terminated without notice but having taken note of the fact that the workman raised dispute after eight years of his alleged retrenchment, awarded a lump sum compensation of

`60,000/- to the workman in lieu of back wages, seniority, past service benefits as well as consequential service benefits. In the aforesaid background, the workman has approached this Court in the instant proceedings praying for his reinstatement with full back wages, seniority and continuity in service.

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

7. After a close scrutiny of the material available on record vis-à-vis reasoning assigned by learned Tribunal, while awarding compensation to the workman in lieu of back wages, seniority and past service benefits, this Court is not inclined to accept the contention raised by Mr. Rahul Mahajan, learned counsel for the workman that since the workman had successfully proved on record that his services were illegally terminated in violation of Section 25F of the Act, learned Tribunal could not deny reinstatement on account of delay in raising the demand notice, especially in view of judgment dated 2.12.2015, rendered by the Writ Court in CWP No. 4407 of 2015. Though, a careful perusal of aforesaid judgment reveals that this Court had directed the Labour Commissioner to make a reference to the Tribunal despite there being considerable delay of eight years, but while doing so, this Court definitely did not preclude/bar the respondent from raising the question with regard to delay in the proceedings to be held before the Tribunal. In the aforesaid Writ Petition, the workman had laid challenge to the action of the Labour Commissioner in not making reference and this Court having taken note of the explanation rendered on record by the workman, had only directed the Labour Commissioner to make reference to the Labour Court.

8. A careful perusal of the specific reference made under Section 10(1) of the Act, which has been taken note herein above, itself reveals that the question with regard to delay and laches was required to be decided by the Tribunal while considering the claim of the workman. It is not in dispute that at no point in time, dispute, if any, was ever raised by the workman qua specific reference made to the Labour Court by the Appropriate Government, rather, the workman by way of filing claim, made an attempt to justify the delay caused in making the reference, as such, there appears to be no force in the argument of Mr. Rahul Mahajan, learned counsel for the workman that the learned Tribunal could not have gone into the question of delay and laches, while ascertaining the claim of the workman. The Apex Court, in **Prabhakar** v. **Sericulture Deptt.** (2015) 15 SCC 1, while specifically dealing with the question of delay in raising the dispute by the workman under the Act *ibid*, has held that since there is no period of limitation prescribed under the Industrial Disputes Act, for raising dispute but if such a dispute is raised after a long period, it is to be seen whether such a dispute still exists. In the aforesaid background, Apex Court has held that notwithstanding the fact that the law of limitation does not apply, it is to be shown by the workman that there is a dispute *in praesenti* and, for that purpose, he has to demonstrate that even if considerable period has elapsed and there are laches and delays, such delay has not resulted into making such dispute seized to exist. Apex Court has further held that if because of such a delay, dispute no longer remains alive and is to be treated as 'dead', then it would be non-existent dispute, which cannot be referred. In the aforesaid judgment, Apex Court concluded that 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 the proceedings under the Act *ibid*. However, the policy of industrial adjudication is that very stale claims should not be generally encouraged or allowed unless there is a satisfactory explanation for the delay. By way of aforesaid judgment, Apex Court ordered that if a Court finds that the dispute still exists though raised belatedly, it is always permissible for the Court to take the aspect of delay into consideration and mould the relief.

In such cases, it is open for the Court to either grant reinstatement with back wages or lesser back wages or grant compensation instead of reinstatement. Reliance in this regard is also placed upon following judgments rendered by Apex Court, viz.; **Rajasthan State Agriculture Mktg. Board** v. **Mohan Lal** (2013) 14 SCC 543; **U.P. SRTC** v. **Ram Singh** (2008) 17 SCC 627; **Dharappa** v. **Bijapur Coop. Milk Producers Societies Union Ltd.** (2007) 9 SCC 109; **Asstt. Engineer, CAD** v. **Dhan Kunwar** (2006) 5 SCC 481 and **Mahavir** v. **Union of India** (2018) 3 SCC 588. Similar view has been taken by this Court in **Girja Nand** v. **State of Himachal Pradesh & Others**, CWP No. 93 of 2019 decided on 13.3.2019; **Smt. Sumfali Devi** v. **State of Himachal Pradesh and another**, CWP No. 2861 of 2018 decided on 2.4.2019 and; **The Additional Chief Secretary (PW) & Others** v. **Shri Ram Gopal**, LPA No. 27 of 2019 decided on 3.4.2019. The long and short of the matter is very well expressed by the maxim, *vigilantibus non dormientibus jura subveniunt*, that is to say, the law assists those that are vigilant with their rights, and not those that sleep thereupon.

9. Though, in the case at hand, impugned Award itself reveals that the respondent failed to prove abandonment of job by the workman but the Man Days chart, Exhibit RW1/B clearly reveals that the workman had worked for 6 days in the year 1994, 137 days in the year 1997, 45 days in the year 1998, 121 days in the year 1999 and 5 days in the year 2004. Thus, the workman had actually worked for 314 days till the date of his alleged termination. Similarly, the evidence available on record reveals that after the termination of the workman, fresh hands were engaged by the respondent despite the petitioner being available for the job, but, as has been taken note herein above, workman issued demand notice after around eight years of the alleged retrenchment, by which time, much water had flown under the bridge, as such, learned Tribunal, while keeping in view all relevant factors including the mode and manner of appointment, nature of appointment, length of service, grounds on which termination is set aside and delay in raising the dispute, proceeded to award compensation in lieu of back wages, seniority and past service benefits. Thus, this court sees no reason to interfere with the aforesaid findings, which otherwise appear to be reasonable and justified in the facts and circumstances of the case.

10. Learned counsel for the workman relies upon a judgment passed by a Coordinate Bench of this Court in **Sh. Daulat Ram** v. **The Executive Engineer, HPPWD**, CWP No. 1887 of 2017 and other connected matters, decided on 11th December, 2017, whereby it has been held that the reinstatement cannot be denied merely on the ground of delay. With utmost respect, we find that may be the binding judgments of Supreme Court have not been considered in the above mentioned cases by the Coordinate Bench of this Court. That apart, the judgment is not based upon *ratio decidendi* of the binding judgments of Supreme Court and is primarily based upon the discretion exercised by the Court. We are thus unable to follow the same, rather, being bound by the dictum of the Supreme Court in the cases referred to supra, we do not find any reason to interfere with the Award passed by learned Tribunal.

11. The question with regard to competence of the Labour Court to award compensation in such like cases is no more *res integra.* The Apex Court in **Workmen Rastriya Colliery Mazdoor Sangh** v. **Bharat Coking Coal Ltd.**, (2016) 9 SCC 431 and **Rashtriya Colliery Mazdoor Sangh v**. **Employers**, (2017) 1 SCC 264, has dealt with the issue at hand and has proceeded to award compensation to the tune of Rs.4.00 Lakh to each of the workmen in the latter case, as such, argument advanced by Mr. Adarsh Sharma, learned Additional Advocate General that no compensation could have been awarded on account of delay in raising the dispute, deserves outright rejection.

12. In the light of aforesaid observations, the Award passed by learned Tribunal calls for no interference by this Court, which is accordingly upheld. The writ petition is dismissed. All pending miscellaneous applications also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE SURYA KANT, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Smt. Kishan Dei ....Petitioner
Versus
The Executive Engineer, HPPWD ....Respondent

CWP No. 472 of 2019
Decided on: 9.4.2019

Industrial Disputes Act, 1947 – Sections 25F, 25G & 25H – Termination of service without notice- Delay in raising dispute- Effect- On finding that workman had raised demand notice after seven years of termination, Labour Court denying reinstatement and back wages and directing payment of compensation of Rs. 95000/-- Petition against award- Petitioner-workman praying that since termination of service was without notice, he should be reinstated with all consequential benefits- Held, undue delay and laches on part of workman in raising dispute is relevant factor for denying reinstatement- Workman stands duly compensated qua reinstatement and back wages by directing payment in lump sum- Petition dismissed. (Paras 8 to 12)

Cases referred:

Asstt. Engineer, CAD vs. Dhan Kunwar, (2006) 5 SCC 481
Daulat Ram vs. The Executive Engineer, HPPWD, CWP No. 1887 of 2017 decided on 11th December, 2017
Dharappa vs. Bijapur Coop. Milk Producers Societies Union Ltd., (2007) 9 SCC 109
Girja Nand vs. State of Himachal Pradesh & Others, CWP No. 93 of 2019 decided on 13.3.2019
Mahavir vs. Union of India, (2018) 3 SCC 588
Prabhakar vs. Sericulture Deptt., (2015) 15 SCC 1
Rajasthan State Agriculture Mktg. Board vs. Mohan Lal, (2013) 14 SCC 543
Rashtriya Colliery Mazdoor Sangh vs. Employers, (2017) 1 SCC 264
Sumfali Devi vs. State of Himachal Pradesh and another, CWP No. 2861 of 2018 decided on 2.4.2019
The Additional Chief Secretary (PW) & Others vs. Shri Ram Gopal, LPA No. 27 of 2019 decided on 3.4.2019
U.P. SRTC vs. Ram Singh, (2008) 17 SCC 627;
Workmen Rastriya Colliery Mazdoor Sangh vs. Bharat Coking Coal Ltd., (2016) 9 SCC 431

For the petitioner Mr. Rahul Mahajan, Advocate.
For the respondent: Mr. Ashok Sharma, Advocate General with M/s Adarsh Sharma and Nand Lal Thakur, Additional Advocates General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral**)**

By way of instant Writ Petition filed under Article 226 of the Constitution of India, petitioner-workman (hereinafter referred to as, "workman") has laid challenge to Award dated 16.10.2017 passed by the Labour Court-cum-Industrial Tribunal, Kangra at Dharamshala (HP) (hereinafter referred to as, "Tribunal") in Reference No. 200/2016, whereby learned Tribunal awarded a lump sum compensation of Rs.95,000/- in favour of the workman in lieu of the back wages, seniority, past service benefits as well as other consequential service benefits.

2. Precisely the facts as emerge from the record are that the Appropriate Government made following reference under Section 10(1) of the Industrial Disputes Act, 1947 (hereinafter referred to as, 'Act') to the Tribunal:

> "Whether alleged termination of services of Smt. Kishan Devi W/O Shri Uggar Chand, R/O Village Findpar, P.O. Mindhal, Tehsil Pangi, District Chamba, H.P. during September, 2004. by the Executive Engineer, HPPWD, Killar Division, H.P.P.W.D. Killar, Tehsil Pangi, District Chamba, H.P., who had worked as beldar on daily wages and has raised her industrial dispute after more than 7 years vide demand notice dated 06.01.2012, without complying the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, keeping in view of delay of more than 7 years in raising the industrial dispute, what amount of back wags, seniority, past service benefits and compensation the above ex-worker is entitled to from the above employer/management?"

3. The workman claimed before learned Tribunal that she was engaged by the authorities on daily wage basis on Muster Roll in the year 1995. She continued to work till September, 2004, as such, she had completed 160 days in each calendar year as per the criteria prescribed for tribal area. The workman alleged that her services were unlawfully terminated by the respondent verbally in September, 2004, without issuing one month's notice and retrenchment compensation, as envisaged under Section 25F of the Act. The workman claimed before learned Tribunal that since the respondent violated provisions of Section 25 of the Act, her oral termination deserves to be set aside. While placing on record factum with regard to retention of her juniors at the time of her retrenchment, workman also alleged that the principle of '*last come, first go'* was also not followed by the respondent. She further claimed that after her termination, respondent engaged many persons, who subsequently worked as daily wage *Beldars* but at no point in time, opportunity, if any, was ever afforded to her for re-employment, as such, action of the respondent, which is in sheer violation of the provisions contained under Section 25H of the Act, deserves to be quashed and set aside.

4. Per contra, respondent by way of a written reply to the aforesaid claim put forth by the workman, refuted the same on the ground of maintainability as well as delay and laches. Though the respondent admitted the factum with regard to workman's engagement in the respondent-Department as a Daily Wager in the year 1997, but claimed that she intermittently worked upto September, 2004, whereafter, she herself abandoned the job, as such, there was no obligation on its part to comply with the provisions contained under Section 25 of the Act. Respondent prayed for dismissal of the claim of the workman on the ground of delay and laches and claimed before learned Tribunal that since demand notice was issued after a considerable delay of seven years of the alleged retrenchment, no relief, if any, can be granted to the workman.

5. Learned Tribunal, on the basis of pleadings as well as evidence adduced on record by respective parties arrived at a conclusion that the services of the workman were illegally terminated without notice but having taken note of the fact that the workman raised dispute after seven years of her alleged retrenchment, awarded a lump sum compensation of `95,000/- to the workman in lieu of back wages, seniority, past service benefits as well as consequential service benefits. In the aforesaid background, the workman has approached this court in the instant proceedings praying for her reinstatement with full back wages, seniority and continuity in service.

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

7. After a close scrutiny of the material available on record vis-à-vis reasoning assigned by learned Tribunal, while awarding compensation to the workman in lieu of back wages, seniority and past service benefits, this Court is not inclined to accept the contention raised by Mr. Rahul Mahajan, learned counsel for the workman that since the workman had successfully proved on record that her services were illegally terminated in violation of Section 25F of the Act, learned Tribunal could not deny reinstatement on account of delay in raising the demand notice, especially in view of judgment dated 22.2.2016, rendered by the Writ Court in CWP No. 130 of 2016. Though, a careful perusal of aforesaid judgment reveals that this Court had directed the Labour Commissioner to make a reference to the Tribunal despite there being considerable delay of seven years, but while doing so, this Court definitely did not preclude/bar the respondent from raising the question with regard to delay in the proceedings to be held before the Tribunal. In the aforesaid Writ Petition, the workman had laid challenge to the action of the Labour Commissioner in not making reference and this Court having taken note of the explanation rendered on record by the workman, had only directed the Labour Commissioner to make reference to the Labour Court.

8. A careful perusal of the specific reference made under Section 10(1) of the Act, which has been taken note herein above, itself reveals that the question with regard to delay and laches was required to be decided by the Tribunal while considering the claim of the workman. It is not in dispute that at no point in time, dispute, if any, was ever raised by the workman qua specific reference made to the Labour Court by the Appropriate Government, rather, the workman by way of filing claim, made an attempt to justify the delay caused in making the reference, as such, there appears to be no force in the argument of Mr. Rahul Mahajan, learned counsel for the workman that the learned Tribunal could not have gone into the question of delay and laches, while ascertaining the claim of the workman. The Apex Court, in **Prabhakar** v. **Sericulture Deptt.** (2015) 15 SCC 1, while specifically dealing with the question of delay in raising the dispute by the workman under the Act *ibid*, has held that since there is no period of limitation prescribed under the Industrial Disputes Act, for raising dispute but if such a dispute is raised after a long period, it is to be seen whether such a dispute still exists. In the aforesaid background, Apex Court has held that notwithstanding the fact that the law of limitation does not apply, it is to be shown by the workman that there is a dispute *in praesenti* and, for that purpose, he has to demonstrate that even if considerable period has elapsed and there are laches and delays, such delay has not resulted into making such dispute seized to exist. Apex Court has further held that if because of such a delay, dispute no longer remains alive and is to be treated as 'dead', then it would be non-existent dispute, which cannot be referred. In the aforesaid judgment, Apex Court concluded that 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 the proceedings under the Act *ibid*. However, the policy of industrial

adjudication is that very stale claims should not be generally encouraged or allowed unless there is a satisfactory explanation for the delay. By way of aforesaid judgment, Apex Court ordered that if a Court finds that the dispute still exists though raised belatedly, it is always permissible for the Court to take the aspect of delay into consideration and mould the relief. In such cases, it is open for the Court to either grant reinstatement with back wages or lesser back wages or grant compensation instead of reinstatement. Reliance in this regard is also placed upon following judgments rendered by Apex Court, viz.; **Rajasthan State Agriculture Mktg. Board** v. **Mohan Lal** (2013) 14 SCC 543; **U.P. SRTC** v. **Ram Singh** (2008) 17 SCC 627; **Dharappa** v. **Bijapur Coop. Milk Producers Societies Union Ltd.** (2007) 9 SCC 109; **Asstt. Engineer, CAD** v. **Dhan Kunwar** (2006) 5 SCC 481 and **Mahavir** v. **Union of India** (2018) 3 SCC 588. Similar view has been taken by this Court in **Girja Nand** v. **State of Himachal Pradesh & Others**, CWP No. 93 of 2019 decided on 13.3.2019; **Smt. Sumfali Devi** v. **State of Himachal Pradesh and another**, CWP No. 2861 of 2018 decided on 2.4.2019 and; **The Additional Chief Secretary (PW) & Others** v. **Shri Ram Gopal**, LPA No. 27 of 2019 decided on 3.4.2019. The long and short of the matter is very well expressed by the maxim, *vigilantibus non dormientibus jura subveniunt*, that is to say, the law assists those that are vigilant with their rights, and not those that sleep thereupon.

9. Though, in the case at hand, impugned Award itself reveals that the respondent failed to prove abandonment of job by the workman but the Man Days chart, Exhibit RW1/B clearly reveals that the workman had worked for 131 days in the year 1997, 132 days in the year 1998, 84 days in the year 1999, 51 days in the year 2000, 72 days in the year 2001, 113 days in the year 2002, 72 days in the year 2003 and 91 days in the year 2004. Thus, the workman had actually worked for 746 days till the date of her alleged termination. Similarly, the evidence available on record reveals that after the termination of the workman, fresh hands were engaged by the respondent despite the petitioner being available for the job, but, as has been taken note herein above, workman issued demand notice after around seven years of the alleged retrenchment, by which time, much water had flown under the bridge, as such, learned Tribunal, while keeping in view all relevant factors including the mode and manner of appointment, nature of appointment, length of service, grounds on which termination is set aside and delay in raising the dispute, proceeded to award compensation in lieu of back wages, seniority and past service benefits. Thus, this court sees no reason to interfere with the aforesaid findings, which otherwise appear to be reasonable and justified in the facts and circumstances of the case.

10. Learned counsel for the workman relies upon a judgment passed by a Coordinate Bench of this Court in **Sh. Daulat Ram** v. **The Executive Engineer, HPPWD**, CWP No. 1887 of 2017 and other connected matters, decided on 11th December, 2017, whereby it has been held that the reinstatement cannot be denied merely on the ground of delay. With utmost respect, we find that may be the binding judgments of Supreme Court have not been considered in the above mentioned cases by the Coordinate Bench of this Court. That apart, the judgment is not based upon *ratio decidendi* of the binding judgments of Supreme Court and is primarily based upon the discretion exercised by the Court. We are thus unable to follow the same, rather, being bound by the dictum of the Supreme Court in the cases referred to supra, we do not find any reason to interfere with the Award passed by learned Tribunal.

11. The question with regard to competence of the Labour Court to award compensation in such like cases is no more *res integra.* The Apex Court in **Workmen Rastriya Colliery Mazdoor Sangh** v. **Bharat Coking Coal Ltd.**, (2016) 9 SCC 431 and **Rashtriya Colliery Mazdoor Sangh v**. **Employers**, (2017) 1 SCC 264, has dealt with the issue at hand and has proceeded to award compensation to the tune of `4.00 Lakh to each

of the workmen in the latter case, as such, argument advanced by Mr. Adarsh Sharma, learned Additional Advocate General that no compensation could have been awarded on account of delay in raising the dispute, deserves outright rejection.

12. In the light of aforesaid observations, the Award passed by learned Tribunal calls for no interference by this Court, which is accordingly upheld. The writ petition is dismissed. All pending miscellaneous applications also stand disposed of.

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

Smt. Leela & others ...Petitioners.
Versus
Shri. Mansa Ram & Others ....Respondents.

Civil Revision No. 223 of 2018
Decided on : 9.4.2019

Code of Civil Procedure, 1908 – Order III Rule 4 – Withdrawal of vakalatnama by Counsel- Procedure thereafter- Held, when counsel of party pleads no instructions and withdraws his vakalatnama, court should issue notice to party concerned before proceeding it exparte. (Paras 2 to 4)

For the Petitioners: Mr. Ravinder Singh Jaswal, Advocate.
For the Respondents: Ms. Reena Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The petitioners herein/defendants, in Civil Suit No. 117-1 of 2009, under, orders recorded by the learned trial Judge, on 19.10.2013, were proceeded against ex-parte. At the afore stage, the afore Civil Suit had progressed up to the stage, of adduction of defendants' evidence. The afore ex-parte order was made by the learned trial Judge, apparently, on an application moved by the counsel, engaged by the petitioners (for short "the defendants"), one Mohinder Verma, Advocate, who, therein pleaded no instructions from the defendants, and, obviously sought permission, for, his being permitted to withdraw, as, counsel for the defendants. The learned trial Judge, though proceeded, to, obviously allow the afore application, as, moved therebefore, by the learned counsel for the defendants, and, was also, thereafter rather enjoined, to ensure, qua subsequent thereto, representation being made on behalf of the defendants, comprised in its issuing Court notices upon the defendants, (i) nonetheless, it omitted to recourse the afore apt mechanism, merely on the pretext, qua, since the defendants' not meteing instructions to the counsel engaged previously by them, hence, there being no necessity to issue Court notices upon them. Prima-facie the afore reason is flimsy and extremely tenuous, and, works against the indefeasible rights of the defendants, to, ensure their representation, in, the Civil Suit concerned, given, the counsel concerned, making an application, that, for want of instructions being meted to him, his being permitted, to, withdraw as their counsel.

2. Even though, the afore reasons assigned by this Court, are sufficient, to, conclude, qua, the order recorded, on 19.10.2013 being legally frail, yet, the aggrieved defendants, were also enjoined to, in their application, cast under the provisions of Order 9 Rule 7 of Code of Civil Procedure, make averments therein qua, theirs, acquiring belated knowledge, vis-a-vis, the afore order, and, theirs thereafter moving it, within the prescribed period of limitation, commencing from the date of theirs acquiring knowledge, vis-a-vis, the rendition of the afore order against them.

3. Further, on, the contentious pleadings of the parties, the learned trial Judge, struck an apposite issue, and, with the AW-1, while stepping into the witness box, rendering a testification in his examination-in-chief, qua, his acquiring knowledge, vis-a-vis, the afore order, on, 10.8.2015, and, thereafter, qua upon, his collecting the copy of the order rendered on 22.8.2015, his, instituting the afore application, before the learned trial Judge, (i) hence prima-facie since the date of acquisition of knowledge, by the aggrieved defendants, hence the application standing moved within limitation, thereupon, an affirmative order was enjoined to be made thereon. Significantly, the afore AW-1, while being subjected, to cross-examination, and, an apposite suggestion being put thereat to him, by the Counsel concerned, vis-a-vis, his being communicated by his hitherto counsel, yet given his denying the afore suggestion, and, after the afore denial being made by the afore applicant, the learned counsel for the defendants, rather not, for countervailing, the afore denial, citing Mr. Mohinder Verma, as, a witness, for, ensuring elicitation from him, qua his making communications to the aggrieved defendants. Consequently, when the making of afore endeavors rather constituted, eruption of best evidence, for supporting the reasons, assigned by the learned trial Judge, in declining the relief to the aggrieved defendants, and, also for tearing apart the factum, qua, despite communications being made by the hitherto counsel engaged by the defendants, yet theirs not responding thereto, ((i) thereupon the afore omissions, constrain a conclusion qua the aggrieved defendants, remaining un-communicated by their previous counsel, vis-a-vis, the fate and progress of their case. The further corollary thereof is that they acquired knowledge, only on the date, as, enumerated in examination in chief of AW-1, and, when the instant application is thereafter moved within limitation, it, was required to be allowed.

4. In view of the above, the impugned order warrants interference, hence, it is quashed and set aside, and, also the ex-parte decree is also set aside. The learned trial Judge is also directed, to, permit the parties to adduce evidence, and, thereafter make a decision afresh upon the Civil Suit concerned, within a period of eight weeks. The petition is allowed. All pending applications stand disposed of accordingly.

The parties are directed to appear before the learned trial Court on 29.4.2019. No costs.

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BEFORE HON'BLE MR. JUSTICE SURYA KANT, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Shri Parkash Chand ....Petitioner

Versus

The Executive Engineer, HPPWD ...Respondent

CWP No. 473 of 2019
Decided on: 9.4.2019

Industrial Disputes Act, 1947 – Sections 25F, 25G & 25H – Termination of service without notice- Delay in raising dispute- Effect- On finding that workman had raised demand notice after nine years of termination, Labour Court denying reinstatement and back wages and directing payment of compensation of Rs. 1.00 lakh- Petition against award- Petitioner-workman praying that since termination of service was without notice, he should be reinstated with all consequential benefits- Held, undue delay and laches on part of workman in raising dispute is relevant factor for denying reinstatement- Workman stands duly compensated qua reinstatement and back wages by directing payment in lump sum- Petition dismissed. (Paras 8 to 12)

Cases referred:

Asstt. Engineer, CAD vs. Dhan Kunwar, (2006) 5 SCC 481

Daulat Ram vs. The Executive Engineer, HPPWD, CWP No. 1887 of 2017 decided on 11th December, 2017

Dharappa vs. Bijapur Coop. Milk Producers Societies Union Ltd., (2007) 9 SCC 109

Girja Nand vs. State of Himachal Pradesh & Others, CWP No. 93 of 2019 decided on 13.3.2019

Mahavir vs. Union of India, (2018) 3 SCC 588

Prabhakar vs. Sericulture Deptt., (2015) 15 SCC 1

Rajasthan State Agriculture Mktg. Board vs. Mohan Lal, (2013) 14 SCC 543

Rashtriya Colliery Mazdoor Sangh vs. Employers, (2017) 1 SCC 264

Sumfali Devi vs. State of Himachal Pradesh and another, CWP No. 2861 of 2018 decided on 2.4.2019

The Additional Chief Secretary (PW) & Others vs. Shri Ram Gopal, LPA No. 27 of 2019 decided on 3.4.2019

U.P. SRTC vs. Ram Singh, (2008) 17 SCC 627;

Workmen Rastriya Colliery Mazdoor Sangh vs. Bharat Coking Coal Ltd., (2016) 9 SCC 431

For the petitioner:	Mr. Rahul Mahajan, Advocate.
For the respondent:	Mr. Ashok Sharma, Advocate General with M/s Adarsh Sharma and Nand Lal Thakur, Additional Advocates General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral**)**

By way of instant Writ Petition filed under Article 226 of the Constitution of India, petitioner-workman (hereinafter referred to as, "workman") has laid challenge to Award dated 19.8.2017 passed by the Labour Court-cum-Industrial Tribunal, Kangra at Dharamshala (HP) (hereinafter referred to as, "Tribunal") in Ref No. 138/2016, whereby learned Tribunal awarded a lump sum compensation of Rs.1,00,000/- in favour of the workman in lieu of the back wages, seniority, past service benefits as well as other consequential service benefits.

2. Precisely the facts as emerge from the record are that the Appropriate Government made following reference under Section 10(1) of the Industrial Disputes Act, 1947 (hereinafter referred to as, 'Act') to the Tribunal:

> "Whether the industrial dispute raised by the worker Shri Parkash Chand S/O Shri Hari Singh, R/O Village Chah, P.O. Mandup, Tehsil Sarkaghat, District Mandi, H.P. before the Executive Engineer, H.P.P.W.D. Division, Dharampur, District Mandi, H.P. vide demand notice dated 30.11.2009 regarding his alleged illegal termination of service w.e.f. 01.01.2000 suffers from delay and latches? If not, Whether termination of the services of Shri Parkash Chand S/O Shri Hari Singh, R/O Village Chah, P.O. Mandup, Tehsil Sarkaghat, District Mandi, H.P. by the Executive Engineer, H.P.P.W.D. Division, Dharampur, District Mandi, H.P. w.e.f. 01.01.2000 without complying the provisions of the Industrial Disputes Act, 1947, is legal and justified. If not, what amount of back wages, seniority, past service benefits and compensation the above aggrieved workman is entitled to from the above employer?"

3. The workman claimed before learned Tribunal that he was engaged by the authorities on daily wage basis on Muster Roll with effect from January, 1999. He continued to work till August, 1999, as such, he had completed 240 days. The workman alleged that his services were unlawfully terminated by the respondent verbally with effect from August, 1999 without issuing one month's notice and retrenchment compensation, as envisaged under Section 25F of the Act. The workman claimed before learned Tribunal that since the respondent violated provisions of Section 25 of the Act, his oral termination deserves to be set aside. While placing on record factum with regard to retention of his juniors at the time of his retrenchment, workman also alleged that the principle of '*last come, first go'* was also not followed by the respondent. He further claimed that after his termination, respondent engaged many persons, who subsequently worked as daily wage *Beldars* but at no point in time, opportunity, if any, was ever afforded to him for re-employment, as such, action of the respondent, which is in sheer violation of the provisions contained under Section 25H of the Act, deserves to be quashed and set aside.

4. Per contra, respondent by way of a written reply to the aforesaid claim put forth by the workman, refuted the same on the ground of maintainability as well as delay and laches. Though the respondent admitted the factum with regard to workman's engagement in the respondent-Department as a Daily Wager with effect from 01/1999, but claimed that he intermittently worked upto 12/2001, whereafter, he himself abandoned the job, as such, there was no obligation on its part to comply with the provisions contained under Section 25 of the Act. Respondent prayed for dismissal of the claim of the workman on the ground of delay and laches and claimed before learned Tribunal that since demand notice was issued after a considerable delay of nine years of the alleged retrenchment, no relief, if any, can be granted to the workman.

5. Learned Tribunal, on the basis of pleadings as well as evidence adduced on record by respective parties arrived at a conclusion that the services of the workman were illegally terminated without notice but having taken note of the fact that the workman raised dispute after nine years of his alleged retrenchment, awarded a lump sum compensation of `1,00,000/- to the workman in lieu of back wages, seniority, past service benefits as well as consequential service benefits. In the aforesaid background, the workman has approached this Court in the instant proceedings praying for his reinstatement with full back wages, seniority and continuity in service.

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

7. After a close scrutiny of the material available on record vis-à-vis reasoning assigned by learned Tribunal, while awarding compensation to the workman in lieu of back wages, seniority and past service benefits, this Court is not inclined to accept the contention raised by Mr. Rahul Mahajan, learned counsel for the workman that since the workman had successfully proved on record that his services were illegally terminated in violation of Section 25F of the Act, learned Tribunal could not deny reinstatement on account of delay in raising the demand notice, especially in view of judgment dated 20.12.2012, rendered by the Writ Court in CWP No. 8315 of 2012. Though, a careful perusal of aforesaid judgment reveals that this Court had directed the Labour Commissioner to make a reference to the Tribunal despite there being considerable delay of nine years, but while doing so, this Court definitely did not preclude/bar the respondent from raising the question with regard to delay in the proceedings to be held before the Tribunal. In the aforesaid Writ Petition, the workman had laid challenge to the action of the Labour Commissioner in not making reference and this Court having taken note of the explanation rendered on record by the workman, had only directed the Labour Commissioner to make reference to the Labour Court.

8. A careful perusal of the specific reference made under Section 10(1) of the Act, which has been taken note herein above, itself reveals that the question with regard to delay and laches was required to be decided by the Tribunal while considering the claim of the workman. It is not in dispute that at no point in time, dispute, if any, was ever raised by the workman qua specific reference made to the Labour Court by the Appropriate Government, rather, the workman by way of filing claim, made an attempt to justify the delay caused in making the reference, as such, there appears to be no force in the argument of Mr. Rahul Mahajan, learned counsel for the workman that the learned Tribunal could not have gone into the question of delay and laches, while ascertaining the claim of the workman. The Apex Court, in **Prabhakar** v. **Sericulture Deptt.** (2015) 15 SCC 1, while specifically dealing with the question of delay in raising the dispute by the workman under the Act *ibid*, has held that since there is no period of limitation prescribed under the Industrial Disputes Act, for raising dispute but if such a dispute is raised after a long period, it is to be seen whether such a dispute still exists. In the aforesaid background, Apex Court has held that notwithstanding the fact that the law of limitation does not apply, it is to be shown by the workman that there is a dispute *in praesenti* and, for that purpose, he has to demonstrate that even if considerable period has elapsed and there are laches and delays, such delay has not resulted into making such dispute seized to exist. Apex Court has further held that if because of such a delay, dispute no longer remains alive and is to be treated as 'dead', then it would be non-existent dispute, which cannot be referred. In the aforesaid judgment, Apex Court concluded that 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 the proceedings under the Act *ibid*. However, the policy of industrial adjudication is that very stale claims should not be generally encouraged or allowed unless there is a satisfactory explanation for the delay. By way of aforesaid judgment, Apex Court ordered that if a Court finds that the dispute still exists though raised belatedly, it is always permissible for the Court to take the aspect of delay into consideration and mould the relief. In such cases, it is open for the Court to either grant reinstatement with back wages or lesser back wages or grant compensation instead of reinstatement. Reliance in this regard is also placed upon following judgments rendered by Apex Court, viz.; **Rajasthan State Agriculture Mktg. Board** v. **Mohan Lal** (2013) 14 SCC 543; **U.P. SRTC** v. **Ram Singh** (2008) 17 SCC 627; **Dharappa** v. **Bijapur Coop. Milk Producers Societies Union Ltd.** (2007) 9 SCC 109; **Asstt. Engineer, CAD** v. **Dhan Kunwar** (2006) 5 SCC 481 and **Mahavir** v. **Union of India** (2018) 3 SCC 588. Similar view has been taken by this Court in **Girja Nand** v. **State of Himachal Pradesh & Others**, CWP No. 93 of 2019 decided on 13.3.2019;

Smt. Sumfali Devi v. **State of Himachal Pradesh and another**, CWP No. 2861 of 2018 decided on 2.4.2019 and; **The Additional Chief Secretary (PW) & Others** v. **Shri Ram Gopal**, LPA No. 27 of 2019 decided on 3.4.2019. The long and short of the matter is very well expressed by the maxim, *vigilantibus non dormientibus jura subveniunt*, that is to say, the law assists those that are vigilant with their rights, and not those that sleep thereupon.

9. Though, in the case at hand, impugned Award itself reveals that the respondent failed to prove abandonment of job by the workman but the Man Days chart, Exhibit RW1/B clearly reveals that the workman had worked for 218 ½ days in the year 1999, 295 days in the year 2000 and 205 ½ days in the year 2001. Thus, the workman had actually worked for 499 days till the date of his alleged termination. Similarly, the evidence available on record reveals that after the termination of the workman, fresh hands were engaged by the respondent despite the petitioner being available for the job, but, as has been taken note herein above, workman issued demand notice after around nine years of the alleged retrenchment, by which time, much water had flown under the bridge, as such, learned Tribunal, while keeping in view all relevant factors including the mode and manner of appointment, nature of appointment, length of service, grounds on which termination is set aside and delay in raising the dispute, proceeded to award compensation in lieu of back wages, seniority and past service benefits. Thus, this court sees no reason to interfere with the aforesaid findings, which otherwise appear to be reasonable and justified in the facts and circumstances of the case.

10. Learned counsel for the workman relies upon a judgment passed by a Coordinate Bench of this Court in **Sh. Daulat Ram** v. **The Executive Engineer, HPPWD**, CWP No. 1887 of 2017 and other connected matters, decided on 11th December, 2017, whereby it has been held that the reinstatement cannot be denied merely on the ground of delay. With utmost respect, we find that may be the binding judgments of Supreme Court have not been considered in the above mentioned cases by the Coordinate Bench of this Court. That apart, the judgment is not based upon *ratio decidendi* of the binding judgments of Supreme Court and is primarily based upon the discretion exercised by the Court. We are thus unable to follow the same, rather, being bound by the dictum of the Supreme Court in the cases referred to supra, we do not find any reason to interfere with the Award passed by learned Tribunal.

11. The question with regard to competence of the Labour Court to award compensation in such like cases is no more *res integra.* The Apex Court in **Workmen Rastriya Colliery Mazdoor Sangh** v. **Bharat Coking Coal Ltd.**, (2016) 9 SCC 431 and **Rashtriya Colliery Mazdoor Sangh v**. **Employers**, (2017) 1 SCC 264, has dealt with the issue at hand and has proceeded to award compensation to the tune of Rs.4.00 Lakh to each of the workmen in the latter case, as such, argument advanced by Mr. Adarsh Sharma, learned Additional Advocate General that no compensation could have been awarded on account of delay in raising the dispute, deserves outright rejection.

12. In the light of aforesaid observations, the Award passed by learned Tribunal calls for no interference by this Court, which is accordingly upheld. The writ petition is dismissed. All pending miscellaneous applications also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE SURYA KANT, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Smt. Satya Devi ....Petitioner

Versus
The Engineer-in-Chief, HPPWD and another ....Respondents

CWP No. 449 of 2019
Decided on: 9.4.2019

Industrial Disputes Act, 1947 – Sections 25F, 25G & 25 H – Termination of service without notice- Delay in raising dispute- Effect- On finding that workman had raised demand notice after fifteen years of termination, Labour Court denying reinstatement and back wages and directing payment of compensation of Rs. 30000/- - Petition against award- Petitioner-workman praying that since termination of service was without notice, he should be reinstated with all consequential benefits- Held, undue delay and laches on part of workman in raising dispute is relevant factor for denying reinstatement- Workman stands duly compensated qua reinstatement and back wages by directing payment in lump sum- Petition dismissed. (Paras 8 to 12)

Cases referred:
Asstt. Engineer, CAD vs. Dhan Kunwar, (2006) 5 SCC 481
Daulat Ram vs. The Executive Engineer, HPPWD, CWP No. 1887 of 2017 decided on 11th December, 2017
Dharappa vs. Bijapur Coop. Milk Producers Societies Union Ltd., (2007) 9 SCC 109
Girja Nand vs. State of Himachal Pradesh & Others, CWP No. 93 of 2019 decided on 13.3.2019
Mahavir vs. Union of India, (2018) 3 SCC 588
Prabhakar vs. Sericulture Deptt., (2015) 15 SCC 1
Rajasthan State Agriculture Mktg. Board vs. Mohan Lal, (2013) 14 SCC 543
Rashtriya Colliery Mazdoor Sangh vs. Employers, (2017) 1 SCC 264
Sumfali Devi vs. State of Himachal Pradesh and another, CWP No. 2861 of 2018 decided on 2.4.2019
The Additional Chief Secretary (PW) & Others vs. Shri Ram Gopal, LPA No. 27 of 2019 decided on 3.4.2019
U.P. SRTC vs. Ram Singh, (2008) 17 SCC 627;
Workmen Rastriya Colliery Mazdoor Sangh vs. Bharat Coking Coal Ltd., (2016) 9 SCC 431

For the petitioner: Mr. Rahul Mahajan, Advocate.
For the respondents: Mr. Ashok Sharma, Advocate General with M/s Adarsh Sharma and Nand Lal Thakur, Additional Advocates General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral**)**

By way of instant Writ Petition filed under Article 226 of the Constitution of India, petitioner-workman (hereinafter referred to as, "workman") has laid challenge to Award dated 26.2.2018 passed by the Labour Court-cum-Industrial Tribunal, Kangra at Dharamshala (HP) (hereinafter referred to as, "Tribunal") in Reference No. 642/2016, whereby learned Tribunal awarded a lump sum compensation of Rs.30,000/- in favour of the workman in lieu of the back wages, seniority, past service benefits as well as other consequential service benefits.

2. Precisely the facts as emerge from the record are that the Appropriate Government made following reference under Section 10(1) of the Industrial Disputes Act, 1947 (hereinafter referred to as, 'Act') to the Tribunal:

> "Whether alleged termination of services of Smt. Satya Devi W/o Sh. Krishan Chand Vill. Bhar, PO Kot, Tehsil Sarkaghat, Distt. Mandi, H.P. during 3/2000 by (1) The Engineer-in-Chief HPPWD, Nirman Bhavan, Shimla-2, (2) the Executive Engineer, HPPWD, - Division Dharampur, Distt. Mandi, H.P. who had worked as beldar on daily wages basis w.e.f. 1/3/1999 to 3/2000, only for 275.5 days and has raised her industrial dispute vide demand notice dated 5.2.2015 after 16 years, without complying with the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, keeping in view of working period as above and delay of more than 15 (sic 115) years in raising the industrial dispute, what amount of back wages, seniority, past service benefits and compensation the above ex-worker is entitled to from the above employers/management?"

3. The workman claimed before learned Tribunal that she was engaged by the authorities on daily wage basis on Muster Roll with effect from March, 1999. She continued to work till March, 2000, as such, she had completed 240 days. The workman alleged that her services were unlawfully terminated by the respondents verbally with effect from March, 2000 without issuing one month's notice and retrenchment compensation, as envisaged under Section 25F of the Act. The workman claimed before learned Tribunal that since the respondents violated provisions of Section 25 of the Act, her oral termination deserves to be set aside. While placing on record factum with regard to retention of her juniors at the time of her retrenchment, workman also alleged that the principle of '*last come, first go'* was also not followed by the respondents. She further claimed that after her termination, respondents engaged many persons, who subsequently worked as daily wage *Beldars* but at no point in time, opportunity, if any, was ever afforded to her for re-employment, as such, action of the respondents, which is in sheer violation of the provisions contained under Section 25H of the Act, deserves to be quashed and set aside.

4. Per contra, respondents by way of a written reply to the aforesaid claim put forth by the workman, refuted the same on the ground of maintainability as well as delay and laches. Though the respondents admitted the factum with regard to workman's engagement in the respondent-Department as a Daily Wager with effect from 03/1999, but claimed that she intermittently worked upto 03/2000, whereafter, she herself abandoned the job, as such, there was no obligation on its part to comply with the provisions contained under Section 25 of the Act. Respondents prayed for dismissal of the claim of the workman on the ground of delay and laches and claimed before learned Tribunal that since demand notice was issued after a considerable delay of fifteen years of the alleged retrenchment, no relief, if any, can be granted to the workman.

5. Learned Tribunal, on the basis of pleadings as well as evidence adduced on record by respective parties arrived at a conclusion that the services of the workman were illegally terminated without notice but having taken note of the fact that the workman raised dispute after fifteen years of her alleged retrenchment, awarded a lump sum compensation of `30,000/- to the workman in lieu of back wages, seniority, past service benefits as well as consequential service benefits. In the aforesaid background, the workman has approached this Court in the instant proceedings praying for her reinstatement with full back wages, seniority and continuity in service.

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

7. After a close scrutiny of the material available on record vis-à-vis reasoning assigned by learned Tribunal, while awarding compensation to the workman in lieu of back wages, seniority and past service benefits, this Court is not inclined to accept the contention raised by Mr. Rahul Mahajan, learned counsel for the workman that since the workman had successfully proved on record that her services were illegally terminated in violation of Section 25F of the Act, learned Tribunal could not deny reinstatement on account of delay in raising the demand notice, especially in view of judgment dated 20.12.2012, rendered by the Writ Court in CWP No. 8315 of 2012. Though, a careful perusal of aforesaid judgment reveals that this Court had directed the Labour Commissioner to make a reference to the Tribunal despite there being considerable delay of fifteen years, but while doing so, this Court definitely did not preclude/bar the respondents from raising the question with regard to delay in the proceedings to be held before the Tribunal. In the aforesaid Writ Petition, the workman had laid challenge to the action of the Labour Commissioner in not making reference and this Court having taken note of the explanation rendered on record by the workman, had only directed the Labour Commissioner to make reference to the Labour Court.

8. A careful perusal of the specific reference made under Section 10(1) of the Act, which has been taken note herein above, itself reveals that the question with regard to delay and laches was required to be decided by the Tribunal while considering the claim of the workman. It is not in dispute that at no point in time, dispute, if any, was ever raised by the workman qua specific reference made to the Labour Court by the Appropriate Government, rather, the workman by way of filing claim, made an attempt to justify the delay caused in making the reference, as such, there appears to be no force in the argument of Mr. Rahul Mahajan, learned counsel for the workman that the learned Tribunal could not have gone into the question of delay and laches, while ascertaining the claim of the workman. The Apex Court, in **Prabhakar** v. **Sericulture Deptt.** (2015) 15 SCC 1, while specifically dealing with the question of delay in raising the dispute by the workman under the Act *ibid*, has held that since there is no period of limitation prescribed under the Industrial Disputes Act, for raising dispute but if such a dispute is raised after a long period, it is to be seen whether such a dispute still exists. In the aforesaid background, Apex Court has held that notwithstanding the fact that the law of limitation does not apply, it is to be shown by the workman that there is a dispute *in praesenti* and, for that purpose, he has to demonstrate that even if considerable period has elapsed and there are laches and delays, such delay has not resulted into making such dispute seized to exist. Apex Court has further held that if because of such a delay, dispute no longer remains alive and is to be treated as 'dead', then it would be non-existent dispute, which cannot be referred. In the aforesaid judgment, Apex Court concluded that 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 the proceedings under the Act *ibid*. However, the policy of industrial adjudication is that very stale claims should not be generally encouraged or allowed unless there is a satisfactory explanation for the delay. By way of aforesaid judgment, Apex Court ordered that if a Court finds that the dispute still exists though raised belatedly, it is always permissible for the Court to take the aspect of delay into consideration and mould the relief. In such cases, it is open for the Court to either grant reinstatement with back wages or lesser back wages or grant compensation instead of reinstatement. Reliance in this regard is also placed upon following judgments rendered by Apex Court, viz.; **Rajasthan State Agriculture Mktg. Board** v. **Mohan Lal** (2013) 14 SCC 543; **U.P. SRTC** v. **Ram Singh** (2008) 17 SCC 627; **Dharappa** v. **Bijapur Coop. Milk Producers Societies Union Ltd.**

(2007) 9 SCC 109; **Asstt. Engineer, CAD** v. **Dhan Kunwar** (2006) 5 SCC 481 and **Mahavir** v. **Union of India** (2018) 3 SCC 588. Similar view has been taken by this Court in **Girja Nand** v. **State of Himachal Pradesh & Others**, CWP No. 93 of 2019 decided on 13.3.2019; **Smt. Sumfali Devi** v. **State of Himachal Pradesh and another**, CWP No. 2861 of 2018 decided on 2.4.2019 and; **The Additional Chief Secretary (PW) & Others** v. **Shri Ram Gopal**, LPA No. 27 of 2019 decided on 3.4.2019. The long and short of the matter is very well expressed by the maxim, *vigilantibus non dormientibus jura subveniunt*, that is to say, the law assists those that are vigilant with their rights, and not those that sleep thereupon.

9. Though, in the case at hand, impugned Award itself reveals that the respondents failed to prove abandonment of job by the workman but the Man Days chart, Exhibit RW1/B clearly reveals that the workman had worked for 214 ½ days in the year 1999 and 61 days in the year 2000. Thus, the workman had actually worked for 275½ days till the date of her alleged termination. Similarly, the evidence available on record reveals that after the termination of the workman, fresh hands were engaged by the respondents despite the petitioner being available for the job, but, as has been taken note herein above, workman issued demand notice after around fifteen years of the alleged retrenchment, by which time, much water had flown under the bridge, as such, learned Tribunal, while keeping in view all relevant factors including the mode and manner of appointment, nature of appointment, length of service, grounds on which termination is set aside and delay in raising the dispute, proceeded to award compensation in lieu of back wages, seniority and past service benefits. Thus, this court sees no reason to interfere with the aforesaid findings, which otherwise appear to be reasonable and justified in the facts and circumstances of the case.

10. Learned counsel for the workman relies upon a judgment passed by a Coordinate Bench of this Court in **Sh. Daulat Ram** v. **The Executive Engineer, HPPWD**, CWP No. 1887 of 2017 and other connected matters, decided on 11th December, 2017, whereby it has been held that the reinstatement cannot be denied merely on the ground of delay. With utmost respect, we find that may be the binding judgments of Supreme Court have not been considered in the above mentioned cases by the Coordinate Bench of this Court. That apart, the judgment is not based upon *ratio decidendi* of the binding judgments of Supreme Court and is primarily based upon the discretion exercised by the Court. We are thus unable to follow the same, rather, being bound by the dictum of the Supreme Court in the cases referred to supra, we do not find any reason to interfere with the Award passed by learned Tribunal.

11. The question with regard to competence of the Labour Court to award compensation in such like cases is no more *res integra.* The Apex Court in **Workmen Rastriya Colliery Mazdoor Sangh** v. **Bharat Coking Coal Ltd.**, (2016) 9 SCC 431 and **Rashtriya Colliery Mazdoor Sangh v**. **Employers**, (2017) 1 SCC 264, has dealt with the issue at hand and has proceeded to award compensation to the tune of Rs. 4.00 Lakh to each of the workmen in the latter case, as such, argument advanced by Mr. Adarsh Sharma, learned Additional Advocate General that no compensation could have been awarded on account of delay in raising the dispute, deserves outright rejection.

12. In the light of aforesaid observations, the Award passed by learned Tribunal calls for no interference by this Court, which is accordingly upheld. The writ petition is dismissed. All pending miscellaneous applications also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE SURYA KANT, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Smt. Bimla Devi ....Petitioner

Versus

The Engineer-in-Chief, HPPWD and another ...Respondents

CWP No. 440 of 2019
Decided on: 10.4.2019

Industrial Disputes Act, 1947 – Sections 25F, 25G & 25 H – Termination of service without notice- Delay in raising dispute- Effect- On finding that workman had raised demand notice after sixteen years of termination, Labour Court denying reinstatement and back wages and directing payment of compensation of Rs. 50,000/- - Petition against award- Petitioner-workman praying that since termination of service was without notice, he should be reinstated with all consequential benefits- Held, undue delay and laches on part of workman in raising dispute is relevant factor for denying reinstatement- Workman stands duly compensated qua reinstatement and back wages by directing payment in lump sum- Petition dismissed. (Paras 8 to 12)

Cases referred:

Asstt. Engineer, CAD vs. Dhan Kunwar, (2006) 5 SCC 481

Daulat Ram vs. The Executive Engineer, HPPWD, CWP No. 1887 of 2017 decided on 11th December, 2017

Dharappa vs. Bijapur Coop. Milk Producers Societies Union Ltd., (2007) 9 SCC 109

Girja Nand vs. State of Himachal Pradesh & Others, CWP No. 93 of 2019 decided on 13.3.2019

Mahavir vs. Union of India, (2018) 3 SCC 588

Prabhakar vs. Sericulture Deptt., (2015) 15 SCC 1

Rajasthan State Agriculture Mktg. Board vs. Mohan Lal, (2013) 14 SCC 543

Rashtriya Colliery Mazdoor Sangh vs. Employers, (2017) 1 SCC 264

Sumfali Devi vs. State of Himachal Pradesh and another, CWP No. 2861 of 2018 decided on 2.4.2019

The Additional Chief Secretary (PW) & Others vs. Shri Ram Gopal, LPA No. 27 of 2019 decided on 3.4.2019

U.P. SRTC vs. Ram Singh, (2008) 17 SCC 627;

Workmen Rastriya Colliery Mazdoor Sangh vs. Bharat Coking Coal Ltd., (2016) 9 SCC 431

For the petitioner Mr. Rahul Mahajan, Advocate.

For the respondents: Mr. Ashok Sharma, Advocate General with M/s Adarsh Sharma and Nand Lal Thakur, Additional Advocates General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral**)**

By way of instant Writ Petition filed under Article 226 of the Constitution of India, petitioner-workman (hereinafter referred to as, "workman") has laid challenge to Award dated 20.7.2017 passed by the Labour Court-cum-Industrial Tribunal, Kangra at Dharamshala (HP) (hereinafter referred to as, "Tribunal") in Reference No. 568/2016,

whereby learned Tribunal awarded a lump sum compensation of Rs.50,000/- in favour of the workman in lieu of the back wages, seniority, past service benefits as well as other consequential service benefits.

2. Precisely the facts as emerge from the record are that the Appropriate Government made following reference under Section 10(1) of the Industrial Disputes Act, 1947 (hereinafter referred to as, 'Act') to the Tribunal:

> "Whether alleged termination of services of Smt. Bimla Devi W/o Sh. Narain Singh Vill. Strehar, PO Dharampur, Tehsil Sarkaghat, Distt. Mandi, H.P. during 9/1999. by (1) The Engineer-in-Chief, HPPWD, Nirman Bhavan, Shimla-2, (2) the Executive Engineer, HPPWD, - Division Dharampur, Distt. Mandi, H.P. who had worked as beldar on daily wages basis during 11/1998 to 9/1999, only for 285.5 days and has raised her industrial dispute vide demand notice dated 29.5.2015 after more than 16 years allegedly without complying with the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, keeping in view of working period stated as above and delay of more than 16 years in raising the industrial dispute, what amount of back wages, seniority, past service benefits and compensation the above ex-worker is entitled to from the above employer/management?"

3. The workman claimed before learned Tribunal that she was engaged by the authorities on daily wage basis on Muster Roll with effect from 11/1998. She continued to work till 9/1999, as such, she had completed 240 days. The workman alleged that her services were unlawfully terminated by the respondents verbally with effect from 9/1999 without issuing one month's notice and retrenchment compensation, as envisaged under Section 25F of the Act. The workman claimed before learned Tribunal that since the respondents violated provisions of Section 25 of the Act, her oral termination deserves to be set aside. While placing on record factum with regard to retention of her juniors at the time of her retrenchment, workman also alleged that the principle of '*last come, first go'* was also not followed by the respondents. She further claimed that after her termination, respondents engaged many persons, who subsequently worked as daily wage *Beldars* but at no point in time, opportunity, if any, was ever afforded to her for re-employment, as such, action of the respondents, which is in sheer violation of the provisions contained under Section 25H of the Act, deserves to be quashed and set aside.

4. Per contra, respondents by way of a written reply to the aforesaid claim put forth by the workman, refuted the same on the ground of maintainability as well as delay and laches. Though the respondents admitted the factum with regard to workman's engagement in the respondent-Department as a Daily Wager with effect from 11/1998, but claimed that she intermittently worked upto September, 1999, whereafter, she herself abandoned the job, as such, there was no obligation on its part to comply with the provisions contained under Section 25 of the Act. Respondents prayed for dismissal of the claim of the workman on the ground of delay and laches and claimed before learned Tribunal that since demand notice was issued after a considerable delay of sixteen years of the alleged retrenchment, no relief, if any, can be granted to the workman.

5. Learned Tribunal, on the basis of pleadings as well as evidence adduced on record by respective parties arrived at a conclusion that the services of the workman were illegally terminated without notice but having taken note of the fact that the workman raised dispute after sixteen years of her alleged retrenchment, awarded a lump sum compensation of `50,000/- to the workman in lieu of back wages, seniority, past service benefits as well as consequential service benefits. In the aforesaid background, the workman has approached

this court in the instant proceedings praying for her reinstatement with full back wages, seniority and continuity in service.

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

7. After a close scrutiny of the material available on record vis-à-vis reasoning assigned by learned Tribunal, while awarding compensation to the workman in lieu of back wages, seniority and past service benefits, this Court is not inclined to accept the contention raised by Mr. Rahul Mahajan, learned counsel for the workman that since the workman had successfully proved on record that her services were illegally terminated in violation of Section 25F of the Act, learned Tribunal could not deny reinstatement on account of delay in raising the demand notice, especially in view of judgment dated 20.12.2012, rendered by the Writ Court in CWP No. 8315 of 2012. Though, a careful perusal of aforesaid judgment reveals that this Court had directed the Labour Commissioner to make a reference to the Tribunal despite there being considerable delay of sixteen years, but while doing so, this Court definitely did not preclude/bar the respondents from raising the question with regard to delay in the proceedings to be held before the Tribunal. In the aforesaid Writ Petition, the workman had laid challenge to the action of the Labour Commissioner in not making reference and this Court having taken note of the explanation rendered on record by the workman, had only directed the Labour Commissioner to make reference to the Labour Court.

8. A careful perusal of the specific reference made under Section 10(1) of the Act, which has been taken note herein above, itself reveals that the question with regard to delay and laches was required to be decided by the Tribunal while considering the claim of the workman. It is not in dispute that at no point in time, dispute, if any, was ever raised by the workman qua specific reference made to the Labour Court by the Appropriate Government, rather, the workman by way of filing claim, made an attempt to justify the delay caused in making the reference, as such, there appears to be no force in the argument of Mr. Rahul Mahajan, learned counsel for the workman that the learned Tribunal could not have gone into the question of delay and laches, while ascertaining the claim of the workman. The Apex Court, in **Prabhakar** v. **Sericulture Deptt.** (2015) 15 SCC 1, while specifically dealing with the question of delay in raising the dispute by the workman under the Act *ibid*, has held that since there is no period of limitation prescribed under the Industrial Disputes Act, for raising dispute but if such a dispute is raised after a long period, it is to be seen whether such a dispute still exists. In the aforesaid background, Apex Court has held that notwithstanding the fact that the law of limitation does not apply, it is to be shown by the workman that there is a dispute *in praesenti* and, for that purpose, he has to demonstrate that even if considerable period has elapsed and there are laches and delays, such delay has not resulted into making such dispute seized to exist. Apex Court has further held that if because of such a delay, dispute no longer remains alive and is to be treated as 'dead', then it would be non-existent dispute, which cannot be referred. In the aforesaid judgment, Apex Court concluded that 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 the proceedings under the Act *ibid*. However, the policy of industrial adjudication is that very stale claims should not be generally encouraged or allowed unless there is a satisfactory explanation for the delay. By way of aforesaid judgment, Apex Court ordered that if a Court finds that the dispute still exists though raised belatedly, it is always permissible for the Court to take the aspect of delay into consideration and mould the relief. In such cases, it is open for the Court to either grant reinstatement with back wages or lesser back wages or grant compensation instead of reinstatement. Reliance in this regard

is also placed upon following judgments rendered by Apex Court, viz.; **Rajasthan State Agriculture Mktg. Board** v. **Mohan Lal** (2013) 14 SCC 543; **U.P. SRTC** v. **Ram Singh** (2008) 17 SCC 627; **Dharappa** v. **Bijapur Coop. Milk Producers Societies Union Ltd.** (2007) 9 SCC 109; **Asstt. Engineer, CAD** v. **Dhan Kunwar** (2006) 5 SCC 481 and **Mahavir** v. **Union of India** (2018) 3 SCC 588. Similar view has been taken by this Court in **Girja Nand** v. **State of Himachal Pradesh & Others**, CWP No. 93 of 2019 decided on 13.3.2019; **Smt. Sumfali Devi** v. **State of Himachal Pradesh and another**, CWP No. 2861 of 2018 decided on 2.4.2019 and; **The Additional Chief Secretary (PW) & Others** v. **Shri Ram Gopal**, LPA No. 27 of 2019 decided on 3.4.2019. The long and short of the matter is very well expressed by the maxim, *vigilantibus non dormientibus jura subveniunt*, that is to say, the law assists those that are vigilant with their rights, and not those that sleep thereupon.

9. Though, in the case at hand, impugned Award itself reveals that the respondents failed to prove abandonment of job by the workman but the Man Days chart, Exhibit RW1/B clearly reveals that the workman had worked for 47 ½ days in the year 1998 and 238 days in the year 1999. Thus, the workman had actually worked for 285 ½ days till the date of her alleged termination. Similarly, the evidence available on record reveals that after the termination of the workman, fresh hands were engaged by the respondents despite the petitioner being available for the job, but, as has been taken note herein above, workman issued demand notice after around sixteen years of the alleged retrenchment, by which time, much water had flown under the bridge, as such, learned Tribunal, while keeping in view all relevant factors including the mode and manner of appointment, nature of appointment, length of service, grounds on which termination is set aside and delay in raising the dispute, proceeded to award compensation in lieu of back wages, seniority and past service benefits. Thus, this court sees no reason to interfere with the aforesaid findings, which otherwise appear to be reasonable and justified in the facts and circumstances of the case.

10. Learned counsel for the workman relies upon a judgment passed by a Coordinate Bench of this Court in **Sh. Daulat Ram** v. **The Executive Engineer, HPPWD**, CWP No. 1887 of 2017 and other connected matters, decided on 11th December, 2017, whereby it has been held that the reinstatement cannot be denied merely on the ground of delay. With utmost respect, we find that may be the binding judgments of Supreme Court have not been considered in the above mentioned cases by the Coordinate Bench of this Court. That apart, the judgment is not based upon *ratio decidendi* of the binding judgments of Supreme Court and is primarily based upon the discretion exercised by the Court. We are thus unable to follow the same, rather, being bound by the dictum of the Supreme Court in the cases referred to supra, we do not find any reason to interfere with the Award passed by learned Tribunal.

11. The question with regard to competence of the Labour Court to award compensation in such like cases is no more *res integra.* The Apex Court in **Workmen Rastriya Colliery Mazdoor Sangh** v. **Bharat Coking Coal Ltd.**, (2016) 9 SCC 431 and **Rashtriya Colliery Mazdoor Sangh v**. **Employers**, (2017) 1 SCC 264, has dealt with the issue at hand and has proceeded to award compensation to the tune of Rs. 4.00 Lakh to each of the workmen in the latter case, as such, argument advanced by Mr. Adarsh Sharma, learned Additional Advocate General that no compensation could have been awarded on account of delay in raising the dispute, deserves outright rejection.

12. In the light of aforesaid observations, the Award passed by learned Tribunal calls for no interference by this Court, which is accordingly upheld. The writ petition is dismissed. All pending miscellaneous applications also stand disposed of.

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

Kishori Lal & another ...Appellants.

Versus

Money Ram and Others ....Respondents.

RSA No. 66 of 2006 a/w CO No. 18/08
Decided on : 11.4.2019

Code of Civil Procedure, 1908 – Order XXII Rules 3 & 4 – Death of party- Substitution of legal representatives- Which Court to decide?- Held, question of substitution of legal representatives of deceased party and abatement of suit, if any, is to be decided by that Court where matter was pending at time of death of party. (Para 2)

Code of Civil Procedure, 1908 – Order XX Rules 1 & 6 and Order XXII Rules 1 & 2 – Decree against deceased party- Nature- Held, decree passed against party who was dead on date of its passing is nonest. (Para 2)

For the Appellants: Mr. Divay Raj Singh, Advocate.

For the Respondents: Mr. Ajay Kumar, Sr. Advocate with Mr. Dheeraj K Vashisht, Advocate, for respondent No.1 and 2.
Mr. Anup Rattan, Advocate, for respondents No.4 and 5.
Respondent No.3 ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

In the plaintiff's suit, for, rendition of a decree for declaration, the learned trial Judge, rendered a verdict of dismissal. The aggrieved therefrom, namely one Balwant, plaintiff, and, one Watna, the contesting defendant therein, preferred two separate Civil appeals respectively bearing Numbers 125/98 RBT 19/04/98, and, 138/98 RBT 18/04/98, before the learned first Appellate Court, and, upon the afore Civil Appeals, the learned first Appellate Court allowed the appeal preferred by the plaintiff Balwant, and, dismissed the cross- appeal preferred therebefore by one Watna.

2. The afore Watna is arrayed in Civil Appeal No. 125/98 RBT 19/04/98, in the array of respondents, and, in Civil Appeal No. 138/98 RBT 18/04/98, as an appellant. The instant appeal, is, instituted by his LRs, without there being, prior thereto, any order being recorded, by the learned first Appellate Court, for, the afore deceased being substituted by his LRs, especially when his demise occurred during the pendency, of, the afore Civil Appeals, and, the relevant application was preferable therebefore. Consequently, without any application for the relevant purpose being moved before the learned first Appellate Court, wherebefore the demise of the afore occurred, and, without an order being pronounced thereon, the, preferment of instant appeal by his LRs, is grossly mis-constituted, and, is required to be allowed, given, the impugned verdict being nonest it, standing rendered against an unsubstituted deceased litigant. For facilitating representation of, the, estate of the deceased Watna by his LRs, the matter is remanded to the learned First

Appellate Court. The learned first Appellate Court is directed, to, upon an application being moved therebefore, for the afore purpose, pass an appropriate order thereon, in accordance with law, and, thereafter also record a fresh decision on the afore Civil appeals.

In view of the above, the present appeal is disposed of, alongwith cross-objection, and, with all pending applications.

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

Paras Ram and others ...Petitioners
Versus
Manoj Sharma ...Respondent

CR No.224 of 2017
Decided on : 11.4.2018

Code of Civil Procedure, 1908 – Order XXII Rule 4 – Joint estate- Death of co-owner/ co-defendant- Whether suit would abate for not bringing on record, legal representatives of deceased co-owner within time?- Held, property being joint, surviving co-defendant would represent estate of deceased co-owner/co-defendant in absence of his legal representatives- Suit would not abate in such circumstances. (Paras 3 to 5)

For the petitioners : Mr. Sunil Mohan Goel, Advocate.
For the respondents : Mr. Karan Singh Kanwar, Advocate

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

During pendency of civil Suit No. 235 of 2014, titled as "Manoj Sharma versus Bhedi Devi", co-defendant No. 1, expired on 18.10.2014, (a) however, no steps, within 90 days therefrom, were endeavored to be taken by the plaintiff, for begetting her substitution by her LRs, (b) rather an apposite application was moved, on 23.9.2015. Upon CMA No. 206/VI/2015, the learned trial Court, ordered for substitution of deceased co-defendant, by her LRs, as disclosed in the application, also, pronounced an order (c) that given the estate of deceased co defendant No. 1, being represented by co defendant No. 2, latter whereof being one of the LRs of deceased co-defendant No. 1, hence rejected the argument addressed before it, by the learned counsel for the defendant, that rather the aforesaid lapses, hence rendering, the suit, to, on demise of defendant No. 1, hence abate in its entirety, even qua co-defendant No. 2. The defendants, are aggrieved by the impugned order, hence motion this Court.

2. For testing the validity of espousal(s) made before this Court, by the learned counsel for the petitioner, it is imperative, to make illusion(s) to the zimini orders, copies whereof are appended with the instant petition, (i) perusal(s) thereof disclose, that, apparently the apposite permission was granted, on 16.5.2015, by the learned trial Judge, to the plaintiff, whereat the counsel for defendant No. 2 was also present, (ii) however, thereat, and, besides subsequently upto a pronouncement being made upon the apposite application, no scribed motion, was made by the plaintiff, before, the learned trial Court

qua the apposite application being disallowed, given for want of apposite steps being taken within time, thereupon the suit abating, in its entirety, (iii) ill fate whereof, repeatedly arising from the factum, of, no apposite application being preferred, before the learned trial Judge, within the mandated period of time. Absence of apposite scribed motions, by the plaintiff, before the learned trial Judge, is also an evident display of the plaintiff being estopped, to raise the aforesaid contention, before this Court.

3. Be that as it may, even otherwise the defendants, had, resisted the apposite application, moved by the plaintiff, on the ground, that, despite his awareness, and, knowledge about demise of co-defendant No. 1, his omitting to take appropriate steps, within time, hence perse visiting upon the apposite application, the ill consequence(s), of its entailing dismissal, especially when no apposite explication, was purveyed, for condoning the delay in the belated institution, of the apposite application, before the learned trial Judge. The aforesaid contention appears to be untenable, given no material existing on record, hence for sustaining the aforesaid espousal. The absence of aforesaid material, does, constrain this Court to infer that there was, no, willful dereliction/omission, on the part of the plaintiff, and, his counsel, in not promptly instituting the apposite CMA, before the learned trial Judge, hence dehors any explication, being purveyed, for the belated institution of the aforesaid CMA, yet not affecting, the pronouncement, on merits, made upon the apposite application.

4. Furthermore, it is apparent, on a reading, of, the memo of parties, of the apposite civil suit, of, all the proposed LRs of Paras Ram, being fathered by one Ses Ram, and, the apposite application contains recital(s), of, the LRs of deceased co-defendant No. 1, alike co-defendant No. 2, being fathered by one Ses Ram, thereupon it appears, as submitted by the learned counsel, for the defendant, that deceased co-defendant No. 1, was, the grand-mother of co defendant No. 2, besides also is the grand mother of other LRs, disclosed in the apposite CMA. Moreover, when it remains uncontrovered, that, dehors the other LRs, proposed to be substituted in place of deceased co-defendant No. 1, yet, impleaded co-defendant No. 2 alone held, the apposite capacity, to, on her demise, hence represent her estate, thereupon even, if, assumingly no orders stood rendered, for deceased co-defendant No. 1 being substituted by her LRs, other than Paras Ram, rather, with the latter being already arrayed as co-defendant No.2, in the apposite civil suit. In aftermath, with co-defendant No. 1, solitarily holding the capacity, to represent the estate of deceased co-defendant No. 1, hence, it cannot be said, that, even if no explicit order was made by the learned trial Judge, vis-à-vis, abatement of the suit, thereupon, immediately on demise of co-defendant No. 1, especially with no apposite motion being made within time, the ill fate(s), of, the suit automatically abating, in its entirety, hence befalling thereupon.

5. Accordingly, there is no merit in the instant revision petition, and, the same is dismissed. The impugned order of 14.9.2017, is maintained and affirmed. All pending application(s), if any, are also disposed of. No costs.

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

Cr. Appeals No. 451 of 2008
and 487 of 2008
Reserved on : 28.3.2019
Decided on : 13.4.2019

1. Cr.Appeal No. 451 of 2008

Partap Singh ...Appellant
Versus
State of H.P. and others ...Respondents
2. Cr. Appeal No. 487 of 2008
State of H.P. ...Appellant
Versus
Partap Singh ...Respondent

Indian Penal Code, 1860 – Sections 325 & 353 read with 34- Grievous hurt and obstruction in discharge of public duties etc.- Proof- Trial Court convicting accused for causing grievous hurt and obstructing public servant in discharge of his duties- Appeal against- Held, eye witnesses (PW1 & PW10) not aware of identities of accused who made assault-But claiming during trial that identities of accused were disclosed to them by some other persons- Their statements under Section 161 of Cr.P.C. lacking this aspect- Weapon of offence recovered at instance of witnesses and not at instance of accused-Contents of FIR incredible-Prosecution failed in proving its case against accused-Appeal allowed- Conviction set aside. (Paras 10 to 14)

For the appellant :Mr. Ajay Chandel, Advocate, for appellant in Cr. Appeal No. 451 of 2008 and Mr. Hemant Vaid, Addl. A.G. for the appellant in Cr. Appeal No. 487 of 2008

For the respondent(s) :Mr. Ajay Chandel, Advocate, for respondent No. 1 in Cr. Appeal No. 487 of 2008 and Mr. Hemant Vaid, Addl. A.G., for respondent-State in Cr. Appeal No. 451 of 2008.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The present appeals arise, from a common thereto judgment, rendered by the learned Sessions Judge, Kinnaur, Sessions Division, at Rampur Bushahr, H.P., upon Session trial No. 28 of 2004, decided on 28.5.2008, hence both are decided under a common verdict.

2. Criminal appeal bearing No. 451 of 2008, stands directed by the convict, against, the judgment rendered by the learned Sessions Judge, Kinnaur Sessions Division, at Rampur Bushehr, (i) whereunder, he returned findings of conviction, upon, the appellant/convict, and sentenced him to pay a fine of Rs. 1,000/-, for, an offence constituted under Section 353, read with Section 34 IPC (ii) and, it further sentenced him to undergo simple imprisonment, till rising, of the Court, and, to pay a fine of Rs. 5000/-, for, commission of an offence constituted under Section 325 IPC, (iii) and in default of payment of fine, for an offence under Section 353 read with Section 34 IPC, the appellant was further sentenced to undergo simple imprisonment, for one month (iv) and, in default of payment of fine, for an offence under Section 325 IPC, the appellant was further sentenced to undergo simple imprisonment, for three months, (v) whereas, criminal appeal bearing No. 487 of 2008, stands directed by the state of H.P., against the afore decision, rendered by the learned Sessions Judge, Kinnaur at Rampur Bushehr, wherethrough, it seeks enhancement of the aforesaid sentence(s), imposed upon the convicts.

3. The facts relevant to decide the instant case are that on 2.1.2004, Sh. Amar Singh complainant was deputed as a conductor and Sh. Bhim Singh as a driver on HRTC

bus No. HP-31-1546 on Sundernagar-Durah route and the bus after its journey from Sundernagar reached at Durah in Ani at 5:30 p.m. The complainant along with driver Bhim Singh were taking food in the Dhaba of Devi Ram at about 6:40 p.m., and at that time three boys identified as accused, entered and commanded the complainant as to how he had charged Rs. 4/- as fare in lieu of Rs. 3/- for Nithar-Jalori journey. On insistence of the complainant that the fare was charged correctly, the accused beat him. On intervention of Sh. Bhim Singh driver, the accused Partap Singh gave him fists and kicks blows and complainant also noticed knife in his hand. Accused Rakesh and Om Prakash also gave beatings to the complainant with dandas, kicks and fists. Bhim Singh driver suffered injury on face, fracture of jaw and dislocation of teeth. The complainant and Bhim Singh were rescued by Sh. Devi Ram and his son Yash Pal from the accused. The complainant was taken to C.H.C. Nirmand in a private van. On these facts, the complainant lodged FIR at Police Station, Nirmand on the same night at 12:45 a.m. All the codal formalities were completed and the challan was prepared.

4. On conclusion of investigations, into the offences, allegedly committed by the accused, a report under Section 173 of the Code of Criminal Procedure was prepared and filed in the Court concerned.

5. The accused/respondents were charged by the learned trial Court, for, theirs committing offence(s) punishable under Sections 452, 353, 332 and 333 read with Section 34 IPC. In proof of the charge, the prosecution examined eleven witnesses. On conclusion of recording of prosecution evidence, the statements of the accused/respondents, under, Section 313 of the Code of Criminal Procedure, were, recorded by the trial Court, wherein, the accused claimed innocence and pleaded false implication in the case. However, they did not lead any evidence in defence.

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

7. The appellant is aggrieved by the judgment of conviction recorded by the learned trial Court. The learned counsel appearing for the appellant has concertedly, and, vigorously contended, qua the findings of conviction, recorded by the learned trial Court, standing, not, based on a proper appreciation, by it, of the evidence on record, rather, theirs' standing sequelled by gross mis-appreciation, by it, of the material on record. Hence, he contends qua the findings of conviction, being reversed by this Court, in the exercise of its appellate jurisdiction, AND, theirs being replaced by findings of conviction.

8. On the other hand, the learned Additional Advocate General has, with considerable force and vigour, contended that the findings of conviction recorded by the Court below, standing based, on a mature and balanced appreciation, by it, of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication, whereas, the State seeks enhancement, of, the sentence(s), imposed upon the convict, by the learned trial Court.

9. 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.

10. The learned trial Judge, imputed credence, to the deposition(s) of PW-1, one Amar Singh, employed as a Conductor in the bus concerned, and, also vis-à-vis, the deposition of the victim, who stepped into the witness box, as PW-10, (a) and upon, his conjoining the afore testification(s), rendered by the afore witnesses', with the, deposition(s) rendered by PW-8, who, in his testification, rendered proof, vis-à-vis, Ext. PW8/A, wherein

stands enumerated, the hereinafter recorded injuries, found occurring on the person of the victim:

i. History of alleged beating.
ii. Severe bleeding (clots below and around and inside nose, also mouth;
iii. Fracture of lower jaw towards left of medium line.
iv. Left tempro mandibular joint, seems dislocated.
v. Swelling face around nose with severe tenderness and pain.
vi. Person is unable to speak clear swallow and spit, nor can open mouth;
vii. Left foot is swollen, tender and painful walks as lame.
viii. After initial treatment patien is being referred to IGMC Shimla for further treatment"

and vide discharge slip, Ext. PW6/A, the hereinafter recorded injuries are enumerated:

i. Fracture right angle of mandible (right side of lower jaw)
ii. Fracture left parasymphysis (body or mandible) area of lower jaw bone between chin and left limit of lower jaw.

besides, with his deposing qua the injuries, borne in MLC, Ext. PW8/B, being a sequel of knife Ext. P-1, being used from the handle side, upon the victims' person, and, a) importantly, with his rather dispelling, the, suggestion(s) put to him, by the learned defence counsel, qua the injuries enumerated, in the apposite MLC, being not causable by fall, b) AND conspicuously, with his, in contemporaneity, vis-à-vis, his rendering the afore deposition, hence being shown Ext. PW8/B, (c) thereupon he concluded, that the prosecution rendering efficacious proof, vis-à-vis, the charge framed against the accused. However, for the reasons to be assigned hereinafter, the afore dependence(s) by the learned trial Judge, in his hence recording an order of conviction, upon the accused, and, his imposing the afore consequent therewith sentence(s) upon him, is infirm, given, d) though, PW-1 and PW-10, both evidently being unaware of the identities of each of the accused, yet theirs naming, the accused, being, a, sequel of one Yash Pal, and, one Devi Ram, unfolding to both, their respective names. Consequently, the factum of the afore unfoldments, vis-à-vis, the victims by PW-1, and by PW-10, was also enjoined to be cogently proven, hence by the prosecution. However, a reading of the testification, occurring in the cross-examination of PW-1, unveils imminent dis-concurrence, interse therewith, vis-à-vis, his previous statement recorded, under Section 161 Cr.PC, and, as borne in Ext. PW8/A, (e) improvement(s) whereof, is, comprised, in his testifying, qua Ext. PW8/A, rather making vivid disclosures, qua the afore Yash Pal and one Devi Ram, hence revealing to him, the, names of the accused persons, however, upon his being confronted with his previous statement, borne in Ext. PW8/A, the afore rendered disclosures rather remaining un-echoed, therein, c) thereupon it stands firmly concluded qua, PW-1, hence improving or embellishing, upon his previous statement, recorded in writing, conspicuously, vis-à-vis, the afore Yash Pal, and, Devi Ram, making dis-closures, to him, vis-à-vis, the names of the accused, d) corollary whereof being qua with PW-1 rather being previously un-aware of the identity(s) of each of the accused, (e) thereupon, hence the afore gross improvements, and, embellishments, existing interse, his testification(s), vis-à-vis, his previously recorded statement in writing, obviously work(s) against the prosecution, (f) and, concomitantly renders open an inference, qua with both PW-1, and, PW-10, being previously unaware of the identities, of the accused, thereupon, theirs rather being awakened, vis-à-vis, the identities of the accused, only by the afore Yash Pal, and, Babu Ram , and, thereafter, their

naming hence the afore accused, in the FIR, rather being naturally incredible, (g) and also thereafter, theirs identifying the accused, in Court, being gross-mis-adventures, of both PW-1, and, of PW-2, and, hence the prosecution, abysmally failing to establish, the, participation in the relevant incident, of, any of the accused.

11. The recovery of knife, borne in Ext. P-1, remained un-effectuated by the Investigating Officer concerned, at the instance of the accused, rather its recovery stood effectuated under Ext. PW1/B, hence at the instance of one Devi Ram, whereon rather exists purported signatures of one Mohan Lal, and, of Devi Ram. However, Devi Ram, who handed over Ext. P-1, to the Investigating Officer concerned, and, in sequel whereof, Ext. PW1/B stood prepared, during, the course of his rendering his testification, has not, only belied the factum, of, participation of the accused in the relevant incident, rather has also denied his making any previous statement before the Investigating Officer concerned, (i) AND_even, upon his being declared hostile, whereafter, he was subjected to a scathing cross-examination, by the learned APP, he proceeded to also deny, the occurrence, of, his signatures upon Ext. PW8/A, (ii) and, rather in ordeal, of his cross-examination, as conducted by the learned defence counsel, he made echoing(s) qua the accused, not being, armed with any dandas or knife, (iii) wherefrom a momentous inference is drawable, qua the prosecution omitting, to hence unfailingly establish the identity of the accused, or concomitantly, their participation in the relevant incident.

12. Preponderantly, also with the other witnesses to Ext. PW1/B, also, denying, the, occurrence, of his signatures thereon, and, with despite, the afore conjoint denials, being made, by one Devi Ram, and by PW Mohan Lal, (i) the prosecution yet failing to, after collecting the specimen and admitted signatures of Devi Ram, and, of, Mohan Lal, hence send them along with the disputed signatures, of the afore existing, on, Ext. PW1/B, to the handwriting expert concerned, (ii) thereupon, it is to be concluded qua Ext. PW1/B being fictitiously drawn, and, recovery of knife therethrough, at the instance of Devi Ram, being both tenuous, and, also lacking in tenacity.

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

14. The appeal is allowed. The impugned judgment is quashed and set aside. The accused is acquitted. Case property be destroyed after the expiry of the period of limitation, for filing an appeal. Fine amount, if deposited by the accused, be forthwith refunded to him. Personal and surety bond(s) be forthwith discharged. All pending application(s), if any, are also disposed of.

Cr. Appeal No. 487 of 2008

In view of the findings recorded upon Cr. Appeal No. 451 of 2008, the instant appeal is dismissed as infructuous. All pending application(s), if any, are also disposed of.

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

Nasir Mohammad .....Petitioner.

Versus

State of H.P. .....Respondent.

Cr. M.P. (M) No. 138 of 2019
Reserved on: 7.3.2019.
Date of Decision: 15.3.2019

Code of Criminal Procedure, 1973 - Section 439 - **Narcotic Drugs and Psychotropic Substances Act, 1985 (Act) -** Sections 20 & 37**–** Recovery of 2 kg. 10 gm of charas-Bail-Grant of- Accused seeking bail on ground that pure resin contents bring recovered material into less than commercial quantity and rigors of Section 37 of Act are not attracted- Held, if any narcotic drug or substance is found mixed with one or more neutral substance(s), then for purpose of imposition of punishment only pure contents of substance are to be considered- Pure content is reckonable parameter for granting bail- Pure contents of stuff allegedly recovered from accused bring it into less than commercial quantity- Petition allowed- Conditional bail granted. (Paras 14 to 16)

Cases referred:
E. Micheal Raj vs. Intelligence Officer, Narcotic Control Bureau, (2008)5 SCC 161
Harjit Singh vs. State of Punjab, (2011)4 SCC 441
Hira Singh & Anr. vs. Union of India, Cr. Appeal No. 722 of 2017 decided on 3.7.2017
Mohd. Sahabuddin and another vs. State of Assam, (2012) 13 SCC 491
Rajvir Singh @ Raju vs. State of Punjab, CRM-M-35080-2018
State of H.P. vs. Mehboob Khan, 2013 (3) Shimla 12 Law Reporter (FB) 1834

For the Petitioner: Mr. Kulbhushan Khajuria, Advocate.
For the Respondent: Mr. Hemant Vaid, Addl.A.G with Mr. Yudhveer Singh Thakur and Mr. Vikrant Chandel, Deputy Advocates General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant petition has been filed by the bail applicant, under, Section 439 Cr. P.C., wherethrough he seeks, the indulgence, of his being ordered to be released from judicial custody, whereat, he stands extantly lodged, for, his allegedly committing offences, punishable under Sections 20,25 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "ND &PS Act), in case FIR No. 273 of 2016 dated 16.12.2016, registered with Police Station, Sadar, District Chamba.

2. The instant petition, warrants, an, adjudication being meted, vis-a-vis, (a) the aggregate or the total weight, of, the banned narcotic substance, rather comprising the apposite parameter, for, making a further determination, qua, thereupon, the purported recovery(ies), from, the alleged conscious and exclusive possession of the petitioner, being amenable, for, being categorized, as, (a) commercial quantity or more than commercial quantity thereof, (b) AND/ or the aggregate or the gross weight, of, the entire contents, as, carried in the recovered psychotropic substance, hence constituting the reckonable parameter, for making the apt determination, qua effectuation, of recovery(ies) thereof, from, the exclusive, and, conscious possession, of, the accused, being, hence construable to be (i) small quantity or (ii) more than small quantity or (iii)commercial quantity thereof.

3. In the instant case, registered against petitioner herein, the FSL concerned (i) qua 2 kg. 10 gram of charas, allegedly recovered, from, the exclusive and conscious possession of petitioner herein, has opined, that (i) the quantity, of, the purified content, of, the aforesaid contraband as found, in the exhibit, carrying a weight, of, 18.76% hence, prima-facie, the pure content thereof, of, the aforesaid narcotic substance, as extracted from the bulk thereof, falls within, domain, of, small quantum of, the aforesaid narcotic substance, as extracted from the bulk thereof, rather falls within, domain, of, greater than small quantity and less than, the commercial quality thereof, (ii) yet the aggregate weight, of, the narcotic substance(s), as, recovered from the exclusive possession of the accused, without segregating therefrom, the pure contents, thereof renders, the apposite haul, to fall, within, the domain, of it being construable to be categorized, as, more than commercial quantity (iii) thereupon reiteratedly also an adjudication, is to be meted qua any of the apt pure contents thereof, hence, comprising the apt parameter(s).

4. Mr. Kulbhushan Khajuria, learned counsel appearing, for the petitioner, contends, that, with hence charas, occurring at serial No.23 of, the table appended, with, the ND& PS Act, and, with a clear, and, candid prescription, borne therein, qua 100g, being specified, as, small quantity thereof, (i) hence, the aggregate quantum, only of, the aforesaid pure contents, as, borne in the seized narcotic substances, alone, being construable, to be the apt reckonable principle, for making the further determination, vis-a-vis, the narcotic substances recovered, from the exclusive and conscious possession, of the accused, dehors, the total bulk of the afore contraband, hence, falling or not falling, within the domain, of, small or more than small or commercial quantity thereof, (ii) specifically, when the table, with, clear explicitly hence refers to charas, and, omits to make any explicit reference therein, vis-a-vis, the other part of the narcotic substance/neutral substance, carried in the seized contraband, rather, being also reckonable, nor, with, the total or aggregate weight, whereof, of, the entire milli-gram, carried in the seized contraband, being mandated to comprise, the justifiable principle, hence, for making, the apt reckoning qua, the entire seizure hence falling within the domain of small quantity or more than small or commercial quantity thereof.

5. In making the aforesaid submissions, the learned counsel, appearing for the petitioner, has placed reliance, upon, the verdict pronounced, by, the Hon'ble Apex Court, in a case titled as *E. Micheal Raj vs. Intelligence Officer, Narcotic Control Bureau*, reported in *(2008)5 SCC 161*, the relevant paragraph No.19 whereof stand extracted hereinafter:-

> "16. On going through Amarsingh case (2005)7 SCC 550, we do not find that the Court was considering the question of mixture of a narcotic drug or psychotropic substance with one or more neutral substance/s. In fact that was not the issue before the Court. The black-coloured liquid substance was taken as an opium derivative and the FSL report to the effect that it contained 2.8% anhydride morphine was considered only for the purposes of bringing the substance within the sweep of Section 2(xvi)(e) as `opium derivative which requires a minimum 0.2% morphine. The content found of 2.8% anhydride morphine was not at all considered for the purposes of deciding whether the substance recovered was a small or commercial quantity and the Court took into consideration the entire substance as an opium derivative which was not mixed with one or more neutral substance/s. Thus, Amarsingh case (supra) cannot be taken to be an authority for advancing the proposition made by the learned counsel for the respondent that the entire substance recovered and seized irrespective of the content of the narcotic drug or psychotropic substance in it would be considered for application of Section 21 of the NDPS Act for the

> purpose of imposition of punishment. We are of the view that when any narcotic drug or psychotropic substance is found mixed with one or more neutral substance/s, for the purpose of imposition of punishment it is the content of the narcotic drug or psychotropic substance which shall be taken into consideration. " (p.170-171)

(a) wherein an affirmative view has been pronounced, vis-a-vis any narcotic drug, and, psychotropic substance(s), upon, theirs being found rather mixed with one or more neutral substance(s), thereupon, for the purpose of imposition of punishment, only the weight, of, pure contents' of the narcotic drug, and, the weight, only of, the psychotropic substance, being the alone reckonable besides the apt parameter(s).

6. The learned counsel appearing for the petitioner also placed reliance, upon, a judgment of the Hon'ble Apex Court, rendered, in a case titled, as, ***Mohd. Sahabuddin and another*** *vs.* ***State of Assam***, reported in *(2012) 13 SCC 491*, relevant paragraph(s) No.11 and 12 whereof, stand extracted hereinafter:-

> "11. The submission of the learned counsel for the appellants was that the content of the codeine phosphate in each 100 ml. bottle if related to the permissible dosage, namely, 5 ml. would only result in less than 10 mg. of codeine phosphate thereby would fall within the permissible limit as stipulated in the Notifications dated 14.11.1985 and 29.1.1993. As rightly held by the High Court, the said contention should have satisfied the twin conditions, namely, that the contents of the narcotic substance should not be more than 100 mg. of codeine, per dose unit and with a concentration of not more than 2.5% in undivided preparation apart from the other condition, namely, that it should be only for therapeutic practice. Therapeutic practice as per dictionary meaning means 'contributing to cure of disease'. In other words, the assessment of codeine content on dosage basis can only be made only when the cough syrup is definitely kept or transported which is exclusively meant for its usage for curing a disease and as an action of remedial agent.
>
> 12. As pointed out by us earlier, since the appellants had no documents in their possession to disclose as to for what purpose such a huge quantity of Schedule 'H' drug containing narcotic substance was being transported and that too stealthily, it cannot be simply presumed that such transportation was for therapeutic practice as mentioned in the Notifications dated 14.11.1985 and 29.1.1993. Therefore, if the said requirement meant for therapeutic practice is not satisfied then in the event of the entire 100 ml. content of the cough syrup containing the prohibited quantity of codeine phosphate is meant for human consumption, the same would certainly fall within the penal provisions of the N.D.P.S. Act calling for appropriate punishment to be inflicted upon the appellants. Therefore, the appellants' failure to establish the specific conditions required to be satisfied under the above referred to notifications, the application of the exemption provided under the said notifications in order to consider the appellants' application for bail by the Courts below does not arise."
>
> (p.495-496)

(A) wherein it stands expostulated, qua, for the bail applicant concerned, deriving, the benefits, of, notifications respectively issued, on 14.11.1985, and, on 29.1.1993, it being incumbent, for them to establish (a) the twin conditions qua the contents of narcotic substances imperatively, not, exceeding 100 mg per dose unit, (b) and with a concentration of, not, more than 2.5% in undivided preparation, and, apart therefrom, the other condition, of, it being evidently transported, only for therapeutic practice i.e. for contributing to cure of

disease, also, necessitating, its, imperative satisfaction. However, the reliance placed thereupon, is inapt, for the reasons (i) the counsel not bearing in mind the trite factual matrix, as, appertaining to the case supra, as, occurs in preceding paragraph No.10 thereof, wherein, there is a trite display, of the apt recovery, effectuated, from, the accused therein, being vis-a-vis bottles of Phensedyle cough syrup, whereinwithin existed, hence, 183.15 to 189.85 mg of codeine phosphate, and, each 100 ml bottle of Recodex cough syrup, also, contained 182.73 mg of codeine phosphate, (ii) AND obviously, even after, multiplying the aforesaid quantum of codeine phosphate, as, carried in each 100 ml., bottle(s) of Phensedyle cough syrup, and, of Phensedyl, with the respective numerical strength, of, the respective cache, of, bottles, thereupon, also the level of the banned narcotic drug, namely, codeine phosphate, being, in a quantum, whereupon, obviously the carrying thereof, of, even pure contents of codeine phosphate, as, borne in the cache, of, seized bottles, of, Phensedyle cough syrup, and, of Recodex cough syrup, is rendered hence, to fall within the ambit, of, commercial quantity thereof, (iii) hence, in succeeding paragraph No.12, the Hon'ble Apex Court, had propounded that, yet, with a notification of 14.11.1985, and, of 29.1.1993, enjoining upon the accused, to satisfy the aforesaid twin conditions, and, the material thereat also evidently, bearing out, qua its being transported, for therapeutic practice, thereupon, alone all the benefit(s) thereof, being accruable, vis-a-vis, the accused. Contrarily, obviously the level or extent or quantum, of the pure content, of the banned narcotic drug(s), namely, codeine phosphate, as, carried, in each, of the seized bottles, after, segregating therefrom hence the contents of the other part of the mixture, borne in each of the bottle(s), renders, the, apt quantum thereof, to, fall within small quantity thereof, (iv) thereupon, hence the ratio decidendi, propounded, in the aforesaid case, being unavailable for bestowal upon the accused herein, (v) more so when neither the notifications alluded therein, are, espoused hereat, for deriving, the, apposite benefits thereof, nor the twin conditions embodied, therein, are, hereat propagated nor when the extant cache, is, espoused, to be transported, only for therapeutic use, rather is a narcotic drug, than a psychotropic substance, as was thereat. Consequently, reliance upon the case supra, is, inaptly placed. Contrarily, the factual scenario prevailing hereat, is, covered by the pronouncement, made, in E. Micheal's case (supra), given the afore verdict answering with aplomb the conundrum qua (a) upon any narcotic drug or psychotropic substance being found standing mixed with one or more neutral substance/s, thereupon for the purpose of imposition of punishment, only the pure content of the narcotic drug or psychotropic substance, rather comprising the apt reckonable parameter, (b) AND when hereat, the, resin content is the apposite pure content of the seized narcotic substance substance, thereupon the afore pure content, is, the apt reckonable parameter, for granting bail.

7. The learned counsel appearing for the petitioner also places reliance, upon, a judgment of the Hon'ble Apex Court, rendered in a case titled, as, *Harjit Singh vs. State of Punjab, (2011)4 SCC 441,* (i) wherein, vis-a-vis, the seizure of 7.10 kg of opium, as, effectuated, from, the exclusive and conscious possession of the accused therein, and, with its being opined, to contain 0.8% morphine, it standing expostulated qua hence the entire mass or gross weight, of the opium rather being the apt reckoner, dehors the percentum of morphine, occurring therein (ii) It has also been expostulated, therein that the entire quantity or the gross weight, of the entire ill substance, being rather recknonable, for making the further apt determination, qua whether the recovered substance, hence falling within small quantity or greater than small quantity or commercial quantity thereof. The apt paragraph No.21 of Harjit Singh's case (supra), stands extracted hereinafter:-

> "21. In the instant case, the material recovered from the appellant was opium. It was of a commercial quantity and could not have been for personal consumption of the appellant. Thus the appellant being in possession of the

> contraband substance had violated the provisions of Section 8 of the NDPS Act and was rightly convicted under Section 1018(b) of the NDPS Act. The instant case squarely falls under clause (a) of Section 2(xv) of the NDPS Act and Clause (b) thereof is not attracted for the simple reason that the substance recovered was opium in the form of the coagulated juice of the opium poppy. It was not a mixture of opium with any other neutral substance. There was no preparation to produce any new substance from the said coagulated juice. For the purpose of imposition of punishment if the quantity of morphine in opium is taken as a decisive factor, Entry No.92 becomes totally redundant. Thus, as the case falls under clause (a) of Section 2(xv), no further consideration is required on the issue. More so, opium derivatives have to be dealt with under Entry No.93, so in case of pure opium falling under clause (a) of Section 2(xv), determination of the quantity of morphine is not required. Entry No.92 is exclusively applicable for ascertaining whether the quantity of opium falls within the category of small quantity or commercial quantity."

(iii) Though evidently, the seized contraband i.e. opium, did, contain some per centum of morphine, yet therein, it, has also been propounded, that the existence, of, some per centum of morphine therein, being an irrelevant factor, for determining qua hence the substance or contraband seized, from, the exclusive and conscious possession of the accused therein, being construable to be opium, rather the entire quantum, of, the narcotic drug or substance, as, recovered from the exclusive and conscious possession of the accused therein, being the solitary apt determinant, (iv) thereupon also the aforesaid, expostulation, does not give any leverage to the espousal, of, the counsel for the bail applicant, rather contrarily support therefrom, is, derived by the State, for contending that the gross weight or the aggregate, of the entire contraband, borne in the apt narcotic substances, as recovered, from the conscious and exclusive possession, of the accused, being, the only recknonable factor, for making the apt determination.

8. The learned Addl. Advocate General submits, that with notification bearing S.O.2941(E) of 18.11.2009 whereunder Note 4 in the table, at the end of Note 3, is added, (i) with a prescription therein, qua the quantum or the level of presence, of, the pure banned narcotic drug, in, the seized cache, being not the singular, reckonable parameter, for making an apt determination, of, quantification thereof, thereupon, the espousal addressed before this Court, by the counsel for the petitioners, hence, rather warranting rejection. The aforesaid submission, is further anvilled, upon, a verdict pronounced by the Hon'ble Apex Court in *Cr. Appeal No. 722 of 2017, titled as Hira Singh & Anr. vs. Union of India,* decided on 3.7.2017, whereunder, the hereinafter extracted questions, stand referred, for determination, by a larger Bench of the Hon'ble Apex Court, and, more particularly with the apt reference, appertaining, vis-a-vis, the legal expostulation settled by the Hon'ble Apex Court in E. Micheal Raj's case (supra), being or not being per incuriam, vis-a-vis, the notification of 19.10.2001, rather hence awaiting rendition thereon, thereupon, the benefits of all the trite expostulations, borne in, E. Micheal Raj's Case (supra) being not affordable, to the bail petitioners,

> "(a) Whether the decision in this Court in E. Micheal Raj (supra) requires reconsideration having omitted to take note of entry No.239 and Note 2(two) of the notification dated 19.10.2001 as also the interplay of other provisions of the Act with Section 21?
>
> (b) Does the impugned notification issued by the Central Government entail the redefining the parameters for constituting an offence and more particularly for awarding punishment?

(c) Does the Act envisage that the mixture of narcotic drug and seized material/substance should be considered as a preparation in totality or on the basis of the actual drug content of the specified narcotic drug?

(d) Whether Section 21 of the Act is a stand alone provision or intrinsically linked to the other provisions dealing with "manufactured drug" and "preparation" containing any manufactured drug?

however, the aforesaid submission is rejected, for the reasons, (i) qua nowat, with, the larger Bench of the Hon'ble Apex Court, not making any pronouncement, upon the afore-extracted questions, as, referred thereto, (ii) AND in aftermath, with, the vires of the apt notification standing not upheld nor reversed nor the verdict pronounced by the Hon'ble Apex Court, in, E. Micheal Raj's case (supra), with, the afore applied clear expostulations (supra) occurring therein, standing neither quashed nor set aside, thereupon, dehors any apt non-rendition thereon , it is not deemed just, fit and appropriate, to curtail the liberty of the bail petitioner. Paramountly also any benefit, strived to be derived by the prosecution, from, Harjit Singh"s case (supra) cannot prevail, given (a) the reference to the larger Bench, rather appertaining to not to the, afore verdict, rather it appertaining, vis-à-vis, the premier initial verdict rendered in E. Michael Raj's case (supra), verdict whereof is directly attractable, vis-à-vis, the controversy at hand, (b) thereupon, till the afore referred apt reference made to a larger Bench, vis-à-vis the efficacy of the pronouncement, occurring in E. Michael Raj's case, stands answered, and, whereunder hence the verdict rendered in E.Michael Raj's case hence is annulled, (c) thereupto the clout and efficacy, of the verdict rendered in E.Michael Raj's case remains intact, (d) AND also only the afore verdicts' efficacy, is to be nowat tested, than, of Harjit Singh's case (supra), efficacy whereof has remained un-referred to the larger Bench, (e) and till the comparative efficacies of both, the afore verdicts are determined by the larger Bench, hence it is deemed fit to nowat follow the decision in E.Michael Raj's case (supra), (f) even otherwise, the trite factum of pure content of the relevant narcotic drug/substance being or not, the relevant apt reckonable parameter, when stands earlier decided in E.Michael Raj's case, by a Bench strength holding a numerical strength co-equal, to the one which rendered, the, subsequent verdict in Harjit Singh's case (supra) (g) and when the afore earlier pronouncement, as made, vis-à-vis the controversy at hand, may prima-facie, on the principle of propriety be binding on the subsequent Bench of the Hon'ble Apex Court, holding a Bench strength, co-equal to the earlier Bench strength, which rendered a verdict, in, Michael Raj's case (supra), (h) thereupon also till the comparative merit of both the verdicts (supra) are evaluated by a larger Bench, it is deemed fit to follow the initial premier verdict rendered in E. Michael Raj's case (supra).

9. At this stage, the learned Additional Advocate General has placed on record, an order rendered upon Cr.M.P(M) No. 1145 of 2014, by the Hon'ble Division Bench of this Court, upon a reference made to it, by the learned Single Judge, with respect, to the comparative applicability, of, the verdict(s), made, in E. Micheal Raj's case (supra), and, in Harjit Singh's Case, whereon, the Division Bench of this Court, has rather assigned merit, to the pronouncement made, in, Harjit Singh's case. However, the aforesaid verdict is distinguishable, and, may not be applicable hereat, given circumstances since then up to now, rather begetting an immense change, (i) change whereof stands comprised, in, the Hon'ble Apex Court in Hira Singh case, making, the aforesaid reference, vis-a-vis, a larger Bench, (ii) wherein only the validity of the pronouncement, made in E Micheal"s Case, stands referred for determination, to a larger Bench. Since the reference made by the Hon'ble Apex Court vis-a-vis, the conundrum, wherewith this Court is beset, prima-facie prevails, upon, the earlier therewith pronouncement made upon an apposite reference, by the Division Bench of this Court, (iii) thereupon, before validating the adjudication made by

the Division Bench of this Court, it is deemed fit, to, await rendition, of, an order by the larger Bench, of the Hon'ble Apex Court, upon, a reference made vis-a-vis it, only, vis-a-vis, the binding effect, of, E Micheal Raj's case.

10. The learned Additional Advocate General, has placed on record an order/judgment, rendered by a co-ordinate Bench of this Court, in Cr.M.P(M) No. 1751 of 2018, wherein, a view dis-concurrent vis-a-vis the view taken by this Court has been taken. The reason which prevailed upon the co-ordinate Bench of this Court, to, take a view different from the one earlier taken by this Court, is, anvilled upon the factum that the import and relevance of the reference, made by the larger bench of the Hon'ble Apex Court in case Hira Singh & Anr. vs. Union of India (supra) rather not eroding the effect of the judgment rendered by a full Bench of this Court in *State of H.P. vs Mehboob Khan,* 2013 (3), Shimla 12 Law Reporter (FB) 1834, and, also not diluting the rigor of a verdict pronounced by the Hon'ble Apex Court, in, Harjit Singh's case (supra)

11. The further reason assigned by the co-ordinate Bench of this Court, to, not accept the reasonings' made by this Court, while earlier affording the facility of bail to various bail applicants, who, motioned this Court, for indulgence thereof is (a) anvilled upon the reference made by the Hon'ble Apex Court in Hira Singh's case (supra) wherein, the amended notification No. S.O.1055(E) of 19.10.2001 wherethrough Note 4 was added in the end of Note 3, and, wherein the validity of the pronouncement made in E Michael Raj's Case (supra) was referred hence for consideration to a larger Bench of the Hon'ble Apex Court, (b) hence given E.Micheal Raj's case (supra) rather omitting to take note of entry No. 239, and, also of Note 2, besides, of notification of 19.10.2001, as, also of the interplay of the other provisions of the Act with Section 21, (c) also stands, though, limited to the validity of the pronouncement made in E Michael Raj's Case (supra), yet ipso facto, hence the afore reference not perse invalidating, the, judgment rendered by the Hon'ble Apex Court in Harjit Singh's case (supra) (d) preeminently also, thereupon the afore judgment, rendered in Harjit Singh's case (supra), upto, the stage of its being disturbed or set aside by a subsequent thereto verdict, hence, rendered by a Bench of the Hon'ble Apex Court larger in numerical strength, vis-a-vis, the Bench of the Hon'ble Apex Court, hence, rendering, the, earlier thereto verdict, recorded in E. Michael Raj's case, (e) rather, thereupto the verdict pronounced in Harjit Singh's case (supra) holding clout, and, command, (f) the verdict earlier made by this Court, while, making a vehement dependence, upon, E Micheal Raj's Case (supra), and, when a reference in Hira Singh's Case (supra), is, made to a larger Bench of the Hon'ble Apex Court, rather only in respect of its validity, and, with E Michael Raj case (supra) hence, not, standing attracted, vis-a-vis, charas, (g) given, the contraband recovered in E Micheal Raj's case (supra) being Heroin, and, not charas, (h) in Mehboob Khan's case (supra), an unambiguous verdict standing rendered that, unless, the presence of, a, material substance is established, hence, the entire mass of charas being construed to be contraband, (i) however, for the reasons' to be assigned hereinafter, all the afore reasons', cannot come to be accepted by this Court, preeminently with the Punjab and Haryana High Court in case CRM-M-35080-2018 titled, as *Rajvir Singh @ Raju vs State of Punjab*, rather taking a view holding concurrence with the view earlier taken by this Court, (j) and, obviously hence the view dis-concurrent taken by a co-ordinate Bench of this Court in Cr.M.P(M) No. 1751 of 2018, vis-a-vis, the verdict earlier made, by this Court, rather cannot be accepted by this Court, (k) a bare reading of the definition of charas encapsulated in Section 2 (iii) (a) of the ND & PS Act, with, amplifying clarity, makes a vivid echoing qua it being hence separated resin, in whatever form, whether crude or purified, (l) and also with the afore clause defining with explicitly, and also, making a statutory contemplation qua concentrated preparation, and, resin known as Hashish oil or liquid Hashish, all falling, within the statutory definition of charas, (m) thereupon, the separated resin or resinous

substance, is, the solitary factor or substance being hence reckonable for hence it, falling or not falling within or outside the afore domain, of, the statutory definition of charas, (n) and, also concomitantly rather only the weight thereof, is, the apt reckonable factor, for, determining qua its constituting small, intermediate or commercial quantity thereof.

12. Further more the effect, if any, of the notification holding prescription, if any, contrary to the afore definition of charas, is, the apt conundrum, borne in Hira Lal's Case (supra), and, is referred for adjudication to a larger Bench, of, the Hon'ble Apex Court, and, obviously unless an adjudication is meted thereon, also, specifically vis-a-vis its vires, thereupto this Court is of the firm view that the indulgence of bail, cannot be refused, to the bail applicant, given, E Micheal's case (supra) rather holding both sway and clout.

13. Be that as it may, the view taken by the co-ordinate Bench of this Court different than the earlier view taken by this Court, is, unacceptable to this Court, as, it is anvilled, upon, the principle contemplated in Mehboob Khan's case, principle whereof, is, in nutshell, stands echoed in, the, judgment, of, the co-ordinate Bench of this Court, relevant paragraph whereof stands extracted hereinafter:-

> "25. On the issue under consideration, in Mehboob Khan's case, the full Bench of this High Court, keeping in view the definition of 'Charas' in unambiguous terms, has held that unless presence of material substance is established, entire mass of charas shall be considered as contraband."

(a) when a reading thereof unveils, that unless, the presence of material substance is established, thereupon the entire mass or bulk is to be construed to be charas. However, when hereat, the, report of the FSL concerned, rather underscores the quantum, of, resinous substance, as carried in the bulk allegedly, as, recovered from the conscious and exclusive possession of the accused, and, when the afore resinous substance, is the solitary, statutorily recoknable factor, for construing whether is charas, and, also when weight thereof is concomitantly, hence the, singular recoknable parameter, for determining qua its falling within or outside hence the apt small, intermediate or commercial quantity thereof, (b) thereupon in the instant case, reliance, if any, upon, a verdict in Mehboob Khan's case (supra), would be misplaced, and, this Court would not proceed to accept the view, on anvil thereof, as, taken by the co-ordinate Bench of this Court.

14. Even though, the learned Additional Advocate General, has contended, that clause (c) of Section 2(iii) of the ND & PS Act, enables him to contend, that any neutral substance, as, coagulated alongwith the bulk of resin being also construable, to be a part of resinous substance, and, also hence being construable, to be charas, and, he further contends that the afore propagation, is, both weighty, and, vigorous, as all clauses (a) to (c) of Section 2 (iii) of the ND & PS Act, are cumulatively readable, more specifically, clause (c) in the instant case, is, readable with clause (a). Even if the afore submission addressed by the learned Additional Advocate General has some vigor, yet its vigor is diluted, by the factum (i) qua given in E Micheal Raj's case, the afore argument appearing to stand dealt with, and, adjudicated upon, and, with the hereinafter extracted apt portion thereof:-

> 15. It appears from the statement of Objects and Reasons of the amending Act of 2001 that the intention of the legislature was to rationalize the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentence, the addicts and those who commit less serious offences are sentenced to less severe punishment. Under the rationalized sentence structure, the punishment would vary depending upon the quantity of offending material. Thus, we find it difficult to accept the argument advanced on behalf of the

> respondent the rate of purity is irrelevant since any preparation which is more than the commercial quantity of 250 gm and contains 0.2% of heroin or more would be punishable under Section 21(c) of the NDPS Act, because the intention of the legislature as it appears to us is to levy punishment based on the content of the offending drug in the mixture and not on the weight of the mixture as such. This may be tested on the following rational. Supposing 4 gm of heroin is recovered from an accused, it would amount to a small quantity, but when the same 4 gm is mixed with 50 kg of powdered sugar, it would be quantified as a commercial quantity. In the mixture of a narcotic drug or a psychotropic substance with one or more neutral substance(s) the quantity of the neutral substance(s) is not to be taken into consideration while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance. It is only the actual content by weight of the narcotic drug which is relevant for the purposes of determining whether it would constitute small quantity or commercial quantity. The intention of the legislature for introduction of the amendment as it appears to us is to punish the people who commit less serious offences with less severe punishment and those who commit grave crimes, such as trafficking insignificant quantities, with more sever punishment."

also making an emphatic, and, categorical expression, that, in making the relevant determination, vis-a-vis, the apt weight(s), the weight, of, one or more neutral substance(s), as, mixed with the relevant narcotic drug or psychotropic substance, rather, being excludable, (ii) and only, the, weight of the apt pure content, of, the Narcotic drug or Psychotropic substance, being the appropriate reckoneable parameter, and, also only the relevant weight thereof, being enjoined to be gauged. Thereupon, even though, the afore verdict was not dealing with charas, mixed with the one or more neutral substance(s), yet the hereinabove extracted apt portion thereof, adequately benumbs the afore espousal, as, made by the learned Additional Advocate General, (iii) thereupon the weight of the neutral substance added or coagulated with the pure content, of, charas, is, unreckonable hence, for, making any further determination, whether, the apt seizure being construable to be falling, within or outside the category of small, intermediate or commercial quantity. Moreover, when the afore explicit pronouncement, made in E Micheal Raj's case (supra), has been rendered for adjudication in Hira Singh's case (supra), to a larger bench of the Hon'ble Apex Court,also, hence thereupto this Court, does not deem it fit, to refuse indulgence of bail, and, in making the aforesaid conclusion, this Court is also deriving the fullest leverage, from a judgment rendered, in, Rajvir Case (supra).

15. Even though, hence dis-concurrent/divergent views are expressed by this Court, and, by a co-ordinate Bench of this Court, vis-a-vis, the conundrum hence besetting both the Courts, (a) yet this Court is constrained not to refer the afore conundrum, for, an adjudication thereon being rendered, by a larger Bench of this Court, as (b) the Hon'ble Apex Court while making a decision in Hira Singh's case (supra), has, hence thereunder made a reference to a larger bench, of the Hon'ble Apex Court, vis-a-vis, the conundrum besetting this Court (c) thereupon when verdicts of the Hon'ble Apex Court are binding upon this Court, (d) thereupon, for avoiding emanation, of, an earlier thereto conflicting rendition by a larger Bench of this Court, vis-a-vis the verdict as may come, from, the larger Bench, of, the Hon'ble Apex Court, upon a reference made qua it in Hira Singh's case (supra), also, thereupto it would be insagacious or unbefitting, to rest, the validity of conflicting verdicts recorded by co-ordinate Benches of this Court, by making a reference to a larger Bench of this Court.

16. Consequently, the petition is allowed, and, the bail petitioner is ordered to be released, on bail, subject to his complying with the following conditions:

(i) that the bail applicant shall furnish personal bond in the sum of Rs 5,00,000/- with three sureties in the like amount to the satisfaction of the learned Special Judge, Chamba.

(ii) that the bail applicant shall join the investigation, as and when required by the Investigating Agency;

(iii) that he shall not directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iv) that he shall not leave India without the prior permission of the Court ;

(v) that he shall deposit his passport, if any, with the Police Station concerned; and

(vi) that in case of violation of any of these conditions, the bail granted to the petitioner shall be forfeited and he shall be liable to be taken into custody.

(vii) that upon his re-indulging in crime, thereupon the State is at liberty for motioning this Court, for, cancellation of the bail.

17. Any observation made hereinabove, shall not, be taken as an expression of opinion on the merits, of the case, and, the trial Court shall decide the matter uninfluenced by any observation made hereinabove.

****

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

Himachal Pradesh State Road and other
Infrastructure Development Corporation Ltd. ....Appellant.

Versus

M/s C & C Construction Ltd ....Respondent.

Arb. Appeal No. 3 of 2019.
Reserved on : 02.04.2019
Decided on: 22.04.2019.

Arbitration and Conciliation Act, 1996 (Act) - Sections 17 & 37 – Interim orders pending arbitration- Sustainability- After termination of contract, Corporation confiscating plant, machinery etc. of Contractor towards amount allegedly due to it by invoking clause 15.2 thereof- Arbitrator directing Corporation to restore possession of properties to Contractor as interim measure- Challenge thereto- Held, words "payment due to employer" (Corporation) used in contract refer to definite sum arrived at upon legal adjudication- Such amount cannot be determined unilaterally by Corporation as due to it from Contractor- As such right to confiscate and sell properties of Contractor would accrue only after adjudication of "payment due to employer" (Corporation) either by court of law or through process of arbitration- Unliquidated damages as claimed by Corporation do not become "payment due" till matter is adjudicated in its favour- No adjudication so far in favour of Corporation that it is entitled for unliquidated damages- Arbitrator right in directing restoration of confiscated properties to Contractor- No infirmity in his order- petition dismissed. (Paras 19 to 21)

Indian Contract Act, 1872- Section 73- Unliquidated damages, whether amounts to debt? Held, unliquidated damages do not take shape of debt until liability is adjudicated and damages are assessed by decree or order of Court or other adjudicatory authority. (Para 19)

Case referred:
Union of India vs. Raman Iron Foundry, AIR 1974 SC 1265

For the appellant	:	Mr. J.S. Bhogal, Sr. Advocate with Ms. Srishti Verma, Advocate.
For the respondent	:	Mr. Ajay Kumar, Sr. Advocate with M/s Navin Kumar and Depal Hode, Advocates.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act'), the appellant has prayed for the following reliefs:-

> *"It is, therefore, respectfully prayed that this appeal be allowed and the order dated 8.3.2019 (Annexure A-4) passed by the Arbitral Tribunal in the arbitration proceedings may be set aside. The appellant may also be allowed its costs in these proceedings and such other and further relief as may be considered just and proper in the facts of the case and justice be done."*

2. Brief facts necessary for adjudication of this appeal are under:-

Parties before this Court entered into a contract, i.e contract bearing no. PW-SRP/RIDC/HP5/ICB/PKG-1), vide which, respondent/claimant (hereinafter referred to as the 'Claimant') was awarded the balance work of widening and strengthening of *Theog-Kotkhai-Kharapatthar* road project from Km. 0+000 to 48+000 by the appellant.

3. Some salient dates of the package are as under:-

a) Date of award of work: 09.10.2013;
b) Date of agreement: 19.11.2013;
c) Date of commencement of work: 09.01.2014;
d) Stipulated date of completion: 30.06.2016;

Vide communication dated 25.09.2018 (page 352 of the paper book), the agreement was terminated by the appellant/employer on the alleged ground of fundamental breach of terms of the agreement by the claimant.

4. Vide communication dated 27.9.2018 (page 354 of the paper book), appellant/employer called upon the claimant to deposit amount due as per notified Employer's claim and outstanding material recovery/secured advance positively within three days. It was mentioned in this communication that Employer reserved its right to notify any remaining/left out recoveries to be effected from the Contractor in terms of contractual provisions. It was further mentioned that the Executive Engineer, NH Div. Theog, HPPWD, will take over the site and confiscate all Materials on the site, Plant, Equipment, Temporary works, works with the help of District Administration.

5. This was followed by communication dated 16.11.2018, which reads as under:-

"To

Sh R.M. Aggarwal,
Director (Technical),
C&C Construction Limited,
Plot No. 70, Institutional, Sector 32,
Gurgaon-122001 (Haryana)

Subject:- Widening and Strengthening of Theog-Kotkhai-Kharapatthar road from Km 0+000 to Km 48+000 (Contract No. PW.SRP/RIDC/ Procurement-ICB-5/Pkg-1/ 2013) & Kharapatthar-Hatkoti-Rohru road from Km 48+000 to 80+684 (Contract No. PW.SRP/RIDC/Procurement/-NCB-5/2013) – Regarding supplying of requisite information of the confiscated machinery/plant/ equipment.

Reference:- 1.Employer's letter no. HPRIDC/SRP/EE- (T&D)/ICB-5/Gen.(Vol- XII)/2018-1759- 62 dated 27.09.2018.

2.Employer's letter no. HPRIDC/SRP/EE- (T&D)/ICB-5/Gen.(Vol- VII)/2018-1743- 46 dated 26.09.2018.

3. Employer's email dated 17.10.2018.

Sir,

In continuation to above referred letter and email, the assessment of the confiscated plant/machinery/equipment done by the committee formed by Superintending Engineer, Mechanical HPPWD, Dhalli is enclosed herewith. It is noted in the assessment that some requisite information such as Registration No. Make & Model, Engine No., Chassis No., Year of Manufacture and up to date taxes deposited with concerned authorities are not available with the Employer. You are requested to provide the above said documents/information on or before November, 25, 2018 through some responsible key person failing which further action shall be taken as per the relevant contractual provisions. The same is required to be furnished by you at the earliest so that next action for the auction of the confiscated plant/machinery/equipment can be taken at the earliest.

Further depreciation in the valuation due to delay in supplying the requisite information and extended cost of watch and ward, etc, may be recovered from you.

Therefore, you are once again requested to furnish the above cited information to this office at the earliest.

Encl: As above

Chief Engineer-cum-Project Director,
State Roads Project, HPRIDC,
Nirman Bhawan, Shimla-2."

6. Feeling aggrieved, claimant filed Arbitration Petition No. 110 of 2018 before this Court under Section 9 of the Arbitration and Conciliation Act, 1966, in which, on 05.12.2018, this Court passed the following order:-

"Issue notice. Ms. Srishti Verma, Advocate, appears and waives notice on behalf of the respondent. She prays for and is granted two weeks' time to file reply.

List on 26.12.2018. In the meanwhile, it is ordered that machinery seized by the respondent shall not be put to auction".

7. Said petition was finally disposed of by this Court on 28.01.2019 in the following terms:-

"Mr. Ajay Kumar, earned Senior Counsel, representing the petitioner, states that as per instructions imparted to him, the present petition, has rendered, infructuous because during the pendency of the present petition, Arbitration Tribunal stands constituted for the adjudication of dispute inter se parties. He further contended that though now disputes inter se parties are required to be adjudicated by the learned Tribunal, so constituted in terms of agreement inter se parties, but till the time, application for interim protection/measures filed on behalf petitioner, is not decided by learned Arbitration Tribunal, interim order passed by this Court may be ordered to be continued.

2. Mr. J.S. Bhogal, learned Senior Counsel representing the respondent(s), fairly acknowledged the factum with regard to constitution of learned Arbitration Tribunal and contended that petitioner may be directed to file an application under Section 17 of the Arbitration and Conciliation Act, 1996, within time bound manner, so that application for interim measures is decided within stipulated period.

3. Consequently, in view of the above, present petition is disposed of, as having rendered infructuous. However, it is further ordered that petitioner shall file application under Section 17 of the Arbitration and Conciliation Act, 1996, if any, within a period of two weeks from today and thereafter, same would be decided by the learned Arbitration Tribunal expeditiously, preferably, within a period of four weeks. Till the disposal of application as referred to above, interim protection granted by this Court vide order dated 5.12.2018, shall remain in inforce.

4. The petition(s) stands disposed of accordingly, so also, the pending application (s), if any."

8. Thereafter, claimant filed a petition under Section 17 of the Act before the learned Arbitral Tribunal praying for the following reliefs:-

"It is therefore most respectfully prayed that this Hon'ble Court may be pleased to order as under/grant following relief to the claimant:

a) restraining the Respondent from disposing of or selling or auctioning or parting with possession of the illegally seized equipment, machines, plants, material and other assets of the Claimant as informed by the Respondent vide HPRIDC Letter No. 2250-57 dated 16.11.2018 [Annexure P-6 (colly)] and for preservation of the illegally seized equipments, machines, plants, material and other assets of the Claimant pertaining to Road Construction Contract Package I -Theog – Kotkhai – Kharapatthar (km0+000 to Km 48+000 terminated by the Respondent) pending the arbitration proceedings contemplated by the Claimant and Respondent;

(b) direct the Respondent to maintain status-quo with respect to the seized equipment, machines, plants, material etc. as informed vide Claimant's letter dated 16.10.2018;

(c) direct the Respondent to restore the possession of all such seized equipment, machines, plants and materials to the Claimant as per Claimant's letter dated 16.10.2018;

(d) Grant any other or further relief which this Hon'ble Tribunal may deem fit in the facts and circumstances of the case."

9. Vide impugned order, learned Tribunal has disposed of the application filed by the claimant by directing the petitioner/employer to put back the claimant in possession of the machinery equipment and other articles as per the list within a week from the passing of the order.

10. Feeling aggrieved, the petitioner/employer, has filed the present appeal.

11. A perusal of the order impugned demonstrates that learned Tribunal allowed the application filed under Section 17 of the Act primarily on the ground that employer, without adjudication of its claim either through Court of law or through arbitration, could not have had taken recourse to confiscate the machinery and other equipments. According to the learned Tribunal, in order to exercise its so called right of confiscation, even the terms of the contract did not entitle the employer to confiscate the machinery and equipment without the claim having been adjudicated upon qua its entitlement to damages or other dues.

12. Learned Senior Counsel appearing for the petitioner/Employer has argued that the impugned order is not sustainable in law as the findings returned by the learned Tribunal that the employer could not have confiscated the property of the claimant without any adjudication in favour of employer are perverse findings as the same ignore the provisions of Clause 15.2 of the Contract, as in terms of this Clause, after termination of the Contract, the Employer had a right to sell the items of the Contractor if the contractor had failed to make the payment due to the employer. Mr. Bhogal has further argued that a notice in terms of Clause 15.2 of the agreement was served upon the contractor and after the contractor failed to make the payment of the amounts as were due towards the employer, in these circumstances, the employer was within its right to confiscate and sell the properties of the contractor, including the plant, machinery etc and for this, no adjudication in its favour was required. Mr. Bhogal has relied upon the judgment of Hon'ble Supreme Court passed in M/s H.M. Kamaluddin Ansari & Co. v. Shankar Vijay Saw Mills, AIR 1984 Supreme Court 29.

13. On the other hand, Mr. Ajay Kumar, learned Senior Counsel appearing for the claimant/respondent has argued that there is no merit in the appeal as learned Tribunal has correctly concluded that in the absence of there being any adjudication in favour of employer, it could not have had unilaterally and arbitrarily confiscated the properties of the claimant. He has further argued that the so called payments which were purportedly due to the employer from the claimant are in the shape of damages and it is settled law that till the time an adjudication is not made in favour of a party which claims damages, it cannot be said that anything is due to said party from other party. On these bases, he has prayed that as the appeal is without merit, the same be dismissed.

14. I have heard learned Senior Counsel appearing for the parties and also gone through the impugned order as well as the relevant record of the case.

15. The challenge to the judgment passed by learned Tribunal on behalf of the appellant is primarily on the ground that while passing the impugned order, learned Tribunal has erred in not appreciating that Clause 15.2 of the Contract is enforceable without adjudication of the claim of the appellant in terms of the law laid down by Hon'ble Supreme Court in M/s H.M. Kamaluddin Ansari & Co. (supra). Before proceeding further, it is therefore necessary to consider at this stage itself the law laid down by Hon'ble Supreme Court in case referred to supra. In the said judgment, the primary issue before the Hon'ble Supreme Court was interpretation of Clause 18 of the general conditions of the Contract, subject matter of the said case, which read as under:-

> *"18. Recovery of Sums Due: Whenever any claim for the payment of a sum of money arises out of or under the contract against the contract, the purchaser shall be entitled to recover such sum by appropriating in whole or in part, the security, if any,l deposited by the contractor, and for the purpose aforesaid, shall be entitled to sell and/or realise securities forming the whole or part of any such security deposit. In the event of the security being insufficient, the balance and if not security has been taken from the contractor, the entire sum recoverable shall be recovered by appropriating any sum then due or which at any time thereafter may become due to the contractor under the contract or any other contract with the purchaser or the Government or any person contracting through the Secretary. If such sum even be not sufficient to cover the full amount recoverable, the contractor shall be on demand pay to the purchaser the balance remaining due..."*

16. In the said case, appellant before the Hon'ble Supreme Court failed to perform its part of the contract i.e. to supply the books. The contract was cancelled and by a notice, DGS & D called upon the appellant therein to pay the amount, failing which, alternative arrangements would be made to recover the amount. There were also some other contracts between the parties, in which appellant had supplied goods and payments were due to it under pending bills from the respondent. As respondent-Union of India threatened to withhold an amount of `92,364/- from the payments due under the pending bills of other contracts, the appellant-firm sought an injunction under Section 41 read with Second Schedule of the Arbitration Act, and Order 39, Rules 1 and 2 read with Section 151 of the Code of Civil Procedure, restraining the respondents from appropriating, withholding or recovering the amount claimed from its other bills in any manner whatsoever.

17. The moot issue was as to whether the appellant was entitled for an order of injunction as prayed for under Section 41 of the Arbitration Act or not. As there were different opinions in the judgments of the same High Court on the same question, learned Single Judge, who was of the view that such an injunction could be issued, made a reference to the Division Bench. On reference, Division Bench however held that the Court could grant an injunction restraining the respondent from appropriating or recovering the amount of damages claimed from the appellant's other pending bills, but no order restraining the Union of India from withholding payments of the other pending bill could be issued under Section 41 of the Arbitration Act as it would amount to a direction to pay the amount due under other bills and such a prayer would virtually amount to seeking a relief for decreeing the claim of the appellant in those contracts. In appeal, Hon'ble Supreme Court held that injunction order restraining the respondent from withholding the amount due under other pending bills to the contractor virtually amounts to issuing a direction to pay the amount to the contractor and such an order was beyond the purview of Clause (b) of Section 41 of the Arbitration Act. It further held that Clause 18 of the standard contract conferred ample

powers upon Union of India to withhold the amount and no injunction could be issued restraining Union of India from withholding the amount.

18. Coming to the facts of the present case, here it is not as if the appellant before this Court has been injuncted by learned Tribunal from withholding any amount payable to the respondent against other contracts, which appellant intended to withhold on account of the dispute pending before the learned Arbitral Tribunal. Here issue was that post termination of the contract, appellant confiscated the properties of the respondent/contractor by invoking Clause 15.2 of the Contract with the intent of selling them to make good the amount which as per the appellant was due to it from the respondent as damages.

19. In my considered view, the judgment of the Hon'ble Supreme Court referred to above, in fact, has no bearing upon the dispute in hand. The thrust of the learned Senior Counsel appearing for the appellant that it stands substantiated from the said judgment that the appellant could have had exercised the power vested in it under Clause 15.2 of the Contract independent of adjudication of its claim also has no force. Under Clause 18 of the Contract, subject matter of the dispute before the Hon'ble Supreme Court, Union of India had only withheld payments due to the contractor for other contracts. This as per the Hon'ble Supreme Court was permissible. In this case, according to the appellant, on account of acts of omission and commission of the respondent, it is entitled for certain damages. In order to make good those damages, it invoked the provisions of Clause 15.2 of the contract and confiscated the property of the contractor with the intent to sell the same and thus, make good its loss. This, in my considered view, is not permissible unless the damages as claimed by the appellant stand adjudicated upon either by a competent Court of Law or in arbitration proceedings because it is settled law that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. *(See AIR 1974 Supreme Court 1265, Union of India vs. Raman Iron Foundry)*.

20. Clause 15.2 of the Contract *inter alia* provides that after termination of the contract, the Employer may complete the Works and/or arrange for any other entities to do so. The Employer and these entities may then use any Goods, Contractor's Documents and other design documents made by or on behalf of the Contractor. It further provides that Employer can then give notice that the Contractor's Equipment and Temporary Works will be released to the Contractor at or near the Site and the Contractor shall promptly arrange their removal, however, if by this time, Contractor has failed to make the payment due to the Employer, these items may be sold by the Employer in order to recover this payment. Thus, the words used in the Clause are "payment due to the Employer". In my considered view, damages till adjudicated upon in favour of the Employer by a competent Court of law or adjudicatory authority cannot be termed to be "payment due to the Employer". This is for the reason that "payment due to the Employer" has to be a definite arrived at figure, upon legal adjudication, and the same cannot be an amount arrived at unilaterally by the Employer, purportedly due to it, from the contractor. This in fact is not the spirit of Clause 15.2 of the Contract also. At this stage, it is also relevant to refer to the notice which purportedly was given by the Employer to the Contractor in terms of Clause 15.2 of the Contract, which is dated 18.09.2018 (page 252 of the Contract) as the amount claimed therein is *inter alia* delay damages, cost of restoration of damages, etc.

21. In view of discussion held herein-above, there is neither any infirmity nor any illegality in the impugned order. Learned Tribunal has correctly held that the appellant herein without adjudication of its claim either through a competent Court of law or through arbitration could not have taken recourse to confiscate the machinery or other equipments

of the Contractor and even the terms of the Contract do not entitle the Employer to confiscate the machinery and equipments without the claim having been adjudicated upon or finding of its entitlement to damages or other dues returned by competent Court of law. Clause 15.2 of the Contract, otherwise also, has to be read down meaning thereby that the right of the Employer to sell the items, referred to in the said Clause would accrue only after an adjudication of the "payment due to the Employer" has been made either by a competent Court of law or through the process of arbitration.

Hence, as this Court does not finds any merit in the present appeal, nor the order passed by the learned Tribunal suffers from any illegality, irregularity or perversity, present appeal is dismissed. Pending miscellaneous application(s), if any, also stand disposed of. No order as to cost.

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

Smt. Leela Devi .....Petitioner.

Versus

State of Himachal Pradesh & ors. .....Respondents.

CWP No. 839 of 2019

Date of decision: 23rd April, 2019.

Himachal Pradesh Land Records Manual – Para 28.11- Income certificate- Cancellation thereof- Competence of Deputy Commissioner- Held, as per procedure prescribed in the Manual, Deputy Commissioner (Appellate Authority) is not competent to cancel certificate of income issued in favour of person. (Paras 6 to 8)

For the petitioner : Mr. Umesh Kanwar, Advocate.

For the respondents : Mr. Vikas Rathore, Addl. AG with Mr. J.S. Guleria, Dy. AG for respondents No. 1 to 4.

The following judgment of the Court was delivered:

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

In this writ petition order dated 5.3.2019 passed by learned Additional Deputy Commissioner, Sirmour district at Nahan (Appellate Authority under the scheme framed for appointment of Anwanwari worker/helper) is under challenge.

2. The petitioner and respondent No. 5 were candidates to the post of Anganwari Helper in Anganwari Center, Millah, Tehsil Shillai, District Sirmour for which the interview was held on 20.2.2017. The petitioner was selected and appointed as Anganwari Helper in the said center. Her selection and appointment was challenged by respondent No. 5 on the ground that the income certificate she furnished was not genuine.

3. The Appellate Authority during the course of proceedings in the appeal sought report qua the income of the petitioner and private respondent from Tehsildar Shillai, District Sirmour. The inquiry was conducted by the Tehsildar. On the basis of the material

collected during the course of inquiry the income of the petitioner and the private respondent was found more than the prescribed one i.e. Rs.35,000/- per annum from all sources.

4. The report was submitted to the Appellate Authority which was considered and made basis to dismiss the appeal filed by respondent No. 5 and also to quash the selection process held for the post of Anganwari Helper. The Child Development Project Officer, the 4th respondent has been directed to initiate fresh process to appoint suitable candidate as Anganwari Helper in Anganwari Centre, Millah with the observation that the impugned order shall not bar the petitioner and private respondent for applying afresh to the post subject to the condition that they fulfill the eligibility criteria.

5. Chapter 28 of the Himachal Pradesh Land Records Manual deals with the procedure prescribed for issuing various certificates including the income tax certificate. Para 28.11 of chapter 28 reads as follows:

> 28.11 If it is found during inquiry or otherwise, that any information given by the applicant is wrong, the certificate issuing authority shall cancel the certificate after passing a speaking order in this behalf and initiate proceedings against the delinquent under the law. In such a situation, the certificate earlier issued will be replaced by a copy of the cancelled certificate in the electronic record.

6. Therefore, in terms of para 28.11 of this chapter in the event of during the course of inquiry the information supplied by an applicant for issuance of a certificate is held to be wrong, the certificate issuing authority shall cancel the certificate after passing a speaking order in this behalf and initiate the proceedings against the delinquent in accordance with law. In the case in hand the authority issuing the certificate is Assistant Collector Ist Grade, Shillai, District Sirmour. The said authority has issued only a report that the income of the petitioner and for that matter of the private respondent was over and above the prescribed limit i.e. Rs.35,000/- per annum. The income certificates issued in their favour were as such not cancelled and the appellate authority, the Additional Deputy Commissioner, Sirmour district at Nahan has rather accepted the report submitted by the Assistant Collector Ist Grade and cancelled the appointment of the petitioner as Anganwari Helper. Though it is deemed cancellation of the income certificates so issued in favour of the petitioner and also the private respondent, however, as per the further procedure prescribed under chapter 28 of the Manual against the cancellation of the certificate by the competent authority viz in the case in hand Assistant Collector Ist Grade the appeal is maintainable before the officer next higher in the hierarchy i.e. Sub Divisional Officer (Civil) the Appellate Authority. The relevant provisions contained in para 28.1 in this regard reads as follow:

> 28.1 The Tehsildar/Naib Tehsildar Mohal, Sub-Divisional Officer (C), Additional District Magistrate/Additional Deputy Commissioner and Deputy Commissioner concerned shall be the competent authorities to issue all kinds of certificates within their respective jurisdictions. The next higher officer in the official hierarchy shall be the appellate authority for adjudication upon refusal of an officer competent to issue the certificate for issuing a certificate or in case any person is aggrieved about issuance of a certificate to another person.

7. Therefore, the appropriate course available in the matter of cancellation of the income certificates was to have held inquiry by the issuing authority i.e. the Assistant

Collector Ist Grade, Shillai into the authenticity and genuineness thereof and in the event of the information having been supplied by the petitioner and private respondent found to be incorrect, to have cancelled the same by affording them the opportunity of being heard. The decision to cancel the income certificates issued in their favour could have been challenged in an appeal maintainable before the Sub Divisional Officer (Civil), Shillai, District Sirmour in terms of the provisions contained in para 28.1 of Chapter 28 reproduced supra. However, the petitioner and private respondent seems to have not opted for filing an appeal. Their right of filing the appeal also seem to have escaped the notice of learned Appellate Authority and it is as a result thereof the report has been considered and made basis to dismiss the appeal preferred by the private respondent. She has not challenged the said order. As regards the ground of challenge thereto in this writ petition though we are satisfied therewith, however, do not want to enter upon the controversy on merits and leave it open to the petitioner to challenge the report of the Tehsildar in an appeal before appropriate forum in accordance with law, if so advised.

8. Being so, we find no illegality in the impugned order as learned Appellate authority has quashed the selection process and also the appointment of the petitioner as Anganwari Helper and ordered to initiate the process afresh in which the petitioner and private respondent, if eligible, will also participate.

9. Before parting, we direct the respondents-State to complete the selection process to be initiated afresh within two months.

10. With the above observation, the writ petition is disposed of, so also the pending application(s), if any.

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

M/s Tube Expansion Equipments Pvt. Ltd. .....Petitioner

Versus

M/s Tube Expansion Worker Union Parwanoo, & others .....Respondents.

CMPMO No. 171 of 2017
Decided on : 24.4.2019

Payment of Wages Act, 1936 - Sections 15 & 17-A – Direction for furnishing surety etc.- When can be issued? During pendency of proceedings, Commissioner allowing application of workmen and directing employer (Company) to furnish surety or equivalent towards their salary purportedly illegally withheld by Company- Challenge thereto- Held, manufacturing unit of Company lying closed due to strike called by workmen- Question of withholding of salary illegally yet to be decided on merits after adducing evidence- Main case at evidence stage- Requisite material not existing before Commissioner to pass impugned order- Order set aside with direction to Commissioner to conclude proceedings expeditiously- Petition allowed. (Paras 3 & 4)

For the petitioner: Mr. Sumeet Raj Sharma, Advocate.
For the respondents: Nemo.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, J (oral)

During the pendency of the petition, filed by the respondents/employees, of, the petitioner company, and, constituted under the provisions of Section 15 of the Payment of Wages Act, 1936, (i) the employees, preferred an application, cast, under the provisions of Section 17A of the Payment of Wages Act, before the learned Commissioner, and, thereupon an affirmative order stood, hence pronounced, (ii) the petitioner/company being aggrieved therefrom, hence, has strived, to, through the instant petition, beget its reversal.

2. The validity of availment of the remedy, prescribed under Section 17A of the Payment of Wages Act, 1936, provisions whereof, are, extracted hereinafter:-

> "**17A. conditional attachment of property of employer or other person responsible for payment of wages.-** (1) Where at any time after an application has been made under sub-section (2) of section 15 the authority, or where at any time after an appeal has been filed under section 17 by an employed person or [any legal practitioner or any official of a registered trade union authorized in writing to act on his behalf or any Inspector under this Act or any other person permitted by the authority to make an application under sub-section (2) of section 15] the Curt referred to in that section, is satisfied that the employer or other person responsible for the payment of wages under section 3 is likely to evade payment of any amount that may be directed to be paid under section 15 or section 17, the authority or the Court, as the case may be, except in cases where the authority or Court is of opinion that the ends of justice would be defeated by the delay, after giving the employer or other person an opportunity of being heard, may direct the attachment of so much of the property of the employer or other person responsible for the payment of wages as is, in the opinion of the authority or Court, sufficient to satisfy the amount which may be payable under the direction.
>
> (2) The provisions of the code of Civil Procedure, 1908 (5 of 1908), relating to attachment before judgment under that code shall, so far as may be, apply to any order for attachment under sub-section (1)."

(i) would arise only, upon, the material placed on record, by the workmen, hence exemplifying qua their being, an, imminent likelihood of the employer company, evading payment of the espoused amount, upon, its may be being directed to be released, vis-à-vis, the workmen, upon, an application, cast, before the learned Commissioner, under the provisions of Section 15 or Section 17, of, the Act.

3. For determining whether, the, afore condition standing satisfied, and, thereupon the order impugned before this court acquiring validity, it is imperative to allude, vis-à-vis, the contest made, by the petitioner company, qua an application, cast, under the provisions of Section 15, and, Section 17 of the Act, as stood, preferred before the learned Commissioner. On the afore application, the workmen had espoused, qua, there legitimate salary(s) being withheld by the employer. The afore averment was contested by the petitioner company, through, its meteing a reply thereto, and, therein, it, contended qua the production at manufacturing unit, of, the company being stalled, owing to an illegal strike, and, sit down of the employees. The afore contention was required to be, prima facie satisfied, by concurrent therewith material hence standing placed on record. A perusal of the record, does, prima facie disclose, qua, the afore contention may not be, at this stage hence deriving, any support from any material, in consonance therewith, (a) yet, when the

counsel for the petitioner company, submits before this Court, that, the main petition is yet to be listed, for adduction of evidence, by the petitioner company, (b) thereupon when, upon, the afore factum probandum, evidence remains yet unadduced, (c) thereupon, when the requisite material rather, for, ensuring satiation being meted, vis-à-vis, the afore ingredients, is, yet to be adduced, and, is obviously not existing before the learned Commissioner, (d) thereupon it is un-befitting for the latter, to proceed, to, order for the petitioner company, furnishing surety, equivalent, to the, purportedly illegally withheld salary, of, the workmen. Even otherwise, the afore direction is beyond the ambit of law, and, is accordingly quashed and set aside.

4. In view of the above observations, the instant petition is allowed. However, the learned Commissioner is directed, to, expeditiously conclude the trial of petition No.2/2 of 2016. All pending application, if any, also stand disposed of.

5. Any observation made herein above shall not be taken as an expression of opinion on the merits of the case, and, the learned Commissioner shall decide the matter uninfluenced, by any observation made hereinabove.

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

Ambuja-Darla-Kashlog-Mangoo Transport Co-operative Society Ltd., Darlaghat
....Petitioner.

Versus

Smt. Shanti Devi and another ....Respondents.

CMPMO No. 301 of 2017
Decided on : 25.4.2019

Himachal Pradesh Cooperative Societies Act, 1968 - Sections 93 & 94– **Limitation Act, 1963 (Act)** – Section 5 - Application for condonation of delay in filing appeal- Whether Authority can touch merits of case while deciding such application?- Inspector, Co-operative Societies, allowing application of applicant for making her member of Society- Society filing appeal against order before Assistant Registrar (A.R.)- A.R. dismissing appeal being barred by limitation and sufficient cause not shown for condonation of delay- Revision against- Deputy Registrar dismissing revision but also proceeded to decided matter on merits- Petition against- Held, Authority was required to confine itself to validity of order passed on application under Section 5 of Act and not to proceed to make adjudication upon merits of case- Order of Deputy Registrar suffered from gross illegality- Petition allowed- Order set aside- Matter remanded with direction that Registrar himself shall adjudicate it. (Para 1)

For the Petitioner: Mr. Sudhir Thakur, Sr. Advocate with Mr. Anirudh Sharma, Advocate.

For the Respondents: Mr. Neeraj Gupta, Sr. Advocate with Ms. Rinki Kashmiri, Advocate, for respondent No.1.
Mr. Sanjeev Bhushan, Sr. Advocate with Ms. Abhilasha Kaundal, Advocate for respondent No.2.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

One Santi Devi, instituted a case bearing Number 792 dated 4.4.2014, before, the Arbitrator O/o Assistant Registrar, Co-operative Societies, District Solan (H.P). The afore case was raised, under, the provisions of Section 40/72 of HP Co-op Societies Act, 1968. Through the afore petition, she had, sought a direction being pronounced, upon, one M/S Baghal Land Loosers Transport Co-op Society Ltd. Darlaghat qua the afore entity enlisting her, as, its member. Upon the afore case, the Inspector/Arbitrator concerned, made an affirmative order. The aggrieved therefrom i.e the Bhagal Land Loosers Transport Cooperative Societies Ltd. Darlaghat, preferred an appeal, before the Assistant Registrar Cooperative Societies Solan. The afore appeal was barred by limitation, and, an application cast under the provision of Section 5 of Limitation Act was appended therewith. However, the Assistant Registrar concerned, being dis-satisfied with the reasons enunciated, in the afore application, hence refused to condone the delay, and, dismissed the appeal, as, mis-constituted, it being beyond limitation. The aggrieved therefrom preferred a Revision Petition, before the Deputy Registrar Cooperative Societies (Consumer) Directorate of Cooperation Himachal Pradesh, Shimla, and, thereupon, the latter made the impugned order. The afore authority/Officer who pronounced the impugned order, was required, to only confine himself/itself to the validity of the order borne, in Annexure A-4, yet it beyond the domain, of, the reasoning assigned in Annexure A-4, has proceeded to make an adjudication even, upon, the merits of the case. Consequently, the impugned order is ingrained with a gross illegality and impropriety. For undoing the afore gross impropriety and illegality, the matter is remanded to the Deputy Registrar Cooperative Societies (Consumer) Directorate of Cooperation Himachal Pradesh, to hence make a fresh decision, thereon within six weeks hereafter, after bearing in mind all the contentions raised therebefore by the learned counsel for the litigants concerned, and, after allowing or disallowing, through, reasons, hence their respective contentions, to, thereafater determine the validity of the order made by the Assistant Registrar concerned, vis-a-vis his/its dismissing the application, cast under the provisions of Section 5 of the limitation Act. The Officer making the impugned order, is, censured, and, hereafter, the remanded lis shall be adjudicated, by the Registrar Co-operative Societies.

In view of the above, the present petition stands disposed of alongwith all pending applications.

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

Manoj Joshi ....Petitioner
Versus
CBI ....Respondent.

Cr.MP(M) No. 643 of 2018
Decided on : 25.4.2019

Code of Criminal Procedure, 1973 - Section 439 – Regular bail in case of murder and conspiracy etc.- Grant of- Accused seeking regular bail on medical grounds- Medical Board constituted for his check up reporting of accused suffering from tuberculosis and urinary tract infection- Accused needs constant care- No material suggesting his fleeing from justice

and tampering with evidence, if released on bail- Accused directed to be released on conditional bail. (Paras 3, 4 & 6)

For the petitioner: Mr. M/s. Anil Chandel, Shivank Singh Panta, Satish Sharma, Advocates, for the petitioner,.

For the respondent: Mr. Anshul Bansal, and Mr. Anshul Attri, Advocates.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, J (oral)

Through the instant bail-application, cast, under the provisions of Section 439 Cr.P.C., the bail-applicant/accused seeks an order form this Court, for, his being released from judicial custody, wherein he is extantly lodged, in case RC 09(S)2017/SC-1, CBI, New Delhi, of, 22.7.2017, registered at Police Station CBI ACB Branch, Shimla, H.P.

2. At the very outset, it is clarified that this Court would only swell upon, and, mete an adjudication, vis-à-vis, the necessity, or otherwise, of, the continuance in judicial incarceration, of the bail applicant, given his being thereat beset with severe ailments, and, qua whether the apposite ailments are amenable, or unamenable for, alleviation hence during his incarceration.

3. For determining the aforesaid factum, it is necessary, to allude, to pronouncement(s) made by the duly constituted Medical Board, as are embodied, in Annexure R-2. The afore board rendered its opinion, on 12.6.2018, and, has communicated therein that the bail-applicant, is, required to be treated for Tuberculosis, and, apart therefrom, the Medical Board, has, in paragraphs, 3, 4 and 5, also articulated, the, other ailments besetting the bail-applicant, during, the course of his incarceration, paragraphs whereof, are extracted hereinafter:-

> "3. The patient presented in the emergency deptt. Of IGMC Shimla on 31.10.2017 midnight with complaints of Left Flank pain. Investigations i.e. Ultra Sound abdomen and NCCT KUB region revealed the presence of Urinary Tract Infaction (UTI). He was treated with appropriate antibiotics and analgesics. He had frequent reoccurrence of UTI as per positive Urine Culture reports dated 14.12.2017, 23.2.2018, 10.5.2018 and 5.6.2018. He required repeated courses of antibiotics. The fresh NCCT KUB dated 5.6.2018 revealed that Left Renal Calculus has passed out but Urine Culture showed persistence of UTI. Appropriate antibiotics have been advised for the UTI. For his reoccurred UTIs he is advised to have plenty of oral fluids, to maintain healthy life style and to maintain good personal and toilet hygiene.
>
> 4. As per Medical records he has been undergoing treatment from orthopedic deptt. Of DDUZH Shimla since 20th February, 2018 for PIVD and Cervical Spondylyts. He remained admitted in DDUZH Shimla for these complaints w.e.f. 24.4.2018 to 2.6.2018. Pelvic traction was applied there and he was advised physiotherapy.
>
> On 5.6.2018, MRI Lumber spine was advised by consultant Neurosurgeon at IGMC Shimla for Spinal Problems and it was done on 8.6.2018. MRI revealed Facet Joint arthropathy at L5-S1 and L4-L5 levels along with mild disc bulge at L4-S1 level without any neural foramina narrowing. For his

spinal problems he is advised to avoid forward bending, weight bearing and squatting to prevent the aggravation of the symptoms.

5. The patient was diagnosed as having Sinusitis at DDUZH Shimla. As per record available, on 9.6.2018, he was also examined by ENT specialist at IGMC Shimla and was diagnosed as having DNS with Rhinopharyngitis."

Thereafter also, a, Medical Board was reconstituted, and, after examining the bail-applicant, it hence made its report, on 21.6.2018, with a recommendation, therein qua the continuance in judicial custody of the bail-applicant, being only subject, to, the hereinafter reflected conditions:-

"1. Whether a balanced and high fiber diet can be provided to prevent constipation and aggravation of anal fissure.

2. Whether facilities of Zietz bath can be provided for relief of symptoms of fissure.

3. Whether any strenuous activity by the petitioner can be avoided to prevent the aggravation of his spinal problems.

4. Whether a clean toilet with in an English type seats can be provided to the patient to prevent the recurrent UTI and aggravation of his spinal problems."

3. However, the learned counsel for the bail-applicant has placed, on record, the subsequent thereto resume(s), of, the medical ailments, of, a severe criticality rather befalling the bail-applicant. He further submits, that, hence therethrough, vis-à-vis, all the afore ailments hence besetting the bail applicant, an inference, is, squalled qua rather theirs' standing evidently aggravated, during his judicial incarceration, (a0 and, further submits, that, dehors the submissions of the learned counsel for the CBI, that, the afore ailments are amenable for re-mediation, even at the toilet concerned, maintained within the jail premises, (b) yet, with the afore mentioned record, rather exemplifying, qua, there being aggravation rather than diminution, in, the medical condition of the bail-applicant, hence the continuance, of, the bail-applicant, in judicial custody, would not be appropriate.

4. Be that as it may, the afore submissions made before this Court, by the learned counsel for the bail-applicant, qua, since, his being subjected to judicial incarceration, his, hence being encumbered with critical diseases, and, the afore diseased also multiplying, and, also accelerating, are, obviously borne from the afore referred report, of, the medical board, and, from the afore apposite medical resume(s), (i) thereupon for mitigating the ailments besetting him, and upon his being subjected, to, judicial incarceration, importantely, when the prevalence, of, hygienic conditions, is, otherwise, of, utmost importance besides, of, the throughout personal attendance, upon the bail-applicant, of, his family, and, when both afore amenities may not be available hence within the jail, (ii) thereupon, for, ensuring the mitigation, of, the severity, of, diseases befalling upon the bail-applicant, thereupon this Court is constrained to allow the bail application.

5. The afore observations are supported by the pronouncements, rendered, by the Coordinate Benches of this Court upon Cr.MP(M) No. 1371 of 2018, decided on 24.10.2018, upon, Cr.MP(M) No. 1372 of 2017, decided on 16.11.2017, and, upon Cr.MP(M) No. 1055 of 2016, decided on 20.10.2016, thereupon also this Court is further constrained to grant the facility of indulgence of bail to the bail-applicant.

6. Moreover, when no material, has been placed on record, by the prosecution, demonstrating that the event of bail being granted to the petitioner/bail applicant, there

being every likelihood of his fleeing from justice or tampering with prosecution evidence, thereupon this Court is constrained to afford, the facility of bail in favour of the petitioner/bail applicant. Accordingly, the petitioner/bail applicant is ordered to be released from judicial custody, subject to compliance by him with the following conditions:-

i) That he shall furnish personal bond in the sum of Rs. 5,00,000/- with three sureties in the like amount, to the satisfaction of learned Special Judge, concerned.

ii) That he shall join the investigation, as and when required by the Investigating agency.

iii) That he shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the Police.

iv) That he shall not leave India without the prior permission of the Court.

v) That he shall deposit his passport, if any, with the Police Station, concerned.

vi) That upon his re-indulging in crime, thereupon the State is at liberty for motioning this Court, for cancellation of bail.

vii) That in case of violation of any of the conditions, the bail granted to the petitioner shall be forfeited and he shall be liable to be taken into custody.

7. Any observation made herein above shall not be taken as an expression of opinion on the merits of the case and the trial Court shall decide the matter uninfluenced by any observation made herein above.

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

Ramesh Chand .....Non-applicant/petitioner

Versus

Mahender Singh .....Applicant/Respondent.

EMP No. 9 of 2018 in Election Petition No. 1 of 2018
Reserved on: 17.04.2019
Date of decision: 25.04.2019.

Representation of the People Act, 1951 (Act) – Sections 81, 82 & 86 - **Code of Civil Procedure, 1908**- Order VII Rule 11– Rejection of election petition on ground of non-supply of essential documents by petitioner- Whether permissible?- Elected candidate/respondent seeking rejection of petition challenging his election to Legislative Assembly on ground that petitioner did not supply essential documents forming integral part of such petition- Held, documents as referred to do not form integral part of petition- These are merely evidence in case and copies of such documents were not required to be served on respondent/applicant- There is no requirement of law that documents or Schedule should have been served upon respondent- Documents since filed in Court, it is always open to respondent to inspect them and find out allegations made in petition. (Paras 15 to 23)

Representation of the People Act, 1951 (Act) – Sections 81, 82 & 86 - **Code of Civil Procedure, 1908 -** Order VII Rule 11 – Rejection of election petition on technical lacuna- Justification- Held, petition cannot be dismissed at threshold on ground of any technical lacuna so as to frustrate endavour to bring to trial issue on grounds set out in it particularly when no prejudice is alleged or shown to have been caused to respondent by such omission or lacuna. (Paras 26, 27 & 35)

Cases referred:

A. Madan Mohan vs. K. Chandrasekhara, AIR 1984 SC 871
Abdulrasakh vs. K. P. Mohammed, 2018 (5) SCC 598
Ajay Maken vs. Adesh Kumar Gupta, 2013(3) SCC 489
Ch. Subbarao vs. Member, Election tribunal, Hyderabad and Ors., 1964 AIR SC 1027
Chandrakant Uttam Chodankar vs. Dayanand Rayu Mandrakar, 2005 (2) SCC 188
Dhartipakar Madan Lal Agarwal vs. Shri Rajiv Gandhi, AIR 1987 SC 1577
Kuldeep Singh Pathania vs. Bikram Singh Jaryal, (2017) 5 SCC 345
M. Karunanidhi vs. H. V. Hande (1983) 2 SCC 473 : (AIR 1983 SC 558)
Mithilesh Kumar Pandey vs. Baidyanath Yadav and others, 1984 AIR (SC) 305
Muraka Radhey Shyam Ram Kumar vs. Roop Singh Ratore & others, 1964 (3) SCR 573
R. K. Roja vs. U. S. Rayudu and another, AIR 2016 SC 3283
Rajendra Singh vs. Usha Rani, 1984 (3) SCC 339
Satya Narain vs. Dhuja Ram, 1974 (4) SCC 237
T. M. Jacob vs. C. Poulose, AIR 1999 SC 1359
T. Phungzathang vs. Hangkhanlian, 2001 (7) JT 439
U. S. Sasidharan vs. K. Karunakaran and Anr., 1990 AIR (SC) 924
Umesh Challiyill vs. K. P. Rajendran, 2008 (11) SCC 740

For the Petitioner/Non-applicant:	Mr. Shrawan Dogra, Sr. Advocate, with Mr. Deven Khanna and Mr. Bharat Thakur, Advocates.
For the Respondent/Applicant:	Mr. Satya Pal Jain and Mr. R. K. Sharma, Sr. Advocates, with Mr. V. B. Verma and Mr. Arun Kumar, Advocates, for respondent No. 1.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Two prayers have been made in this application filed under Order 7 Rule 11 of the Code of Civil Procedure (for short the 'Code'), for rejection of the Election Petition.

(i) The petition be rejected on the ground that there is a violation of statutory provisions, more particularly, the provisions contained in the Representation of the People Act, 1951 (for short the 'Act');

(ii) the petition does not disclose any cause of action.

Arguments on first point were heard on 17.04.2019 and thereafter the judgment was reserved.

2. It is averred in the application that the petitioner has violated Section 82 of the Representation of the People Act, 1951, as such the petition is liable to be dismissed under Section 86 of the Act.

3. It is averred that the copy supplied to respondent No. 1 is not true copy of the original petition, which has been filed before this Court and pages 49 to 242 of the election petition and pages pages 51 to 59 of the Index Form B have not been supplied to the replying respondent and, therefore, the petition deserves to be rejected as these documents are integral part of the election petition. The election petition is in violation of Sections 81 and 82 of the Act and is, therefore, liable to be rejected under Section 86 of the Act.

4. The petitioner non-applicant has filed reply to the application, wherein preliminary submission has been made with regard to the application being not maintainable in view of the law laid down by the Hon'ble Supreme Court in *Kuldeep Singh Pathania vs. Bikram Singh Jaryal (2017) 5 SCC 345* wherein it was held that the technical deficiencies, if any, are curable and thus cannot be made a ground for the rejection of the petition.

5. At the outset, it needs to be observed that even though one of the objections taken in the application was with regard to non-supply of page 40(41) to respondent No. 1, however, after verifying the record, the learned counsel for the applicant conceded that the aforesaid page(s) have, in fact, been supplied to him. At this stage, it is also to be noted that none of the defeated candidates has filed the election petition and the present petition has been filed on behalf of a voter.

6. Before proceedings further certain provisions of the Act need to be noticed.

> "80.Election Petitions - No election shall be called in question except by an election petition presented in accordance with the provisions of this Part.
>
> 81(3). Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition.
>
> 83(2). Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.
>
> 86. Trial of election petition.-(1) The High Court shall dismiss an election petition which does not comply with the provisions of section 81 or section 82 or section 117.
>
> Explanation – An order of the High Court dismissing an election petition under this sub-section shall be deemed to be an order made under clause (a) of section 98.
>
> (2) As soon as may be after an election petition has been presented to the High Court, it shall be referred to the Judge or one of the Judges who has or have been assigned by the Chief Justice for the trial of election petitions under sub-section (2) of section 80A.
>
> (3) Where more election petitions than one are presented to the High Court in respect of the same election, all of them shall be referred for trial to the same Judge who may, in his discretion, try them separately or in one or more groups.
>
> (4) Any candidate not already a respondent shall, upon application made by him to the High Court within fourteen days from the date of commencement

of the trial and subject to any order as to security for costs which may be made by the High Court, be entitled to be joined as a respondent.

Explanation – for the purpose of this sub-Section and of Section 97, the trial of a petition shall be deemed to commence on the date fixed for the respondents to appear before the High Court and answer the claim or claims made in the petition.

(5) The High Court may, upon such terms as to costs and otherwise as it may deem fit, allow the particulars of any corrupt practice alleged in the petition to be amended or amplified in such manner as may in its opinion be necessary for ensuring a fair and effective trial of the petition, but shall not allow any amendment of the petition which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition.

(6) The trial of an election petition shall, so far as practicable consistently with the interests of justice in respect of the trial, be continued from day to day until its conclusion, unless the High Court finds the adjournemnt of the trial beyond the following day to be necessary for reasons to be recorded.

(7) Every election petition shall be tried as expeditiously as possible and endeavour shall be made to conclude the trial within six months from the date on which the election petition is presented to the High Court for trial.

7. It is the admitted case of the parties that the documents at pages 51 to 59 and documents at pages 49 to 242 have not been supplied to the applicant. It is in this background that S/Shri Satya Pal Jain and R. K. Sharma, Senior Advocates, duly assisted by S/Shri V. B. verma and Arun Kumar, Advocates, would contend that since all these documents are integral part of the election petition, therefore, the election petition deserves to be rejected at the threshold. In support of such contention, the learned counsels for the applicant have drawn attention of this Court to paragraphs 9 to 21 of the election petition, which read thus:-

"9. That after the respondent No. 1 filed his nomination form alongwith affidavit in Form 26 as required under rules for the 2017 Assembly elections, the petitioner strongly contradicted the statement/declaration made by respondent-Mahender Singh in his affidavit in Form 26 in relation to his educational qualification and other statements declared in said affidavit. This fact was brought to the notice of Returning Officer of 32-Dharampur constituency, respondent No. 2, by the petitioner by filing written objections dated 21.10.2017 (received in office of respondent No. 2 on 23.10.2017 consisting of 16 pages, including affidavit of the petitioner, which also contained attached therewith Annexures A to L.

10. That the gravamen of his objections was that respondent-Mahender Singh has failed to file proper affidavit prescribed under the rules and filing of incomplete affidavit and giving false or evasive statements in such affidavit by him at the time of submission of nomination paper renders his nomination paper materially defective and hence liable to be rejected under Section 36(2)(b) of the Representation of People Act, 1951.

11. That the date of scrutiny of nomination forms was fixed as 24.10.2017 as pointed out above. The petitioner also submitted written arguments dated 24.10.2017 to the Returning Officer, respondent No. 2, which was duly received in his office on the same date. Alongwith these written arguments the petitioner had also annexed relevant extract of "RO

Handbook" and a copy of decision passed by Hon'ble Supreme Court of India in Civil Appeal No. 2649 of 2016 titled 'Sri Mairembam Prithviraj @ Prithviraj Singh versus Shri Pukherem Sharatchandra Singh'.

12. The decision by the Apex Court specifically dealt with the present proposition wherein the returned candidate's nomination was improperly accepted by the Returning Officer despite objections. It would be most relevant to extract following observations from the said decision (Civil Appeal No. 2649 of 2016) which are most relevant of the present controversy:-

"15. ..... One of the five aspect pertains to the educational qualification of the candidates. An order was issued by Election Commission of India on 28.06.2002 directing that full and complete information relating to the five aspects was to be treated as a defect of substantial character by the Returning Officers.

16. In Resurgence India v. Election Commission of India and Anr. (supra) this court held that every candidate is obligated to file an affidavit with relevant information with their criminal antecedents, assets and liabilities and educational qualification. The fundamental right under Article 19(1)(a) of the voter was reiterated in the said judgment and it was held that filing of affidavit with blank particulars would render the affidavit as nugatory. In Kishan Shakar Kathore v. Arun Dattatray Sawant reported in 2014 (14) SCC page 162 this court considered the question as to whether it was incumbent upon the appellant to have disclosed the information sought for in the nomination form and whether the non-disclosure thereof render the nomination invalid and void. It was held that non-furnishing of the required information would amount to suppression/non-disclosure.

17. It is clear from the law laid down by this Court as stated above that every voter has a fundamental right to know about the educational qualification of a candidate. It is also clear from the provisions of the Act, Rules and Form 26 that there is a duty cast on the candidates to give correct information about their educational qualifications.

18. .... The false declaration relating to his educational qualification cannot be stated to be not of a substantial character. It is no more res intergra that every candidate has to disclose his educational qualification to subserve the right to information of the voter. Having made a false declaration relating to his educational qualification, the appellant cannot be permitted to contend that the declaration is not of a substantial character. For the reasons stated supra, we uphold the findings recorded by the High Court that the false declaration relating to the educational qualification made by the Appellant is substantial in nature."

13. That on 24.10.2017 at the time of scrutiny, the Returning Officer, respondent No. 2, refused to entertain the petitioner as objector as according to the Returning Officer only contesting candidates or their representatives could be present before him for the purpose of scrutiny of nomination forms. The situation was created in such a manner that one of the contesting candidate Digvijay Singh represented to the Returning Officer, respondent No. 2, to treat objections raised by the present petitioner as his objections and allow presence of the petitioner there as his representative which was permissible under rules.

14. That thereafter, on 24.10.2017, the respondent No. 2 treated the objections raised by the petitioner as objections of Digvijay Singh and rejected the same by holding that such objections were required to be challenged before competent court as the Returning Officer is not authorised to decide the same and consequently, the nomination was accepted.

15. That the petitioner submitted representation to the respondent No. 2 on 24.10.2017 itself asking for reasons of acceptance of nomination of the respondent No. 1 despite objections filed by petitioner delivered in the office of respondent No. 2 on 23.10.2017 (objections dated 21.10.2017).

16. That the petitioner submitted representation dated 26.10.2017 at 2:35 pm through email (complaints@ eci.gov.in) to the Election commission of India, respondent No. 3 wherein the wrong action on the part of the Returning Officer was highlighted. Request was made to re-scrutinize the nomination papers of the respondent No. 1 by the respondent No. 2.

17. That on 26.10.2017 the petitioner submitted another representation to respondent No. 2 to supply him reasons for acceptance of nomination paper of respondent no. 1 so that the petitioner is able to challenge the same before Hon'ble High Court.

18. That on 26.10.2017 the respondent No. 2 supplied to the petitioner attested copy of the order passed on nomination paper of respondent No. 1 on 24.10.2017 wherein reference was made to the objections of Digvijay Singh.

19. That on 26.10.2017 the petitioner again wrote to the respondent No. 2 to supply to the petitioner copy of any response filed by respondent No. 1 to the objections filed by the petitioner before respondent No. 2.

20. That on 28.10.2017 the respondent No. 2 gave reply to the petitioner that respondent No. 1 had not filed any reply/counter affidavit against the allegations levelled by the petitioner.

21. That the petitioner received yet another reply from respondent No. 2 wherein it was pointed out that the objections filed by the petitioner were uploaded on the Genesys website and respondent No. 1 was informed about the objections filed by the petitioner. For the action taken, the respondent No. 2 referred to Para 6.10 of the 'Grounds for Rejection of Nomination Paper' in RO Handbook 2014.

8. It is averred that the documents mentioned in aforesaid paras have specifically been relied upon by the petitioner but have not been supplied and even the same are not extracted in the pleadings, therefore, the petition merits rejection at the threshold. In support of such submissions, reliance is placed on the following judgments:-

1. M. Karunanidhi vs. H. V. Handa, 1983 AIR (SC) 558
2. U. S. Sasidharan vs. K. Karunakaran and Anr., 1990 AIR (SC) 924.
3. Mithilesh Kumar Pandey vs. Baidyanath Yadav and others, 1984 AIR (SC) 305.

9. On the other hand, Shri Shrawan Dogra, learned Senior Advocate, duly assisted by S/Shri Deven Khanna and Bharat Thakur, Advocates, would contend that the provisions of Order 7, Rule 11 of the Code can only be invoked in case the petition does not disclose any cause of action. It is further argued that the stage for deciding this application has yet not arrived, as even the issues have not been framed and it is only when an issue is

framed as a preliminary issue, that all these question can be gone into. The merits of the application are to be determined by the provisions of the Act and the High Court Rules and Orders in terms whereof only the pleadings and the annexures thereto appended therewith are required to be supplied to the opposite party. It is further argued that the petition is not different from the index and all the objections as raised by the applicant only pertain to the stage when the election petition is under scrutiny.

10. In addition thereto, the learned counsel for the non-applicant, in support of aforesaid submissions, would place reliance on the following judgments of the Hon'ble Supreme Court:-

1. Kuldeep Singh Pathania vs. Bikram Singh Jaryal, 2017 (5) SCC 345

2. Abdulrasakh vs. K. P. Mohammed, 2018 (5) SCC 598

11. In rebuttal, Shri Satya Pal Jain, learned Senior Advocate, would argue that since there is non-compliance of Section 81 (3) of the Act, therefore, the petition is liable to be dismissed under Section 86 of the Act.

12. In addition thereto, he would argue that Rule 12(g) of the Rules of Procedure and Guidance in the matter of Trial of Election Petitions under Part VI of the Representation of the People Act, 1951 (for short the 'Rule') clearly mentioned that the petition alongwith annexure and Schedule is required to be supplied to the opposite party and obviously non-compliance of such provisions would entail the rejection of the petition. In support of such contention, reliance is placed upon the judgment of the Hon'ble Supreme Court in ***R. K. Roja vs. U. S. Rayudu and another, AIR 2016 SC 3283***.

13. It is further argued that an application under Order 7, Rule 11 CPC has to be disposed of at the threshold as held by the Ho'ble supreme Court in ***Dhartipakar Madan Lal Agarwal vs. Shri Rajiv Gandhi***, ***AIR 1987 SC 1577*** . It is further argued that Schedule and annexure appended with the petition have not been verified and have only been attested and, therefore, also the petition is liable to be rejected.

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

14. Adverting to the submissions made by learned Senior counsel for the applicant that the Schedules and other documents which form an integral part of the petition (as extracted above) should have been served on the returned candidate and in absence of such compliance the petition was liable to be dismissed in liminie under Section 86 of the Act.

15. I find no merit in this contention, as a bare perusal of the pleadings (as extracted above) it would be noticed that the documents as referred to therein are not an integral part of the petition, being merely evidence in the case and, therefore, the copies of such documents were not required to be served on the applicant as there is no requirement that the documents or the Schedule should should have been served on the applicant because if they were filed in the Court it is/was always open to the applicant to inspect them and find out the allegations made in the petition.

16. In taking this view, I am fortified by the judgment of three Judges Bench of the Hon'ble Supreme Court in *A. Madan Mohan vs. K. Chandrasekhara, AIR 1984 SC 871*, wherein the Hon'ble Supreme Court while affirming the decision of the High Court held that there was no requirement that the documents or the schedules should also have been served on the petitioner because if they were filed in the Court, it was always open to the

petitioner to inspect them and find out the allegations made in the petition. Opining that the documents or the schedules were in no sense an integral part of the petition, being merely evidence in the case, the Court held that copies of such annexures were not required to be served on the respondent.

17. Earlier to that an identical question came up for consideration before this Court in *Sahodrabai's case (AIR 1968 SC 1079) (supra)* where while repelling a similar argument the following observations were made (para 12) :

> "The only provision to which our attention has been drawn is sub-s. (3) of S. 81, and sub-s. (2) of S. 83. The first provides that every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and that every such copy shall be an authenticated true copy. The words used here are only "the election petition". There is no mention of any document accompanying the election petition .....Assistance is however taken from the provisions of sub-s. (2) of. S. 83 which, provides that any schedule or any annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition. It is contended that since the pamphlet was an annexure to the petition it was not only necessary to sign and verify it, but that it should have been treated as a part of the election petition itself and a copy served upon the respondents. In this way, non-compliance with the provisions of S. 86 (1) is made out. In our opinion, this is too strict a reading of the provisions. We have already pointed out that S.81(3) speaks only of the election petition..... Even if this be not the case, we are quite clear that sub-s. (2) of S. 83 has reference not to a document which is produced, as evidence of the averments of the election petition but to averments of the election petition which are put, not in the election petition but in the accompanying schedules or annexures."
>
> .....
>
> But what we have said here does not apply to documents which are merely evidence in the case but which for reasons of clarity and to lend force to the petition are not kept back but produced or filed with the election petitions. They are in no sense an integral part of the averments of the petition but are only evidence of those averments and in proof thereof. The pamphlet
>
> therefore must be treated as a document and not as a part of the election petition in so far as averments are concerned .....It would be stretching the words of sub-s. (2) of S. 83 too far to think that every document produced as evidence in the election petition becomes a part of the election petition proper."

18. It is a well settled principle of interpretation of statute that wherever a statute contains stringent provisions they, must be literally and strictly construed so as to promote the object of the Act. As per the statutory provisions extracted above, this Court is clearly of the view that in case the arguments of the appellant were to be accepted, it would be stretching and straining the language of Sections 81 and 82. Moreover, the decision in M. *Karunanidhi v. H. V. Hande (1983) 2 SCC 473 : (AIR 1983 SC 558),* on which heavy reliance is placed by the applicant, no way departs from the ratio laid down by the Sahodrabai's case (supra). The aforesaid case, rests on the ground that the document (pamphlet) was expressly referred to in the election petition and thus became an integral part of the same and ought

to have been served on the respondent. It is, therefore, manifest that the facts of the instant case are clearly distinguishable from the facts of the present case.

19. The case of *Mithilesh Kumar Pandey (supra),* contained a large number of mistakes in respect of the names of the persons through whom corrupt practices were alleged to have been practiced during the election. Therefore, this case clearly has no bearing to the facts of the present case just for technical defects in the copies furnished to the returned candidate.

20. In *U. S. Sasidharan vs. K. Karunakaran and another, 1990 AIR (SC) 924*, the Hon'ble Supreme Court was dealing with the video cassette which forms an integral part of the Election Petition. Copy whereof had not been furnished to the respondent alongwith Election Petition In the present case, the same is not the fact obtaining situation in the present case.

21. The issue in question is otherwise no longer *res integra*, in view of the decision of Hon'ble Supreme Court in *Ajay Maken vs. Adesh Kumar Gupta 2013(3) SCC 489*, wherein the Hon'ble Supreme Court held as under:-

> " While the failure to comply with the requirements of Section 81 obligates the High Court to dismiss the election petition, the failure to comply with the requirements of Section 83 is not expressly declared to be fatal to the election petition. The said distinction is explained by this Court in Manohar Joshi vs. Nitin Bhaurao Patil and another, 1996 (1) SCC 169 paras 20 and 21T."

22. The High Court of Himachal Pradesh has framed Rules called as Rules of Procedure and Guidance in the matter of Trial of Election Petitions under Part VI of the Representation of the People Act, 1951, as amended. The relevant provisions having bearing on the present petition are extracted below:-

> "11. Contents of Petition-(i) A petition may be presented either in person or through an Advocate incharge for calling in question any petition on one or more of the grounds specified in sub-Section (1) of Section 100 and Section 101 of the Act by any candidate at such election or any elector, and
>
> (a) shall contain a concise statement of the material facts on which the petitioner relied, arranged so far as possible in strictly chronological order;
>
> (b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and
>
> (c) shall be signed and verified by the petitioner in the manner laid down in Order VI, Rule 15 of the Code of Civil Procedure, for the verification of pleadings.
>
> (ii) The petition will be presented to the Registrar within office hours on any working day and his receipt showing the date and time of filing of the petition shall be obtained. The receipt shall, also indicate, the date on which the petitioner or his Advocate, if any, must appear before the Registrar for removal of formal defects, if any. The said receipt shall be in Form 'A' appended to these rules.
>
> (iii) Any document order than the election petition itself, but connected with the petition which is not filed with the election petition may

be filed either with the Registrar or in the Election Branch with an endorsement in Form 'E', appended to these rules, of the date of filing the same made on the first page of such document under the dated signature of the party filing the documents or his Advocate.

(iv) An inward diary or a receipt register shall be maintained in the election Branch in which receipt of all petitions, applications, documents and papers connected with election petitions shall be entered on the very day on which those are received in the Branch. The register shall be put up to the Registrar at 4:00 pm on every working day and shall be signed by him by mentioning the time and date of his signature so as to close the entries of that particular day. The serial number in the receipt register and the date of filing the document in question in the election Branch shall be endorsed on the document in the relevant column of a square rubber stamp of the prescribed type. The endorsement on the document shall be signed by the receipt Clerk or Diarist or the Dealing Assistant in the election Branch, as the case may be.

12(b) Schedules or annexures to the petition referred to in the body of the petition – Such schedules or annexures shall also be signed by the petitioner and verified in the same manner as the petition.

13. General requirements regarding petitions-(a) All petitions shall be clearly typed or cyclostyled or printed on only one side of foolscap Government (Judicial) paper or water mark bond paper in double space with at least a quarter margin.

(b) All copies of the petition shall be similarly prepared, but on ordinary paper.

(c) All copies of the petition shall conform to the original, page by page and line by line.

(d) The petition and the copies shall be page marked legibly and the Annexures and Schedules, if any, attached to the petition, shall be consecutively page-marked in the same manner.

(e) A cleanly typed cyclostyled or printed index will be put at the top of the petition showing the serial number of the document, its date, particulars and the page or pages on which is occurs in the papers filed by the petitioner or the Advocate in charge and shall be signed and dated by the Petitioner or such Advocate.

(f) The petitions and their annexures and schedules shall be in the English language. Any original document or any copy of a document,which is not in the said language shall be accompanied by its translation into English, duly certified by the petitioner or the Advocate in-charge to be a correct translation of the original or of the copy as the case may be.

(g) The petitioner or the Advocate in-charge shall ensure that the petition does not suffer from unnecessary prolixity and does not contain any scandalous or vexatious allegations which are not necessary to be made for deciding the matters really in issue.

14. Scrutiny of papers – (a) The Registrar shall cause the petition and its accompanying documents to be scrutinised under his personal supervision. On the conclusion of such scrutiny the Registrar shall make an endorsement on the back of the last page of the index to the effect that the

papers have been scrutinised and if the same have been found to be in order or not, if the Registrar finds that the papers are not complete or do not, otherwise, comply with the requirements of these rules or the provisions of Part-VI of the Act, an endorsement to that effect would be made specifying the defaults or the omissions which require rectification. The endorsement would also show separately if the security for costs referred to above has been deposited by the petitioner before the filing of the petition, and, if the petition has filed within limitation.

(b) On such scrutiny if it is found that the petition does not comply with the requirements of Section 81 or Section 82 or Section 117 of the Act, the Registrar shall make a specific endorsement to that effect.

(c) If some other defect is detected in the petition or it is found that it does not comply with any other rule, the petition will be returned with such endorsement as hereinbefore specified to the petitioner or the Advocate incharge on the date specified in the receipt under rule 11(ii). The said endorsement shall specify the time within which the defect or defects mentioned therein shall be removed and the said time shall not exceed seven days in any case. The rectified petition shall be refiled by the petitioner or the Advocate in-charge within the time so specified.

(cc) It shall be the duty of the petitioner or the Advocate in-charge to bring to the notice of the Registrar the fact of the removal of the defects or any one more of the defects pointed out by the office on the very day on which the defect or defects are removed. The fact of removal of defect or defects having been brought to the notice of the Registrar shall be endorsed on the petition by the Registrar in his own hand writing under his dated signatures specifying with reference to the serial number of the defects or otherwise the particular defects which have been removed.

(d) A list of all the petitions, which are not in conformity with the mandatory provisions of Sections 81, 82 or 117 of the Act, shall be put on a special notice board meant for notices relating to election petitions and a copy of such list shall be sent to the Secretary of the High Court Bar Association before 3:30 pm on the day preceding the date for which these petitions are directed to be placed before any one of the designate judge before. The list shall specify the date on which and the name of the designated Judge before whom the petition will be placed for necessary directions or orders in respect of non-compliance with the rules. Such date of hearing shall also be communicated to the petitioner or the Advocate incharge on the date specified in the receipt under rule 11(ii).

16. Issue of process – In all cases covered by rule 15(d) and where the petition is on scrutiny found by the Registrar to be in order, the Registry shall issue notices of the petition on Form 'C' appended to these rules, accompanied by a copy of the petition, together with copies of the schedules and annexures, any, to each of the respondents named in the petition under Registered (Acknowledgement) postal covers filed by the petitioner as also in the ordinary manner through the administrative Subordinate Judge or the Senior Subordinate Judges or any other Civil Court of the district or place within whose jurisdiction the respective respondent stated to reside or carry on business. The endorsement on the notice requiring such subordinate Judge or Civil Court to effect service on the respondent shall specify that the aforesaid Subordinate Judge or Court shall make every effort to have service

effected immediately and in any event to submit a detailed report of service well within time so as to reach the Registry or this Court before the date of scrutiny. The notices shall be for the settlement of issues and shall be issued for an actual date which shall not be more than four weeks ahead of the date on which the notices are despatched. The notices shall be in Form 'B' appended to these rules and shall specify, inter alia-

(a) the date on which the respondents are required to appear in person or by an advocate;

(b) the date of scrutiny on which the case will be put up before one of the designated Judges with a full and complete report of the office about service of notices; and

(c) a direction to the effect that the case would be heard ex parte if the respondent does not put in appearance in the Registry of the Court and serve notice of having done so on the petitioner or the Advocate incharge before the date of hearing.

18. Appearance – Any appearance, application or act required or authorised by the Act or these Rules to be made or done by a party may be made or done by the party in person or by his recognised agent or by an Advocate, appearing, applying or acting, as the case may be, on his behalf:

Provided that any such appearance shall, if the High Court so directs, be made by the party in person:

Provided further that, unless the context otherwise requires, the recognised agent of a party shall be deemed to be the petitioner or the respondent, as the case may be, for the purpose of these rules.

20. Appearance of respondents-(a) As soon as possible after the receipt of notice of the petition each respondent shall enter before the Registrar appearance in writing. The appearance may be entered through an Advocate or in person. In either event the full, complete and detailed address of the respondent shall be entered on the memorandum of appearance. Thereafter, service of any notice or order of the Court or of the Registry shall be deemed to be sufficient if it is either communicated to the Advocate, or in case where the respondent is not so represented sent by ordinary post to such address of the respondent as has been furnished by him.

(b) Immediately after entering appearance, the respondent or his Advocate, as the case may be shall serve on the Advocate incharge of the case or on the petitioner, if he is not represented by counsel, a notice of having entered appearance.

(c) Any respondent, who does not admit the correctness of the allegations or of the claim made in the petition shall file a written statement in the Registry of the Court at least two days before the date of hearing, replying to the petition and the allegations of the petitioner para-wise.

(d) The written statement shall be typed-written or encyclostyled or printed in double space on one side of foolscap judicial paper and shall be signed and verified in the manner laid down in the Code of Civil Procedure, 1908 for the verification of pleadings.

(e) A spare copy of the written-statement shall be filed in Registry which shall be attested by the respondent concerned, or by his Advocate to be true copy of the original written-statement.

(f) The written statement shall be in English and any documents attached to it or filed by the respondent subsequently shall be either in English or be accompanied by their respective translations into English which should be certified by the respondent concerned or by his Advocate to be true and correct translation of the original documents, in question.

(g) The written-statement shall be accompanied by all documents in the possession or power of the respondent on which he basis his defence. Where he rely on other documents in support of his defence, he shall enter such documents in a list to be added or annexured to the written statement. A document which ought to be entered in the list referred to above but which has not been so entered shall not, without the leave of the High Court, be received in evidence on the respondent's behalf at the hearing of the petition.

The documents produced shall be accompanied by a list in Form 'B' appended to these rules.

(h) The written-statement shall also be accompanied by a cloth-lined strong envelope which shall not be smaller in size than 10"x15", for keeping documents.

(I) The respondent shall serve on the Advocate-incharge or on the petitioner himself if he is not represented by an Advocate, an exact copy of the written-statement and its enclosures, if any, at least two days before the date of hearing.

21. Commencement of trial-(a) The trial of a petition shall be deemed to commence on the date fixed for the respondents to appear before the High Court and to answer the claim or claims made in the petition.

(b) At the commencement of the trial or on such adjourned date for which all the respondents have been served or are deemed to have been served, the High Court shall scrutinise the pleadings of the parties and may, within such time as it may deem fit, permit the petitioner to file a replication in reply generally to any written statement or direct him to file a better statement or better particulars in respect of any matter brought out in any written statement.

(c) At the hearing of the petition, after pleadings have been filed, the High Court shall proceed to frame issues arising out of the pleadings of the parties which are necessary for the determination of the matters in controversy between the parties and postpone further hearing of the petition, but shall fix a day for the production of such evidence as the case requires. The Court shall also fix an intermediary date to watch the return of the summons of the witnesses. The parties or their counsel shall appear before the Registrar on the said date and obtain necessary orders with regard to re-summoning or otherwise the witnesses who might not have been served by the said date.

(d) Within 5 days of the framing of the issues, the parties shall file any other or additional documents which are in their possession or power, and, also file within the same period a list of all the documents which are not in such possession or power for the respective parties but on which they propose to rely at the trial of the case indicating therein the person in whose possession, power or custody such documents may be available, and the relevancy of such documents.

(e) Within ten days of the date on which the issues are framed, the parties shall admit or deny the respective documents filed by the other side in the Registry of the Court by making an endorsement on each document under the signatures of party concerned or his Advocate whether the document is admitted or denied or how much of a document is admitted or denied.

(f) The preceding sub-rule shall not derogate from the right of the parties to serve on the counsel for the other side notice of admission or denial of documents or of admission or denial of facts.

(g) Parties may also, with the leave of the Court, serve interrogatories on the counsel for any other party for being replied to in accordance with law.

24. Procedure-(a) Subject to the provisions of the Act and of these rules, every petition shall be tried, as nearly as may be, in accordance with the procedure applicable under the code of Civil Procedure, 1908, to the trial of suits.

(b) The High Court shall have the discretion to refuse for reasons to be recorded in writing, to examine any witness or witnesses if it is of the opinion that the evidence of such witness or witnesses is not material for the decision of the petition or that the party tendering such witness or witnesses is doing so on frivolous grounds or with a view to delay the proceedings.

(c) The provisions of the Indian Evidence Act, 1872, shall, subject to the provisions of the Act and these rules, be deemed to apply in all respects to the trial of an election petition.

(d) No document shall however be inadmissible in evidence at the trial of an election petition on the ground that it is not duly stamped or registered.

(e) No witness or other person shall be required to state for whom he has voted at an election.

(f) No witness shall be excused from answering any question as to any matter relevant to the points in issue in the trial of a petition upon the ground that the answer to such question may dominate or may tend to dominate him, or that may expose or may tend to expose him to any penalty or forfeiture.

Provided that -

(1)(a) a witness, who answer truly all questions which he is required to answer shall be entitled to receive a certificate of indemnity from the High Court; and

(b) an answer given by a witness to a question put by or before the High Court shall not except in the case of any criminal proceeding for perjury in respect of the evidence, be admissible in evidence against him in any civil or criminal proceedings.

(2) When a certificate of indemnity has been granted to any witness, it may be pleaded by him in any court and shall be a full and complete defence to or upon any charge under Chapter IX-A of the Indian Penal Code (45 of 1860), or Part VII of the Act, arising out of the matter to which such certificate relates, but it shall not be deemed to relieve him from any

disqualification in connection with an election imposed by the Act or any other law.

(3) The reasonable expenses incurred by any person in attending to give evidence may be allowed by the High Court to such person, and shall, unless the High Court otherwise directs, be deemed to be part of the costs.

26. Miscellaneous -(a) The trial of an election petition shall, so far as is practicable consistently with the interest of justice in respect of the trial be continued from day to day until its conclusion, unless the High Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded.

(b) Every objection petition shall be tried as expeditiously as possible and endeavour shall be made to conclude the trial within six months from the date on which the election petition is presented to the High Court for trial.

(c) The High Court give such other orders or directions in the course of a trial of the petition as may appear to it to be necessary in the interests of justice or for expediting the trial and disposal of the case or to prevent abuse or process of Court.

23. Rule 11 provides for contents of petition while Rule 12 specifies the papers accompanying the petition. Rule 13 provides for general requirement regarding petition whereas under Rule 14 the Registry of this Court is required to scrutinise the Election Petition. As per the aforesaid Rules, election Petition alongwith necessary copies may be presented at any time during the court hours and in case any objections are found then the process as contemplated under Rules 14 and 15 are to be followed. Under Rule 14, the Registrar is required to thoroughly examine the petition with a view to see whether it is in conformity with the requirement of law and the Rules applicable to the same. The Rules also provide that the petition is not in conformity with the law and the Rules framed by the High Court, the Registry is required to raise objection which can be removed by a party or Advocate. Under Rule 15, preliminary hearing of defective petitions is required to be undertaken by the designated judge after the matter is placed before him. The petition is required to be scrutinised under Rule 19 on which date it shall be the duty of the petitioner or an Advocate in-charge to appear before the Court on the date of scrutiny and to comply with the order or directions that may be given by the designated judge at the time of scrutiny.

24. Under Rule 15(d), if the High Court finds that Sections 81, 82 and 117 of the Act have duly been complied with and that there has been substantial compliance with the other Rules and it is not necessary to have any other rectification or amendment made in the petition or other paper, the High Court shall order notice of the petition to be issued to the respondent or respondents, as the case may be.

25. The commencement of trial is provided under Section 21. The trial of a petition shall be deemed to commence on the date fixed for the respondents to appear before the High Court and to answer the claim or claims made in the petition.

26. Thus, it is evidently clear from the aforesaid Rules that it is after thorough scrutiny and after recording satisfaction that the petition has been filed strictly in accordance with the provisions of the Act and Rules, the same is placed before the designated judge. Once it is so then the petition cannot be dismissed at the threshold on the ground of any technical lacuna or defects so as to abort or frustrate the endeavour of the

non-applicant / petitioner to bring to trial the issue relating to the grounds set out in the election.

27. The reason for this is obvious. After all, this is a country governed by the Rule of Law where a concerted effort by all concerned has to be made to ensure that there is free, fair and fearless election and the same cannot be sacrificed at the altar of the superficial technicalities.

28. In case of *Chandrakant Uttam Chodankar vs. Dayanand Rayu Mandrakar, 2005 (2) SCC 188*, appeals were filed before the Supreme Court against the order passed by the Bombay High Court dismissing the Election Petitions on the preliminary objections raised by the returned candidate. The question raised before the Supreme Court was, whether the Election Petitions could have been dismissed in limine under section 86 by reason of non-compliance of Sections 81(3), 83(1)(a), (c) and 83(2) of the Act. The Hon'ble Three-Judges Bench following the decisions of the Constitution Bench in case of *Muraka Radhey Shyam Ram Kumar and Ch. Subbrao's case (supra)* and also considering various other judgments, observed in paragraph 81 thereof that the decisions in case of *Satya Narain vs. Dhuja Ram reported in 1974 (4) SCC 237* and in case of *Rajendra Singh vs. Usha Rani reported in 1984 (3) SCC 339* do not lay down good law and allowing the appeal the Hon'ble Supreme Court held that burden to prove that the election petition was not maintainable or the same should be dismissed on the threshold lay on the respondents (applicant therein) and that the act of the officers of the High Court would draw a presumption in terms of Section 114(e) of the Evidence Act. Hon'ble Justice S. B. Sinha, as His Lordship then was, in his concurring judgment observed as under:-

> "85. Concededly, the officers of the High Court are required to perform administrative functions one of which is to scrutinise the election petition so as to ascertain as to whether the petitions filed before the Court are free from any defect. Such an official act would draw a presumption of having been performed in the ordinary course of business in terms of Section 114(e) of the Evidence Act.
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> 86. In Jugal Kishore Patnaik vs. Ratnakar Mohanty Khanna, J., speaking for a three-Judge Bench raised a presumption of correctness as regards endorsement made by an officer of the court in respect of the election petition stating:
>
> "We see no cogent ground to question the correctness of this endorsement which clearly lends support to the inference that the copy filed with the petition had been attested by the respondent and that the petition did not suffer from lack of compliance with the procedural requirement."

29. As regards the contention of learned Senior Advocate for the petitioner, that the schedule and annexures have not been verified and have only been attested to be true which only needs to be reiterated that the verification contemplated under the Act is only that the copy supplied to the opposite party should be true copy of the original and it is not in dispute that the copy so supplied to the applicant are not the true copy of the Election Petition.

30. As held by the Constitution Bench of the Hon'ble Supreme Court in *Muraka Radhey Shyam Ram Kumar vs. Roop Singh Ratore & others, 1964 (3) SCR 573,* that the copy as contemplated in Part IV of the Act, does not mean an absolutely exact copy. It means a copy so true that nobody can by any possibility misunderstand it. The test whether the copy is a true one is whether any variation from the original is calculated to mislead an ordinary person.

31. Likewise another Constitution Bench of the Hon'ble Supreme Court in *Ch. Subbarao vs. Member, Election tribunal, Hyderabad and Ors., 1964 AIR SC 1027*, while considering the question whether the omission of the words true copy in the copies which were admittedly exact copies of the petition, constituted non-compliance of Section 81(3) so as to render the petition liable to be rejected. In this case also the petition was accompanied with the requisite number of copies specified in Section 81(3) but what was urged as regards certain defects in the copies filed. The Hon'ble Supreme Court observed:

> "These defects fell into two types. First there were two matters which it was stated rendered the copies filed not true copies?. If the expressions copy or true copy were read as exact copies of the original, the copies filed did not satisfy that test. The two defendants were:
>
> (1) The original petition contained the signature of the petitioner at the foot of the petition as required by Section 83(1)(c) of the Act. In the copy filed there was no copy of this signature. To that extent therefore the copy was not an exact copy.
>
> (2) The second matter under this head was that the verification in the copy served on the appellant did not exactly correspond to that in the original in that in the latter one of the paragraphs was stated to be true to the personal knowledge of the petitioner while in the former that paragraph was omitted from this group. The other type of defect which was claimed to constitute non-compliance with Section 81(3) was that the words true copy with the signature of the petitioner underneath were not put down in one of the annexures to the petition, copies of which were annexed to the copies of the petition filed."

32. Similar issue was thereafter considered in detail by the Hon'ble Supreme Court in *T. M. Jacob vs. C. Poulose, AIR 1999 SC 1359* and it was observed as under:-

> "40. The object of serving a 'true copy' of an Election Petition and the affidavit filed in support of the allegations of corrupt practice on the respondent in Election Petition is to enable the respondent to understand the charge against him so that he can effectively meet the same in the written statement and prepare his defence. The requirement is, thus, of substance and not of form.
>
> 41. The expression 'copy' in section 81(3) of the Act, in our opinion, means a copy which is substantially so and which does not contain any material or substantial variation of a vital nature as could possibly mislead a reasonable person to understand and meet the charges/allegations made against him in the election petition. Indeed a copy which differs in material particulars from the original cannot be treated as a true copy of the original within the meaning of section 81(3) of the Act and the vital defect cannot be permitted to be cured after the expiry of the period of limitation.
>
> 42. We have already referred to the defect which has been found in the copy of the affidavit served on the appellant in the present case. There is no dispute that the copy of the affidavit served on the appellant contained the endorsement to the effect that the affidavit had been duly signed, verified and affirmed by the election petitioner before a Notary. Below the endorsement of attestation, it was also mentioned: Sd/-Notary. There, however, was an omission to mention the name and particulars of the Notary and the stamp and seal of the Notary in the copy of the affidavit served on the appellant.

There was no other defect pointed out either in the memo of objection or in C.M.P. No. 2903 of 1996 or even during the course of arguments in the High Court or before us. Could this omission be treated asan omission of a vital or material nature which could possibly mislead or prejudice the appellant in formulating his defence? In our opinion No. The omission was inconsequential. By no stretch of imagination can it be said that the appellant could have been misled by the absence of the name and seal or stamp of the Notary on the copy of the affidavit, when endorsement of attestation was present in the copy which showed that the same had been signed by the Notary. It is not denied that the copies of the Election Petition and the affidavit served on the appellant bore the signatures of respondent No. 1 on every page and the original affidavit filed in support of the Election Petition had been properly signed, verified and affirmed by the election petitioner and attested by the Notary. There has, thus, been a substantial compliance with the requirements of section 81(3) read with the proviso to section 83(1)(c) of the Act. Defects in the supply of true copy under section 81 of the Act may be considered to be fatal, where the party has been misled by the copy on account of variation of a material nature in the original and the copy supplied to the respondent. The prejudice caused to the respondent in such cases would attract the provisions of section 81(3) read with section 86(1) of the Act. Same consequence would not follow from noncompliance with Section 83 of the Act.

43. We are unable to agree with Mr. Salve that since proceedings in election petitions are purely statutory proceedings and not ?civil proceedings? As commonly understood, there is no room for invoking and importing the doctrine of substantial compliance i to section 86(1) read with section 81(3) of the Act. It is too late in the day to so urge. The law as settled by the two Constitution Bench decisions of this Court referred to above is by itself sufficient to repel the argument of Mr. Salve. That apart, to our mind, the Legislate intent appears to be quite clear, since it divides violations into two classes those violations which would entail dismissal of the election petition under section 86(1) of the Act like noncompliance with section 81(3) and those violations which attract section 83(1) of the Act i.e. noncompliance with the provisions of section 83. It is only the violation of Section 81 of the Act which can attract the application of the doctrine of substantial compliance as expounded in Murarka Radhey Shyam, 1964 AIR(SC) 1545 and Ch. Subbarao s cases, 1964 AIR(SC) 1027. The defect of the type provided in Section83 of the Act, on the other hand, can be dealt with under the doctrine of curability, on the principles contained in the Code of Civil Procedure.

44. .....

45. In our opinion it is not every minor variation in form but only a vital defect in substance which can lead to a finding of non-compliance with the provisions of Section 81(3) of the Act with the consequences under Section 86(1) to follow. The weight of authority clearly indicates that a certain amount of flexibility is envisaged. While an impermissible deviation from the original may entail the dismissal of an election petition under Section 86(1) of the Act, an insignificant variation in the true copy cannot be construed as a fatal defect. It is, however, neither desirable nor possible to catalogue the defects which may be classified as of a vital nature or those which are not so. It would depend upon the facts and circumstances of each case and no hard

and fast formula can be prescribed. The tests suggested in Murarka Radhey Shyam's case, 1964 AIR(SC) 1545 are sound tests and are now well settled. We agree with the same and need not repeat those tests. Considered in this background, we are of the opinion that the alleged defect in the true copy of the affidavit in the present case did not attract the provisions of Section 86(1) of the Act for alleged non-compliance with the last part of Section 81(3) of the Act and that there had been substantial compliance with the requirements of Section 81(3) of the Act in supplying =true copy of the affidavit to the appellant by the respondent.

33. In *T. Phungzathang vs. Hangkhanlian, 2001 (7) JT 439*, the Hon'ble Supreme Court summed up the law laid down in T. M. Jacob's case (supra) as under:-

"(i) The object of serving a true copy of an election petition and the affidavit filed in support of the allegations of corrupt practices of the respondent in the election petition is to enable the respondent to understand the charge against him so that he can effectively meet the same in the written statement and prepare his defence. The requirement is of substance and not of form.

(ii) The test to determine whether a copy was a true one or not was to find out whether any variation from the original was calculated to mislead a reasonable person.

(iii) The word 'copy' does not mean an absolutely exact copy. It means a copy so true that nobody can by any possibility misunderstand it.

(iv) Substantial compliance with Section 81(3) was sufficient and the petition could not be dismissed, in limine, under Section 86(1) where there had been substantial compliance with the requirements of Section 81(3) of the Act.

(v) There is a distinction between non-compliance with the requirement of Section 81(3) and Section 83. A substantial compliance with the requirement of Section 81 (3) read with the proviso to Section 83(1) of the Act is enough. Defects in the supply of true copy under Section 81 of the Act may be considered to be fatal, where the party has been misled by the copy on account of variation of a material nature in the original and the copy supplied to the respondent. The prejudice caused to the respondent in such cases would attract the provision of Section 81(3) read with Section 86(1) of the Act. The same consequence would not follow from non-compliance with Section 83 of the Act.

(vi) The argument that since proceedings in election petitions are purely statutory proceedings and not civil proceedings as commonly understood, there is no room for invoking and importing the doctrine of substantial compliance into Section 86 (1) read with Section 81 (3) of the Act, cannot be accepted and has to be repelled.

(vii) It is only the violation of Section 81 which can attract the application of the doctrine of substantial compliance as expounded in Murarka Radhey Shyam and Ch. Subbarao cases. The defect of the type provided in Section 83 of the Act, on the other hand, can be dealt with under the doctrine of curability, on the principles contained in the code of Civil Procedure. This clearly emerges from the scheme of Section 83(1) and 86(5) of the Act.

(viii) A certain amount of flexibility is envisaged. While an impermissible deviation from the original may entail the dismissal of an election petition under Section 86 (1) of the Act, an insignificant variation in the true copy

cannot be construed as a fatal defect. It is, however, neither desirable nor possible to catalogue the defects which may be classified as of a vital nature or these which are not so. It would depend upon the facts and circumstances of each case and no hard and fast formula can be prescribed. The test suggested in Murarka Radhey Shyam case are sound tests and are now well settled."

34. In case of *Umesh Challiyill vs. K. P. Rajendran reported in 2008 (11) SCC 740*, the Hon'ble Supreme Court while dealing with the preliminary objections that the affidavit in Form 25 was not affirmed, the affirmation was not duly certified, their verification of the election petition was defective, the source of information as regards the allegations of corrupt practices was vague and lacked pleadings as regards material particulars, considered the scope of Section 83 of the said Act and held inter alia that the election petition cannot be dismissed under Section 86(1) at the outset on the ground that technical or cosmetic defect, but the election petition can be dismissed on the ground of it being not properly constituted as required under the provisions of CPC. The relevant observations read as under:-

" Both the defects which have been pointed out by learned Single Judge were too innocuous to have resulted in dismissal of the election petition on the basis of the preliminay objection. The Courts have to view it whether the objections go to the root of the matter or they are only cosmetic in nature. It is true that the election petition has to be seriously construed. But that apart the election petition should not be summarily dismissed on such small breaches of procedure. Section 83 itself says that the election petition should contain material facts. Section 86 says that the High Court shall dismiss the election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117. But not of defect of the nature as pointed out by the respondent would entail dismissal of the election petition. These were the defects, even if the Court has construed them to be of serious nature, at least notice should have been issued to the party to rectify the same instead of resorting to dismissal of the election petition at the outset.

20. However, in fairness whenever such defects are pointed then the proper course for the Court is not to dismiss the petition at the threshold. IN order to maintain the sanctity of the election the Court should not take such a techical attitue and dismiss the election petition at the threshold. On the contrary after finding the defects, the Court should give proper opportunity to cure the defects and in case of failure to remove/ cure the defects, it could result into dismissal on account of Order 6 Rule 17 or Order 7 Rule 11 CPC. Though technically it cannot be dismissed under Section 86 of the Act of 1951 but it can be rejected when the election petition is not properly constituted as requried under the provisions of the CPC but in the present case we regret to record that the defects which have been pointed out in this election petition was purely cosmetic and it does not go to the root of the matter and secondly even if the Court found them of serious nature then at least the court should have given an opportunity to the petitioner to rectify such defects.

35. Apart from the above, it is significant to note that the applicant has nowhere alleged in the application that the omission or lacuna has mislead the applicant or has

caused any prejudice to the applicant in preparing his defence while filling written statement.

36. In view of the aforesaid discussion, the application is bereft of any merit, insofar as that seeks rejection of the petition on the ground that there is violation of statutory provisions, more particularly, the provisions of the Representation of the People Act, 1951 and to that extent the application is dismissed.

37. Now to come up on 10-06-19 for arguments on the other plea raised by the applicant to the effect that the petition does not disclose any cause of action.

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BEFORE HON'BLE MR. JUSTICE SURYA KANT, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

LPA's No. 149 and 150 of 2016
Decided on: 29.4.2019

1. LPA No. 149 of 2016

H.P. State Forest Development Corporation Limited ...Appellant

Versus

Suraj Bahadur and others ...Respondents

2. LPA No. 150 of 2016

H.P. State Forest Development Corporation and others ...Appellant

Versus

Nota Ram and others ...Respondents

Constitution of India, 1950- Articles 14 & 16- Promotion to post of driver from feeder cadre of cleaners- Corporation dividing feeder cadre of 'cleaners' and denying promotional chances to cleaners (petitioners) appointed initially on daily wage basis but regularized subsequently against said posts- Whether amounts to reasonable classification?– Hon'ble Single Bench allowing writ– LPA- Corporation contending that cleaners appointed on daily wage basis were regularized against personal posts and such benefit was given to them as 'one time measure' to save their retrenchment- Held, Corporation created artificial classification by treating homogenous class of cleaners in two groups- Such classification has no nexus with object sought to be achieved- Nomenclature adopted by Corporation i.e. 'Personal' and 'Cadre' posts is against all canons of service jurisprudence- Cleaners appointed by whatever mode are cleaners for all intents and purposes- LPA dismissed. (Paras 2 to 5)

LPA No. 149 of 2016

For the appellant & respondent No. 2: Ms. Ranjana Parmar, Senior Advocate with Ms. Rashmi Parmar, Advocate.

For respondents No.1 and 4: Mr. P.D. Nanda, Advocate.

LPA No. 150 of 2016

For the appellants: Ms. Ranjana Parmar, Senior Advocate with Ms. Rashmi Parmar, Advocate.

For the respondents: Mr. P.D. Nanda, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral**)**

The instant Letters Patent Appeals under Clause 10 of the Letters Patent Act of the Hon'ble High Court of Judicature at Lahore read with Section 10 of the Delhi High Court Act, as applicable to the State of Himachal Pradesh, have been filed laying challenge to two separate judgments filed by learned Single Judge of this Court i.e. judgment dated 8.5.2015 in CWP No. 4575 of 2012 and judgment dated 29.5.2015 in CWP No. 4543 of 2011, whereby writ petitions having been filed by the respondents-petitioners (hereinafter, 'petitioners') came to be allowed. While allowing aforesaid writ petitions, learned Single Judge directed the appellant-Corporation (hereinafter, 'Corporation') to redraw the Seniority List on the basis of length of service and to consider the case of the petitioners and other similarly situate persons for the post of Driver. Vide aforesaid judgments, Corporation was further directed to pay to salary of the post of Driver the petitioners with effect from the date they have discharged the duties of the said post.

2. For having a bird's eye view, necessary facts as emerge from the record are that the petitioners were appointed on daily wage basis as Cleaners against the vacancies on various dates during the years 1986 to 1994 and subsequently regularized on the said post during the years 1997, 2002, 2010 and 2007. In nutshell, case of the petitioners before the writ Court was that though they were appointed as Cleaners but they have been discharging duties of Drivers and as such, they are fully eligible to be considered for the post of Driver as per the Recruitment and Promotion Rules framed by the Corporation. With a view to substantiate their claim, petitioners placed on record certain documents and claimed that there are 94 posts of Drivers but only 52 incumbents are working on regular basis on the said post. The Corporation, while refuting aforesaid contention raised on behalf of the petitioner, claimed before the writ Court that the Corporation has drawn two separate Seniority Lists by dividing the cadre of the Cleaners in two categories i.e. (a) those who have been regularized from Daily Wage posts and, (b) those appointed on compassionate grounds. The Corporation also admitted that though the petitioners were regularized as Cleaners as per the Government policy, but they were occasionally entrusted the duties of driving the vehicles. The Corporation claimed that the petitioners alongwith some other similarly situate persons were regularized against "personal posts" and such benefit was given to them as 'one-time' measure so as to save them from retrenchment as they were surplus in the Corporation. The Corporation also claimed that many officials are senior to that of the petitioners, who will be regularized as and when posts become vacant because, as per the Recruitment and Promotion Rules of the Corporation, for Drivers, the feeder category is of the Cleaners with three years of service alongwith other eligibility conditions, as such, regularisation, if made qua the petitioners only, same would lead to grave injustice to other similarly situate officials, who are senior to the petitioners and lead to their (petitioners) unjust enrichment.

3. Having heard learned counsel for the parties and perused the material available on record vis-à-vis reasoning assigned by learned Single Judge, while allowing the writ petitions having been filed by the petitioners, we are not persuaded to interfere with the impugned judgments, which otherwise appear to be based upon proper appreciation of the facts as well as law. As per own case of the Corporation, it has drawn two separate Seniority Lists by dividing the cadre of Cleaners into two categories, as a result of which, it has created an artificial classification by treating homogenous class of Cleaners in two groups and such classification has no nexus with the object sought to be achieved. Petitioners alongwith other similarly situate persons came to be regularized in the Corporation against

"personal posts" as per Government policy, but we cannot lose sight of the fact that they were initially appointed on Daily Wage basis as Cleaners on various dates against the vacancies. It is also not in dispute that the petitioners subsequently came to be regularized. Candidates, if any, appointed on compassionate basis against the posts of Cleaner, were required to be treated at par with the petitioners, who, admittedly, had joined the service as Cleaners in the Corporation on Daily Wage basis prior to the appointments made by the Corporation against the posts of Cleaners on compassionate ground, as such, they were required to be treated as one group. The nomenclature adopted by the Corporation i.e. "personal" and "cadre" posts is certainly against all canons of service jurisprudence, because Cleaners appointed by whatever mode, are Cleaners for all intents and purposes and there cannot be any artificial classification by giving separate designations as "personal" and "cadre" posts. Services of the petitioners might have been regularized in terms of the Policy Decision taken by the Government as one time measure against personal posts, however, the fact remains that they all were regularized as Cleaners, as such, there appears to be no justification in framing two Seniority Lists by dividing Cleaners into two categories i.e. those who are regularized from Daily Wage basis and those appointed on compassionate grounds.

4. Moreover, the post of Driver is/was to be filled by way of promotion from amongst the Cleaners, which is feeder category for the post of Driver and claim of the petitioners and other similarly situate persons, could not be defeated on the ground that they were regularized from Daily Wage posts against "personal posts", especially when persons, if any, also came to be appointed against the posts of Cleaners on regular basis on compassionate grounds, that too, after the regularisation of the petitioners.

5. Another argument having been advanced by Ms. Parmar, learned Senior Advocate that at the time of passing of judgments, writ Court had no jurisdiction because, by that time, Himachal Pradesh Administrative Tribunal had come into existence, deserves outright rejection for the reasons; (a) impugned judgments were passed in the presence of Mr. Pranay Pratap Singh, learned counsel for the Corporation and at no point of time, objection, if any, with regard to maintainability and jurisdiction of the writ Court came to be raised and; (b) petitioners had approached the writ Court when Himachal Pradesh Administrative Tribunal was not in existence. Leaving everything aside, it cannot be said that learned Single Judge had no jurisdiction to adjudicate upon the dispute, while exercising power under Article 226 of the Constitution of India. No doubt, an alternative Forum (Himachal Pradesh Administrative Tribunal) came to be established for the adjudication of the service disputes, but that did not strip learned Single Judge of the aforesaid power, as such, learned Single Judge was well within his domain, while disposing of the writ petitions.

6. In view of the aforesaid observations, we find no merit in both the appeals, which stand dismissed accordingly. Pending miscellaneous applications, if any, in both the petitions, also stand disposed of.

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

RSA No. 633 of 2005
alongwith RSA No. 605 of 2005.
Reserved on : 27th March, 2019.
Decided on : 30th April, 2019.

1. RSA No. 633 of 2005.

Shri Biru ...Appellant/Plaintiff.
Versus
Sh. Kundan Lal and another ...Respondents/defendants.

2. RSA No. 605 of 2005.

Shri Biru ...Appellant/Defendant No.1.
Versus
Ved Ram and another ...Respondents/Plaintiff.

Code of Civil Procedure, 1908 – Order XIV Rule 1– Non framing of issues, when will vitiate trial- Held, general rule is that non-striking of issue does not vitiate trial if there is fullest participation of contesting parties- However, where parties failed to adduce vital evidence on account of non-framing of issue, trial may vitiate- On facts, no issue regarding validity of sale deed though in question was framed by Trial Court- Sale deed as such could not be tendered and proved in evidence- Therefore, trial stood vitiated on account of non-framing of issue- Decrees of Lower Courts set aside- Matter remanded . (Paras 6 to 8)

For the Appellant(s): Mr. Sanjeev Kuthiala, Advocate in both appeals.
For Respondent No.1: Mr. Raman Sethi, Advocate in RSA No. 633 of 2005 and Mr. Karan Singh Kanwar, Advocate in RSA No. 605 of 2005.
For Respondent No.2: Mr. Karan Singh Kanwar, Advocate in RSA No. 633 of 2005 and Mr. Raman Sethi, Advocate, in RSA No. 605 of 2005. Respondent No.3 in RSA No. 605 of 2005 is already exparte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Since, there, is, a substantial interconnectivity inter se civil suit No. 50 of 2004(4 of 2001), and, Civil Suit No. 121 of 2001/101 of 2004, and, when both the afore Regular Second Appeals hence bearing RSA No. 605 of 2005, and, bearing RSA No. 633 of 2005, stand directed against concurrently recorded verdicts, respectively, pronounced, upon, Civil Appeal No. 61 of 2005, and, Civil Appeal No.62 of 2005, (i) thereupon, when both the afore RSAs were heard together, and, when on 27.03.2019, on conjoint submissions, of the learned counsel appearing, for the contesting litigants, the only substantial question of law enjoined to be formulated, is, the one which stands hereinafter, thereupon, both the afore RSAs enjoin meteing, of, a common verdict thereon:-

> "1. Whether non striking of issues, with respect to the pleaded factum of invalidity, of, sale deed, bearing No.253, executed on 24.06.1977, vitiates the trial of the suit?"

2. Without delving deep into the merits of the controversy, and, conspicuously given, the parties at contest in both Civil Suit No. 50 of 2004/4 of 2001, and, Civil No. 101 of 2004/121 of 2001, whereon concurrent decrees, were pronounced both by the learned trial Court, and, by the learned First Appellate Court, rather restricting the controversy, only vis-a-vis, the afore extracted substantial question of law, (i) thereupon, tenacity, of, the afore formulated substantial question of law, and, its impinging, upon, the validity(ies)/veracity(ies), of, the concurrently recorded verdicts by both the learned Courts below, hence is, required to be fathomed, and, meted an adjudication.

3. Civil Suit No. 50 of 2004/04 of 2001, stood instituted by one Ved Ram, vis-a-vis, suit khasra numbers, 3830, and, 3829, (i) whereas, civil suit No.121 of 2001, is, restricted to only Khasra No. 3830. In civil suit No. 50 of 2004/04 of 2001, one Ved Ram is the plaintiff, and, he has averred therein qua acquisition of title, vis-a-vis, Khasra Nos. 3830, and, 3829, by one Jaywanti, the mother of defendant No.2 (Kundan Lal), from, defendant No.1, through, a registered deed of conveyance, bearing No. 353 of 24.06.1977. The afore Ved Ram had averred, that, defendant No.2, upon, demise of one Jaywanti, had inherited the latter's interest, in a part, of, the suit land, as stood, acquired by her under a registered deed of conveyance bearing No.353 of 24.06.1977, (ii) and, thereafter co-defendant No.2, hence alienating the suit land to the plaintiff, through, a registered deed of conveyance, bearing No. 586 of 27.4.1998, (iii) hence, the plaintiff one Ved Ram, in civil suit No. 50 of 2004/04 of 2001, rather, prayed that a declaratory decree qua his becoming absolute owner, in, possession of the suit land, be rendered, besides a decree for permanent injunction, for, restraining the defendants from interfering in his peaceful possession of the suit land, be also rendered.

4. Though, the afore pleaded factum hence enjoined, the learned trial Court to strike, an, issue, vis-a-vis, the afore pleaded factum, and, specifically appertaining to the validity of execution of sale deed, bearing No. 253 of 24.06.1977, (i) yet the learned trial Court, omitted to frame the afore imperative issue, and, rather proceeded to render an affirmative decree, upon, Civil Suit No.50 of 2004 (04 of 2001), vis-a-vis, the plaintiff therein, one Ved Ram. One Biru, arrayed as defendant No.1, in the afore civil suit, also instituted civil suit No. 121 of 2001 (101 of 2004), wherein, he claimed rendition, of, a decree for specific performance of contract, and, also averred, in his plaint, qua sale deed bearing No. 253 of 24.06.1977, for reasons set forth therein, being gripped with a vice of invalidity, and, rather the contract of sale executed on 6.2.1998 inter se him, and, defendant No.1 Kundan Lal, rather being decreed to be put to specific performance.

5. Upon, the afore civil suit No. 121 of 2001 (101 of 2004), both the learned courts below rendered findings hence adversarial to the afore plaintiff Biru. Consequently, also the afore pleaded fact, by plaintiff Biru, in, the afore civil suit, and, vis-a-vis, the invalidity of sale deed, bearing No.253 of 24.06.1977, though, also enjoined striking, of, an apt issue in consonance therewith, yet, no issue appertaining therewith, was, formulated by the learned trial Court.

6. The afore conspectus, does unfold, that there being interconnectivity inter se both the civil suits, and, also there being, a, dire necessity, upon, the learned trial Court, to, in both the afore civil suits, strike issue(s), appertaining to the validity, of, sale deed bearing No.253 of 24.06.1977. The afore dire necessity, arises, for determining, the, validity of acquisition of title, by one Jaywanti, from defendant No.1 Biru, and, thereafter by defendant No.2, the sole legatee of the afore Jaywanti, latter whereof subsequently alienated rather one amongst, the suit khasra numbers hence common to both afore civil suits, to one Ved Ram, the plaintiff in civil suit No. 50/2004(4/2001), (i) in respect whereof, concurrent declaratory decrees, and, consequential thereto hence decree(s) for permanent prohibitory injunction rather stand rendered. Importantly also the contract of sale, strived, to be decreed for specific performance,, by one Biru, plaintiff in civil suit No. 121/2001 (101 of 2004), (ii) contract whereof was entered with Kundan Lal, defendant common in both the afore civil suits, and, wherefromwhom, and, after the demise of Jaywanti, one Ved Ram, Plaintiff in Civil Suit No.50/2004 (4 of 2001), had acquired title, vis-a-vis, a part of the suit land, through, a registered deed of conveyance executed, vis-a-vis, him by Kundan Lal, (iii) obviously hence for avoiding rendition, of, conflicting findings, upon, the afore referred contested factum, in both the civil suits, reiteratedly enjoined striking of issue, appertaining

to the, summum bonum, of the controversy, devolving, upon, the validity of the registered deed of conveyance, bearing No.253 of 24.06.1977. Conspicuously, the entire controversy, inter se, the parties would necessarily be put to a secured quietus, only upon, the afore imperative issue hence being struck. Reiteratedly, the afore issue, when imminently spurred, from the pleadings set forth, by the parties, yet it remained unstruck, and, also no evidence, in consonance therewith stood adduced, (iv) even though non striking of a vital issue, arising, from the pleadings, of the parties, may not impair or vitiate the findings rendered by both the learned Courts below, (v) upon, there being evident active participation, and, with fullest knowledge, of, the contesting litigants, in, the entire proceedings. However, the afore excepting principle, vis-a-vis, the non striking, of, a vital issue, as germinating from the contentious pleadings, reared by the legal combatants, in the civil suits concerned, hence not vitiating the trial, of, the suit, (vi) would yet not operate in the extantly prevailing factual matrix, for, the reasons (a) unless the afore sale deed was tendered, into evidence, and, was proven in accordance with law; (b) all, the, endorsements occurring thereon, and, imperatively as made thereon by the Sub Registrar concerned, being proven, in accordance with law, (c) given theirs acquiring, a, presumption of truth, yet the afore presumption rather would acquire an aura of validity only upon lack of adequate rebuttal evidence thereto, (d) reiteratedly, hence, for want of rebuttal evidence being adduced, thereupon, the presumption of truth attached, vis-a-vis, the endorsements existing, on the registered deed of conveyance, rather would be firmly engendered, (e) thereupon, for wants thereof, it is befitting to conclude, that, the rendition of concurrent decrees by both the learned Courts below, upon, Ved Ram's Civil Suit rather being infirm, and, being gripped with an entrenched legal fallibility, (f) also thereupon in case the afore presumption of truth, stands rebutted, thereupon, the rendition of concurrent decrees, upon, Ved Ram's Civil suit, would not acquire the utmost vigour, (g) reiteratedly unless, the endorsement made on the registered deed of conveyance by the Sub Registrar concerned, hence, does come under a cloud, or suffers erosion, (h) whereupon, alone Biru's civil suit seeking rendition of decree for specific performance, of, contract entered inter se him, and, one Kundan Lal, wherefrom Ved Ram acquired title, through, a sale deed 27.04.1998, would be amenable, for, being decreed.

7. The upshot of the above discussion, is that, the exception, to the legal principle, that, the non striking of vital issue, hence not vitiating the trial, upon, there being evident, fullest participation of the contesting litigants, in the entire proceedings, rather not holding clout, in the extantly prevailing legal scenario, (i) and, when the afore ground, and, the afore vital issue ,whereon the entire fulcrum, of the lis, is, rested,and, upon, emanation of apt evidence, whereupon, the concurrently recorded affirmative findings, would, beget apt validation or invalidation, (ii) and, would also facilitate, rendition, of, unflinching findings, vis-a-vis, the validity, of, the acerbic contest, in, Civil suit No. 50 of 2004(4 of 2001), and, upon Civil Suit No. 121 of 2001 (101 of 2004), (iii) thereupon, it is concluded that the non striking of the afore issue, hence, has rather vitiated the trial of the afore civil suits. Consequently, the afore substantial question of law is answered in favour of the appellant(s), and, against the respondent(s).

8. For the foregoing reasons, both the appeals are allowed, and, verdicts impugned before this Court are set aside. In sequel, both the afore civil suits are remanded to the learned trial Court, with a direction to frame the afore issue, appertaining to the validity, of, the registered deed of conveyance, bearing No.253 of 24.06.1977, and, thereafter permit the parties, to lead their respective evidence, on the afore issue, and, to also render fresh findings, upon, both the civil suits. The afore exercise shall be completed within six months from today. The parties are directed to appear before the learned trial Court on 17th

May, 2019. All pending applications also stand disposed of. Records be sent back forthwith.

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

Cr. Revision No. 4 of 2008 along
with Cr. Revision No. 12 of 2008.
Reserved on: 16th April, 2019.
Date of Decision: 30th April, 2019.

1. Cr. Revision No. 4 of 2008.

Davinder Sharma .....Appellant.
Versus
State of H.P. .....Respondent.

2. Cr. Revision No. 12 of 2008.

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

Wildlife Protection Act, 1972 (Act) – Section 5 – **Wildlife Protection Rules, 1974**- Rule 49 – Offences under Act- Complaint- Filing of- Competent Authority- Who is?- Held, in view of delegation of powers as per Section 5 of Act read with Rule 49, wildlife Warden-cum-DFO is competent to file complaint before competent Court qua offences committed under Act. (Paras 10 & 11)

For the Appellant(s): Ms. Tim Saran, Advocate, in Cr. R. No.4 of 2008 and
Mr. N.K. Tomar, Advocate in Cr. R. No. 12 of 2008.
For the Respondent(s): Mr. Hemant Vaid and Mr. Desh Raj Thakur,
Additional Advocate Generals.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

Both the aforesaid Criminal Revisions are being disposed of by a common judgment, as, both arise, from, a common verdict rendered, by the learned trial Court.

2. Both the aforementioned criminal revisions, stand directed, by the accused/convicts, against, the concurrently recorded verdicts by both the learned courts below, vis-a-vis, a charge framed, for, the commission, of, an offence punishable under Section 51 of the Wild Life Protection Act (hereinafter referred to as the Act), and, the consequent thereto, hence, sentences imposed, upon, them.

3. The facts relevant to decide the instant case are that on 7.5.2000, around 8.00 p.m., the police party headed by Durga Dass Sharma, incharge, CIA Solan, along with other police officials was present at Nagali rain shelter in connection with patrolling and was checking the vehicles. It is alleged that at that time a blue coloured vehicle No. HP-16-0405 came from Solan side which was stopped at the spot by Inspector D.D. Sharma and on checking the accused were found sit in the car. It is alleged that on checking the vehicle, a

plastic bag was kept in the back seat of the car, which on opening was found to contain three leopard skins of different sizes, regarding which the accused could not produce the permit and then IO seized the leopard skins, bag under memo EX.PW2/A in the presence of witnesses. The IO prepared the rukka and sent it to the police station concerned, on the basis of which FIR borne in Ex.PB came to be registered. The IO prepared the site map as also the statements of the witnesses were recorded. Thereafter police completed all the investigating formalities and arrested the accused.

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

5. The accused/convicts stood charged, by the learned trial Court, for, theirs committing, an, offence, punishable under Section 51 of the Wild Life Protection Act (hereinafter referred to as the Act). In proof of the prosecution case, the prosecution examined 4 witnesses. On conclusion of recording, of, the prosecution evidence, the statements of the accused, under, Section 313 of the Code of Criminal Procedure, were, recorded by the learned trial Court, wherein, the accused claimed innocence, and, pleaded false implication in the case.

6. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction, upon, the accused/convicts/petitioners herein, for, theirs committing, an, offence, punishable under Section 51 of the Wild Life Protection Act. In appeals preferred therefrom, by the accused/appellants herein, before, the learned Addl. Sessions Judge concerned, the latter affirmed the apposite findings of conviction, and, the, consequent therewith imposition, of, sentence(s), upon, them, as borne, in the judgment, pronounced, by the learned trial Court.

7. The convicts/accused/petitioners herein, stand aggrieved, by the concurrent findings of conviction, recorded, by the learned Courts below. The learned counsel(s) appearing for the accused/petitioners herein, have, concertedly and vigorously contended, qua the findings of conviction, recorded by both the learned Courts below, standing not, based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by them, of the material on record. Hence, they contends qua the concurrent findings of conviction hence warranting reversal by this Court, in the exercise of its revisional jurisdiction, and, theirs being replaced by findings of acquittal.

8. On the other hand, the learned Additional Advocate General appearing for the respondent/State, has, with considerable force and vigour, contended qua the findings of conviction, recorded, by both the learned Courts below, rather standing based, on a mature and balanced appreciation, by them, of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

9. 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.

10. Initially, the learned counsel appearing, for the convicts/accused proceeded to make a vehement submission before this Court (a) that the assumption of cognizance by the learned trial Court, upon, the apposite complaint, and, thereafter, the, order framing, the, charge, and, the consequent therewith conviction, and, imposition, of, sentence, upon, the convicts/accused, by both the learned courts below, being all legally fallible, and, also being ridden with, a, gross legal infirmity, (b) sparked by the factum of the mandate of Section 55, of the Wild life (Protection) Act (hereinafter referred to as the Act), provisions whereof stand extracted hereinafter:-

> "**55**. **Cognizance of offences**.—No court shall take cognizance of any offence against this Act except on the complaint of any person other than—
>
> (a) the Director of Wild Life Preservation or any other officer authorised in this behalf by the Central Government; or
>
> 2[(aa) the Member-Secretary, Central Zoo Authority in matters relating to violation of the provisions of Chapter IVA; or] 3[(ab) Member-Secretary, Tiger Conservation Authority; or
>
> (ac) Director of the concerned tiger reserve; or]
>
> (b) the Chief Wild Life Warden, or any other officer authorised in this behalf by the State Government 2[subject to such conditions as may be specified by that Government]; or
>
> 2[(bb) the officer-in-charge of the zoo in respect of violation of provisions of section 38J; or]
>
> (c) any person who has given notice of not less than sixty days, in the manner prescribed, of the alleged offence and of his intention to make a complaint to the Central Government or the State Government or the officer authorised as aforesaid]."

hence standing transgressed, (c) transgression whereof is contended to spur, from, the Divisional Forest Officer concerned, not being contemplated, to be the statutorily authorised officer, rather to make a complaint, vis-a-vis, the commission, of, the charged offence. However, the afore submission addressed before this Court, (d) is neither weighty nor is acceptable, given it being rested, upon, the counsel(s) appearing for the petitioners, rather remaining oblivious qua the mandate, of, Section 5 of the Act, provisions whereof stand extracted hereinafter:-

> "**5. Power to delegate.**—(1) The Director may, with the previous approval of the Central Government, by order in writing, delegate all or any of his powers and duties under this Act to any officer subordinate to him subject to such conditions, if any, as may be specified in the order.
>
> (2) The Chief Wild Life Warden may, with the previous approval of the State Government by order in writing, delegate all or any of his powers and duties under this Act, except those under clause (a) of sub-section (1) of section 11, to any officer subordinate to him subject to such conditions, if any, as may be specified in the order.
>
> (3) Subject to any general or special direction given or condition imposed by the Director or the Chief Wild Life Warden, any person, authorised by the Director or the Chief Wild Life Warden to exercise any powers, may exercise those powers in the same manner and to the same effect as if they had conferred on that person directly by this Act and not by way of delegation."

(e) wherein, in sub-section (2), the, Chief Wild Life Warden is empowered, to, with the prior approval, of, the State Government, hence, delegate all or any of his powers, and, duties, as contemplated in the Act, (f) and, with sub-section (3) thereof, also foisting, in the delegatee officer, all, the powers as are exercisable under the Act, by the delegating authority, hence, even if, the extant complaint, is, not made by the Chief Wild Life Warden, the afore factum, cannot, grip the extant complaint, with, an aura of invalidity, (g) unless, the learned Additional Advocate General fails, to, place on record, hence, material exemplifying qua the Chief Wild Life Warden rather validly delegating all the statutorily vested powers in him, vis-a-vis, the officer making the complaint, and, the afore delegation, reiteratedly hence,

occurring, after adherence to the procedure, as, prescribed in sub-section (2), and, sub-section (3) of Section 5 of the Act.

11. For determining the afore factum, initially, an allusion, to Rule 49 of the Rules framed under Section 64 of the Act, is imperative, provisions of Rule 49 stand extracted hereinafter:-

> "***49. Cognizance of offences***:- The following officers shall be authorised to make complaints under Section 55, namely;-
>
> (a) The Chief Wild Life Warden;
>
> (b) The Wild Life Warden;"

(a) wherein amongst the officers empowered, to make, a, valid complaint under Section 55 of the Act, the Wild Life Warden is also enunciated or stipulated therein. Since, a reading of the complaint also makes upsurging, qua the complaint, being preferred, by the Wild Life Warden-cum-DFO, hence, with the Wild Life Warden, being, the officer stipulated in the Act, (b) thereupon, the extant complaint, whereupon, the accused stood charged, and, convicted, is to be construed, to be a valid complaint, made by the Wild Life Warden, and, also assumption of jurisdiction thereon, is, both legally valid and justifiable. In aftermath, the mandate borne in Section 5 of the Act, is, also deemed to beget satiation, dehors, the requisite delegating notification remaining omitted to be placed on record or hence through the afore recoursings, the requisite delegation, does make, its upsurging.

12. In proof of the seizure of Ex.P-1 to P-4, being made from the exclusive, and, conscious possession, of, the accused/convicts, (I) the seizure memo borne in Ex.PW2/A, hence stood drawn, (ii) and, it contains thereon, the, signatures of the witnesses thereto, and, of the officer scribing it. The recitals borne in Ex.PW2/A were proven, by one, of the witnesses thereto, namely, Ravinder Lal, who stepped into the witness box as PW-2, (iii) and, during the course of his testification, he has rendered proof qua it carrying his signatures, and, also the authentic signatures of the other witness thereto, one Sanjay Kumar, (iv) and, thereafter during the course of his being subjected, to, an exacting cross-examination, no affirmative elicitations hence emanated from him, for, dispelling the efficacy of Ex.PW2/A or qua it containing false recitals, (v) thereupon, all the recitals borne, in Ex.PW2/A, are, to be concluded to be unflinchingly proven. Moreover, with the Investigating Officer concerned, while stepping into the witness box as PW-3 also proving, the, valid drawing of Ex.PW2/A, and, his also enunciating therein qua the recovery of Ex.P-2 to P-4, hence, occurring therethrough, and, when during the course of his cross-examination, no elicitations rather emerging, for dispelling the efficacy, of, the preparation of Ex.PW2/A, and, also for belying, the recoveries made therethrough, (vi) thereupon, the afore exhibit is concluded to be validly prepared, and, also all the recitals occurring therein, are, also concomitantly concluded to be hence validly proven.

13. In addition, added impetus to the afore inference, is, also garnered (a) from the factum of photographic evidence, comprised in Ex.P-5 to Ex.P-6, negatives whereof are borne in Ex. P-7 to EX.P-8, rather all unveiling qua the accused/convicts hence figuring therein. The factum of occurrence therein, of, the accused/convicts, along with, the leopard skins, as, recovered from their exclusive, and, conscious possession, through Ex.PW2/A, (b) exhibit whereof, for reasons aforestated, is concluded to be validly drawn, and, also validly proven, rather never came to be denied by the accused/convicts, nor evidence was adduced, qua the afore photographic evidence rather being manipulated, fabricated or being morphed. The effects of the afore omission, (c) is, qua hence the afore wants, rather constraining, a, conclusion qua all the recitals, borne in EX.PW2/A, rather being unflinchingly proven.

14. Lastly, the learned counsel appearing for the accused/appellants, have, contended with much vigour before this Court (a) that there exists, no proof, on record rather amply, and, potently pronouncing qua the case property borne in Ex.P-2 to P-4, as stood recovered, from, the exclusive, and, conscious possession of the convicts/accused, being, of, a prohibited animal skin or it being leopard skin, (b) given no expert evidence being adduced on record, for, establishing the factum of the seized skins, being of leopard. The afore submission, is concerted to acquire strength, from, a communication, occurring in the cross-examination of PW-4, who thereat has admitted a suggestion, meted to him, by the counsel for the accused, that there are, a, number of wool type items, bearing resemblance hence with the skin of leopard. Moreover, none of the afore submission(s) hence hold any tenacity, as, in his cross-examination, PW-4 has, testified qua issuance of certificate, borne in Ex.PW3/B, wherein a categorical echoing occurs qua three leopard skins, as stood shown to him, rather being of leopard, (c) and, further, with, his during the course of his cross-examination, hence voluntarily making an articulation qua after, an, inspection being carried of the seized property, it being decipherable qua it being, a, genuine leopard skin or a duplicate thereof, and, further there onwards, his, testifying qua his obtaining, from, the Indian Forest College, professional training, in Wild Life Management, and, on conclusion of the training, his, receiving a certificate, for, the purpose, in respect whereof Ex.PW3/B stood issued, (d) thereupon, PW-4 is to be concluded to be an expert for the relevant purpose, and, his certificate comprised in Ex.PW3/B, is, to be also concluded, to be, a rendition of an expert evidence, vis-a-vis, the seized skins being, of, leopard, without, any further reference to any expert.

15. For the reasons which have been recorded hereinabove, this Court holds that both the learned Courts 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 courts below, hence, not suffering from any gross perversity or absurdity of mis-appreciation, and, non appreciation of germane evidence on record.

16. Consequently, there is no merit in the instant criminal revision petitions, and, they are dismissed accordingly. In sequel, the impugned judgments are affirmed and maintained. All pending applications also stand disposed of. Records be sent back forthwith.

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

Himachal Road Transport Corporation ....Appellant.

Versus

Meeran Devi and others ....Respondents/Cross-objectors.

FAO No. 532 of 2018 along with
Cross objections No. 100 of 2018.
Reserved on : 3rd April, 2019.
Decided on : 30th April, 2019.

Motor Vehicles Act, 1988– Section 166– Motor accident- Death case- Claim application by legal representatives of deceased- Contributory negligence- Proof of- Claims Tribunal allowing application of legal representatives of deceased, a pillion rider on motor-cycle but holding drivers of bus as well as motor cycle negligent in driving leading to such accident-

Tribunal fastening liability to the extent of 50% each on them- Appeal and Cross-objections- Held, no specific issue of contributory negligence framed by Tribunal nor driver of bus made any effort to implead driver and insurer of motorcycle as parties to petition before Tribunal- Person on whose statement FIR was registered also not examined- Tribunal went wrong to fasten liability on basis of contributory negligence of driver of motorcycle. (Paras 3 & 4)

Motor Vehicle Act, 1988– Section 166– Motor accident- Claim application- Compensation towards "loss of consortium"- Entitlement- Held, when deceased was 'unmarried' , his legal representatives are not entitled for compensation under conventional head "loss of consortium". (Paras 5 & 6)

Case referred:

National Insurance Co. Ltd. vs. Pranay Sethi and others, 2017 ACJ 2700

For the Appellant:	Mr. G.S. Rathore, Advocate.
For Respondents No.1 to 4/Cross-objectors:	Mr. Pawan Gautam, Advocate.
For Respondent No.5:	Mr. Sat Prakash, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal, stands directed, by the aggrieved appellant herein, against the award pronounced, by the Motor Accident Claims Tribunal-III, Kangra at Dharamshala, H.P., upon, MAC Petition No. 30-J/13/12, whereunder, compensation amount comprised, in, a sum of Rs.13,72,000/- along with interest accrued thereon, at the rate of 9% per annum, commencing, from, the date of petition till realization thereof, stood, assessed, vis-a-vis, the claimants, and, the apposite indemnificatory liability thereof, was, fastened in 50% proportion thereof, upon, the appellant herein, whereas, the liability qua the remaining, proportion of 50% compensation amount, hence, was fastened, upon, the driver of the motorcycle, upon, whose pillion, the deceased was astride, (ii) whereas, through cross-objections bearing No.100 of 2018, the claimants, hence, assail the fastening, of, the apposite indemnificatory, in 50%, vis-a-vis, compensation amount, upon, the driver of the motorcycle, upon,whose pillion, the deceased was hence astride.

2. The learned counsel appearing for the appellant has contended with much vigour, before this Court (i) that the afore burdening of the apposite indemnificatory liability, vis-a-vis, afore assessed compensation amount, vis-a-vis, the dependents, of, the deceased, is, ridden with a gross inherent fallacy, (ii) sparked by the factum qua the learned tribunal, not, meteing deference, to the statements, of, the RWs concerned, (iii) wherein, they rendered testifications qua the relevant collision, which occurred inter se the bus owned by the HRTC, and, driven at the relevant time, by respondent No.5 herein, namely, Shashi Paul, and, the motor cycle, upon, whose pillion, the deceased Lakhan Pal was astride, being, a, sequel of rash, and, negligent manner of driving, of the afore motorcycle, by its driver. The learned Tribunal, omitting to mete deference, to the apposite FIR, embodied in Ex.PW1/A, wherein, there is an attribution of negligence, to the driver of the motorcyle, upon, whose pillion, the deceased was astride. On the other hand, the cross-objectors/respondents No.1 to 4 herein, through, cross-objections bearing No. 100 of 2018, contested the afore manner, of, fastening of the indemnificatory liability, in, the afore proportionate per centum, both upon the appellant herein, and, the driver of the motorcycle,upon, whose pillion, the deceased at the relevant time, hence, was astride. For the reasons to be recorded hereinafter, the afore submission of the learned counsel for the

appellant herein, is rudderless, whereas, the submission of the learned counsel appearing, for the cross-objectors, rather has vigour.

3. Even though, PW-1 has proven FIR embodied in Ex.PW1/A, and, therein through occur(s) an ascription, of, negligence, vis-a-vis, the driver of the motor cycle, upon, whose pillion, the deceased, at the relevant time, hence was astride. However, the afore ascription, echoed therein, cannot, at this stage, hold any persuasive sway, with this Court, imminently with Tarsem, who lodged the FIR, not stepping into the witness box, nor the appellant eliciting the entire record, appertaining to the investigation(s) carried, vis-a-vis, the afore FIR, more particularly, the site plan prepared by the Investigating Officer, with clear portrayals therein, vis-a-vis, the driver of the bus concerned, or the driver of the motorcycle, upon whose pillion, the deceased, at the relevant time, hence was astride, rather occupying the appropriate or the inappropriate side of the road, (i) whereas, only upon adduction into evidence, of, the afore evidence, would enable, the learned counsel for the appellant, to contend, that, given the afore ascriptions, of, penal inculpability, vis-a-vis, the driver of the motorcycle, upon, whose pillion, at the relevant time, the deceased astride, (ii) hence, the tesitifications rendered by respondents' witnesses, being amenable, for, credence being meted thereto. However, when the afore evidence remained unadduced, thereupon, the mere occurrence, of, the afore echoings, in the afore FIR, are inconsequential, hence for affording any latitude, for, the counsel for the appellant, to contend that the driver of the motorcycle, upon, whose pillion, the deceased was astride, at the relevant time, being the solitary tortfeasor, nor he can contend that the fastening of the apposite indemnificatory liability, in, a proportion, of, 50 per centum, upon, the appellant herein, hence, being ridden, with, any gross infirmity. Contrarily, even though, the claimants' evidence, vis-a-vis, the negligence of the driver of the offending bus or of the driver of the afore motorcycle, is not, an ocular version qua the afore factum. Nontheless, when emergence of the best evidence, vis-a-vis, the afore factum probandum, has remained, unadduced, also has remained unelicited, thereupon, an adverse inference is to be drawn, against, the appellant, (iii) whereupon, it is invincible to conclude that the driver of the offending bus, was, the solitary tortfeaser, in the occurrence, of, acollision inter se the offending bus, driven by respondent No.5 herein, and, the motorcycle, upon, whose pillion, the deceased at the relevant time, hence was astride.

4. Even if, the afore pleadings were reared by the respondents in their replies, instituted to the claim petition, yet when thereafter, upon, the contentious pleadings of the parties, the learned tribunal rather proceeded, to record an order, hence, formulating the issues, and, the order formulating issues, rendered on 21.11.2014, making, rather disclosures qua after, striking of issues, by the learned tribunal concerned, theirs being readover, and, explained, to the contesting litigants, and, theirs claiming qua no other issue arising hence for determination nor being claimed to be struck, (i) thereupon, the appellant, is, concluded to acquiesce, vis-a-vis, the issues formulated by the learned tribunal, and also qua their rather comprising, the, only enjoined to be formulated issues, (ii) and, further sequel thereof being, that, when for want of, formulation, of, requisite issues, appertaining to the ill-fated mishap, being, a, sequel of contributory negligence, vis-a-vis, the driver of the offending bus, and, the driver of the motorcycle, upon, whose pillion, the deceased was astride, nor when obviously prior thereto, neither, the driver of the motorcycle was arrayed, as, a contesting party, nor the insurer, if any, of the motorcycle, stood, arrayed, as a co-respondent in the array of the respondents, (iii) thereupon, the attraction, of, the principle of contributory negligence, and, fastening of the indemnificatory liability, in a proportionate per centum by the learned tribunal, upon, the appellant, and, upon, the driver of the motorcycle, upon, whose pillion the deceased, was astride, hence is both unbefitting, and, legally insagacious.

5. Moreover, the quantification, of damages, by the learned Tribunal in a sum of Rs.1 lac , vis-a-vis, the claimants, (i) under the head, "Funder Charges, other ceremonies, pain, loss and suffering", (ii) and quantification, of a sum of Rs.1,00,000/-, vis-a-vis, the claimants, under the head, "Loss of estate"", as also quantification, of, a sum of Rs.2,00,000/-, under the head, "Loss of love and affection" is in, conflict with the mandate of the Hon'ble Apex Court rendered in ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** reported in ***2017 ACJ 2700***, (iii) wherein, it has been expostulated, that reasonable figures, under conventional heads, namely, loss to estate, loss of consortium, vis-a-vis, the widow of the deceased, and, funeral expenses being quantified only upto Rs.15,000/-, Rs.40,000/-, and Rs.15,000/- respectively. Accordingly, in addition to the amount of Rs.9,72,000/-, as assessed by the learned tribunal under the head "loss dependency", the claimants, are, entitled under conventional heads, namely, loss to estate, and, funeral expenses, sums of Rs.15,000/-, and Rs.15,000/- respectively, as such, the total compensation to which the petitioners are entitled comes to Rs.9,72,000/- + Rs.15,000/- + Rs.15,000/-= Rs.10,02,000/- (Rs. Ten lacs, two thousand only). Since, there is no surviving spouse of the deceased, hence, no assessment can be made under the head, "loss of consortium".

6. For the foregoing reasons, the appeal filed by the insurer is partly allowed, and, the cross-objections instituted by the claimants/cross-objectors are also allowed, and, the impugned award, is, in the aforesaid manner, hence modified. Accordingly, the petitioners, are, held entitled to a total compensation of Rs.10,02,000/-, along with interest @ 9 %, commencing, from, the date of petition till the date, of, deposit, of the compensation amount. The aforesaid compensation amount shall be paid only by the appellant herein, i.e. Himachal Road Transport Corporation. The amount of interim compensation, if awarded, be adjusted in the aforesaid compensation amount, at the time of final payment. Out of the aforesaid compensation amount, claimants No.1 Smt. Meeran Devi, being the mother of the deceased, and, claimant No.2 Rakesh Kumar, father of the deceased shall be entitled, to 80 % of the compensation amount, in equal share, and, the remaining 20% of the compensation amount, be apportioned in equal shares amongst claimants No.3 and 4. All pending applications also stand disposed of. Records be sent back forthwith.

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

Jani Devi (since deceased and her name deleted vide order dated 30.11.2015) and another. .....Applicants/Appellants.

Versus

Bhag Chand (deceased) and others .....Non-applicants/Respondents.

CMP(M) No. 119 of 2019 in
RSA No. 489 of 2007.
Reserved on : 10th April, 2019.
Decided on : 30th April, 2019.

Code of Civil Procedure, 1908 - Order XXII Rules 3 & 9 – Setting aside of abatement of appeal and substitution of legal representatives- Condonation of delay- Sufficient cause- Proof- Held, applicants/appellants rustic villagers unable to understand letter scribed by Counsel in English- One applicant suffering from TB and another suffered amputation of leg- On facts, delay condoned- Abatement set aside- RSA restored for hearing. (Paras 5 & 6)

Case referred:
Mangluram Dewangan vs. Surendra Singh and others, (2011)12 SCC 773

For the applicants:	Mr. Bimal Gupta, Senior Advocate with Ms. Rubina Bhatt, Advocate.
For the Respondents:	Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

During the pendency of RSA No.489 of 2007 before this Court, co-respondent No.1, Bhag Chand expired, on 13.11.2017. On 1.6.2018, a disclosure was made before this Court qua the demise, of, the afore co-respondent No.1, hence occurring, during the pendency of the instant appeal before this Court, (a) and obviously thereat, the learned counsel for the applicants/appellants, was awakened, vis-a-vis, the afore trite factum, and, concomitantly, was enjoined to, within three weeks, hence, take the requisite steps. However, for, want of requisite steps being taken, within the afore period, by the applicants/appellants, and, furthermore, with the counsel for the appellants/applicants, rather thereat pleading no instructions, thereupon, the afore RSA, was, hence dismissed as abated.

2. The afore order of 3.10.2018, dismissing, for the reasons aforestated, the appeal as abated, is, obviously a formal order qua hence, the appeal being dismissed, as abated. Consequently, the effect thereof, is, to be gauged, in, the face of the requisite expostulations, of law, borne in a verdict rendered by the Hon'ble Apex, Court in a case titled as ***Mangluram Dewangan vs. Surendra Singh and others***, reported in ***(2011)12 SCC 773***, the relevant paragraph No.10 whereof stand extracted hereinafter:-

> "10.A combined reading of the several provisions of Order 22 of the Code makes the following position clear:
>
> (a) When the sole plaintiff dies and the right to sue survives, on an application made in that behalf, the court shall cause the legal representative of the deceased plaintiff to be brought on record and proceed with the suit.
>
> (b) If the court holds that the right to sue does not survive on the death of the plaintiff, the suit will abate under Rule 1 of Order 22 of the Code.
>
> (c) Even where the right to sue survives, if no application is made for making the legal representative a party to the suit, within the time limited by law (that is a period of 90 days from the date of death of the plaintiff prescribed for making an application to make the legal representative a party under Article 120 of the Limitation Act, 1963), the suit abates, as per Rule 3(2) of Order 22 of the Code.
>
> (d) Abatement occurs as a legal consequence of (i) court holding that the right to sue does not survive; or (ii) no application being made by any legal representative of the deceased plaintiff to come on record and continue the suit. Abatement is not dependant upon any formal order of the court that the suit has abated.
>
> (e) Even though a formal order declaring the abatement is not necessary when the suit abates, as the proceedings in the suit are likely to linger and will not be closed without a formal order of the court, the court is usually to make an order

recording that the suit has abated, or dismiss the suit by reason of abatement under Order 22 of the Code.

(f) Where a suit abates or where the suit is dismissed, any person claiming to be the legal representative of the deceased plaintiff may apply for setting aside the abatement or dismissal of the suit under Order 22 Rule 9 (2) of the Code. If sufficient cause is shown, the court will set aside the abatement or dismissal. If however such application is dismissed, the order dismissing such an application is open to challenge in an appeal under Order 43 Rule 1(k) of the Code.

(g) A person claiming to be the legal representative cannot make an application under rule 9(2) of order 22 for setting aside the abatement or dismissal, if he had already applied under order 22 Rule 3 for being brought on record within time and his application had been dismissed after an enquiry under Rule 5 of Order 22, on the ground that he is not the legal representative."

3. A perusal of the afore extracted paragraph, unfolds, qua therein, the, apt principle(s) standing enshrined, qua (a) there existing variegated contingency(ies), upon, demise of the litigant concerned, during, the pendency of the suit or appeal before the court concerned, (b) and, upon the litigant concerned, being provenly survived, by his legal representative, and, his estate hence being sufficiently represented, thereupon, the court(s), for, ensuring the continuation of the lis, hence, ordering for substitution of the deceased litigant, by his legal heirs, (c) and, when the right to sue is evidently not surviving, the court concerned, is enjoined to dismiss the suit, as abated, under Rule 1 of Order 22 of the CPC, (d) and, further, upon, the right to sue surviving, and, the requisite application, being not instituted, within the statutorily prescribed period of limitation, thereupon, the suit/appeal rather abating, in consonance with the mandate of Order 22, Rule 3(2) of the CPC, (e) and, in the afore contingency no formal order of abatement, being required to be made by the court concerned.

4. However, hereat, for preempting prolongation of the proceedings, though no formal order of abatement, was, required to be made, for, hence this Court on 3.10.2018, rather proceeding to dismiss, the appeal, as abated, yet, the afore formal order, is, made by this Court. However, subsequent to the order made, on 3.10.2018, the applicants/appellants, through, their counsel instituted the instant application, before this Court, application whereof, is, cast under the provisions of Order 22, Rules, 4 and 9 read with Section 151 of the CPC, and, under Section 5 of the Limitation Act, wherethrough, the, relief for setting aside the order, made by this Court, on 3.10.2018, is hence strived. The invocation of the afore provisions of law, by the applicant/appellant, for hence, begetting reversal of the apposite order made by this Court, is, though an aptly recoursed remedy. However, for an affirmative order being made, upon, the instant application, the statutory ingredients, borne in Order 22, Rule 9 CPC, are required to beget their satiation, provisions whereof read as under:-

> ***9. Effect of abatement or dismissal***.--(1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.
>
> (2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

3. The provisions of Section 5 of the Limitation Act, 1877 (15 of 1877) shall apply to application under sub-rule(2)."

(a) statutory ingredients whereof, are, embedded in the factum of the plaintiff or the legal representative(s), of the deceased plaintiff, being empowered, to make, the requisite application as hereat the instant application has been instituted, rather by the appellant/applicant/defendant, wherethrough, they strived to establish, that, he/they was/were prevented, from, a sufficient cause, to, hence, continue the instant appeal. Even, if, the afore statutory right, is vested in the plaintiff, yet when an appeal arising, from a decree made in a suit, is , a continuation, of the suit, thereupon, the defendants' appeal renders him/them, also empowered, to, draw leverage therefrom, only, for the statutory purpose, of, continuing the appeal. In case, a contra therewith construction, is, meted thereto, or the afore right, though vested in a plaintiff, is not extended, in the afore referred scenario, to the defendant, (b) thereupon, immense hardship would ensue, vis-a-vis, the unsuccessful defendant, and, their/his appeal would be jettisoned. Nowat, the secondary ingredient constituted therein is also though pleaded, yet the afore pleadings, are required to be satiated by prima facie material, as may exist hence in support thereof, whereupon, alone the appellant's endeavour rather would succeed.

5. Even though, this Court on 10.03.2018, apart from the factum, of, (a) the appropriate remedy being not availed within the requisite period, (b) had also for want of meteing, of, instructions by the appellant to his/their counsel, hence proceeded to make a formal order, rather dismissing the appellant's appeal, as abated, (c) yet the afore secondary reason may not stand in the way of this Court, proceeding to allow, the instant application, as dehors the afore secondary reason, the application at hand, does, ad nauseam make explicit echoings, on an affidavit sworn by the applicant, qua (a) lack of responses, to communications made by his counsel, to him, rather emanating from the factum of the applicant, being a rustic villager, and, his not holding the requisite ability, to comprehend, the, letter(s) scribed in English, (b) and, the applicant receiving the apt communication, from, a counsel other than the counsel engaged by him, namely, Mr. Bimal Gupta, hence, the requisite responses not emanating from him/her, (c) and the applicant's/appellant's wife being beset with tuberculosis, (d) and, his son's leg being amputated, hence, cumulatively, all the afore working against, hence, responses being meted, by the applicant, to the apt communications made to him, by a counsel other than Mr. Bimal Gupta, the latter being his/their duly engaged counsel. The afore submission, is, supported, by an affidavit, and, when Mr. Bimal Gupta, was designated as Senior Advocate, and, hence a necessity arose, for, (e) a power of attorney being executed afresh by the applicant/appellant, vis-a-vis, the counsel concerned, and, when it is also pleaded, on affidavit qua, upon, fresh court notices, in RSA No.553 of 2007, being received by the applicant, and, thereafter the applicant visiting, the office, of Mr. Bimal Gupta, Senior Advocate on 16.12.2018, (f) whereat, an intimation was made to him by Mr. Bimal Gupta, about the necessity of filing of a fresh power of attorney, and, also qua necessity for consequential steps being taken, on demise of Bhag Chand, (g) and, when since the acquisition of knowledge, by the applicant, on 16.12.2018, the instant application has been filed within limitation, hence the requisite delay is condoned. In aftermath, also when the afore enunciated, reasons, as cast, in the instant application, are supported by an affidavit, thereupon, they also rather constitute valid, tangible, as well as, well merited statutory grounds, for, recalling the order made, on 3.10.2018.

6. For the foregoing reasons, the instant application is allowed. Consequently, the order of 3.10.2018, hence, dismissing the appeal as abated, is, recalled, and, the abatement if any is also set aside. The registry is directed to restore the RSA to its original number. The legal representatives of deceased Bhag Chand, as enumerated in paragraph

No.3 of the application, are, ordered to be substituted in his place. Amended memo of parties be filed within two weeks from today. On steps being taken within one week from today, notices to the newly added co-respondents be issued, returnable within four weeks thereafter. List after completion of service.

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

Lekh Ram (since deceased) through his legal heir Suresh Kumar
.....Appellant/Plaintiff.

Versus

Krishan Chand (since deceased) through his legal heir and another
....Respondent/defendant.

RSA No. 507 of 2006
Reserved on : 16th April, 2006.
Decided on : 30th April, 2019.

Transfer of Property Act, 1882 (Act)- Section 53-A- Specific Relief Act, 1963 – Section 38– Part performance- Document unregistered- Effect- Held, agreement to sell if not registered cannot be relied upon by party to claim possessory rights in immovable property under Section 53-A of Act. (Para 10)

Transfer of Property Act, 1882 (Act) - Section 53-A- **Registration Act, 1908-** Section 17 (1-A)- Part performance- Held, agreement to sell is compulsorily registrable for purposes of 53-A of Act. (Paras 10 & 11)

For the Appellants:	Mr. Ashwani K. Sharma, Senior Advocate with Mayank Sharma, Advocate.
For Respondent No2:	Mr. K.S. Banyal, Senior Advocate with Mr. Vijender Katoch, Advocate.
For Respondent No.1 (a):	Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed by the appellants herein against the concurrently recorded verdicts rendered by both the learned courts below, wherethrough, the plaintiffs' suit for rendition of a decree for permanent prohibitory injunction, vis-a-vis, the suit khasra number, and, also for rendition, of, a decree, for possession, by way of specific performance of contract, hence stood dismissed.

2. Briefly stated the facts of the case are that the plaintiff claimed a relief of permanent prohibitory injunction, vis-a-vis, the suit land detailed in the plaint, as also, prayed for rendition of a decree for mandatory injunction directing defendant No.1 to get the sale deed executed in favour of the plaintiff with respect of his share 20/59, measuring 4 kanal out of the suit land on the basis of agreement of sale dated 12.7.2002, and, in the alternative, the plaintiff had claimed a decree for possession by way of specific performance of the said agreement to sell. It has been pleaded by the plaintiff that defendant No.1 was

owner of the suit land which adjoins to the abadi of the plaintiff. The plaintiff approached defendant No.1 for sale of a portion of the same upon which defendant No.1 agreed to sell 20/59 shares measuring 4 marlas out of the suit land, and, thereby defendant No.1 executed agreement to sell the suit land on 12.7.2002 and thereby agreed to sell the said land in favour of plaintiff for a consideration of Rs.32,000/- out of which, the plaintiff paid Rs.30,000/- to defendant No.1 on 12.7.2002 in the presence of witnesses and as per the terms and conditions of the said agreement to sell, the possession of the land agreed to be sold in favour of the plaintiff had already been delivered to the plaintiff, wherein the plaintiff had sown different kinds of vegetables at the spot. Under the said agreement to sell, the plaintiff was required to execute the sale deed on or before 12.7.2003 on receipt of balance sale consideration of Rs.2000/- at the time of attestation of the sale deed. The plaintiff remained always willing to perform his part of the agreement and requested defendant No.1 to execute the sale deed after accepting the remaining sale consideration of Rs.2,000/-, but surprisingly, defendant No.1 sold his 25/59 shares measuring 5 kanal out of the suit land in favour of defendant No.2 vide sale deed registered on 27.3.2003 and both the defendants threatened to dispossess him from the suit land, hence, he was compelled to file the suit and claimed the said relief.

3. The defendants contested the suit, and, filed separate written statements to the plaint. Defendant No.1 in his written statement taken preliminary objections, qua maintainability, estoppel, locus standi, cause of action etc. On merits, denied the execution of agreement to sell dated 12.7.2002 and termed the same to be the result of fraud and fabrication in connivance with the witnesses and the scribe thereof. Defendant No.1 disputed the alleged delivery of possession of the said land in favour of the plaintiff and as well as the receipt of sale consideration of Rs.30,000/- by him and prayed for dismissal of the suit.

4. Defendant No.2 in his written statement instituted to the plaint, has taken preliminary objections qua maintainability, cause of action etc. On merit, he pleaded that he is a bonafide purchaser of the land purchased by him to the extent of 25/59 shares measuring 5 kanal out of the suit land for consideration of Rs.83,000/- vide sale deed of 27.3.2003 and with this he prayed for dismissal of the suit.

5. The plaintiff filed replication to the written statement(s) of the defendant(s), wherein, he denied the contents of the written statement(s) and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the defendant No.1 executed agreement to sale dated 12.7.2002 in favour of plaintiff, as alleged? OPP.
2. Whether the plaintiff is entitled for specific performance as claimed? OPP.
3. Whether the plaintiff is entitled for permanent injunction, as prayed? OPP.
4. Whether the plaintiff i s entitled for possession, as prayed? OPP.
5. Whether the suit is not maintainable? OPD.
6. Whether the plaintiff is estopped by his act and conduct? OPD.
7. Whether the plaintiff has no locus standi? OPD.
8. Whether the plaintiff has no cause of action? OPD.

9. Whether the suit is not properly valued? OPD.

10. Whether the defendant No.2 is a bonafide purchaser, as alleged? OPD-2

11. Relief.

7. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff/appellant(s) herein. In an appeal, preferred therefrom, by, the plaintiff/appellant herein, before the learned First Appellate Court, the latter Court dismissed, the, appeal, and, affirmed, the, findings recorded by the learned trial Court.

8. Now the plaintiff(s)/appellant(s) herein, has instituted the instant Regular Second Appeal, before, this Court, wherein he assail the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, on 14.8.2007, this Court, admitted the appeal instituted by the plaintiff(s)/appellant(s), against, the judgment and decree, rendered by the learned first Appellate Court, on, the hereinafter extracted substantial questions of law:-

1. Whether the impugned judgment passed by learned First Appellate Judge is the result of total misreading and misappreciation of pleadings, material and evidence adduced on record by the parties and thus, the resultant findings and conclusion drawn by the learned First Appellate Judge are wrong and perverse?
2. Whether the plaintiff is entitled for decree of permanent prohibitory and mandatory injunction or in the alternative for decree of specific performance of agreement to sell against the defendant (respondent), when due execution of agreement to sell dated 12.07.2002 (Ex.PW1/a) whereby the defendant No.1 had agreed to sell his 20/59 share in the suit land measuring 4 kanals was proved and after having received part payment of Rs.30,000/- out of total sale consideration of Rs.32,000/- had handed over and delivered possession of suit land to plaintiff on the date of execution of the agreement, was established on record?
3. Whether the suit filed by the plaintiff was not maintainable when while seeking reliefs of decree of permanent prohibitory and mandatory injunction, he had also made an alternative prayer for grant of decree of specific performance and for such relief, he ought to have been called upon to make good deficiency of court fee within reasonable time, especially when the issue No.9 framed by Ld. Trial Court as regards the improper valuation f the suit was not pressed by defendants.
4. Whether the impugned judgment and decree-in-appeal passed by learned First Appellate Judge, are sustainable in the eyes of law?

Substantial questions of Law No.1 to 4:

9. The learned counsel for appearing for the plaintiff/appellant has rested his submission qua the declining of relief, by both the learned courts below, being, both insagacious, and, improper, by his canvassing (a) that with Ex.PW1/1, being proven to be validly, and, duly executed, (b) AND with the possession, of, the suit land, in consonance therewith, hence, being obtained, vis-a-vis, the suit khasra number, by the plaintiff, (c) thereupon, the relief qua rendition of decree of permanent prohibitory injunction, and, also for rendition, of, relief qua specific performance of agreement to sell, borne in Ex.PW1/A, hence, being renderable qua the plaintiff. However, for the reasons to be assigned

hereinafter, all the afore submissions lose their vigour, (d) as, a reading of the cross-examination of the plaintiff, discloses qua Ex.PW1/1 being, a, fabricated document, and, it being obtained by fraud, and, mis-representation. The afore admission made by the plaintiff, during, the course of his cross-examination, does obviously, spur an inevitable inference qua the espoused equitable relief of permanent prohibitory injunction, and, also the canvassed equitable relief, for, rendition of a decree for specific performance, of, the afore agreement to sell, both being not grantable, to the plaintiff, as the afore admission(s) carry, firm, concomitant effect(s) qua the plaintiff not coming with clean hands, (f) thereupon, the requisite tenet of equity enjoining its working qua him, only, upon, his coming to the court with clean hands. Contrarily, hence with the plaintiff, rather not coming to the court with clean hands, thereupon, he is debarred to claim both the afore equitable reliefs.

10. Apart from the above, the further infirmity gripping Ex.PW1/1, and, the further factum qua its being un-enforceable, at the instance of the plaintiff, to, hence enable her, to on its anvil rather claim, the afore reliefs, is, marshalled from the factum, of, Ex.PW1/1 though being enjoined, to, be compulsorily registered, through, an amendment made, to the Indian Registration, Act, wherethrough sub-section 1(A), to Section 17, was added, to Section 17 of the afore Act, provisions whereof read as under:-

> "17(1-A). The documents containing contracts to transfer for consideration, any immovable property for the purpose of Section 53-A of the Transfer of Property Act, 1882, shall be registered, if they have been executed or 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 53-A."

(a) and, when the afore amendment was given force, and, life from the year 2001, and, with the afore agreement borne in Ex.PW1/A, rather being executed subsequent thereto, thereupon, when it was enjoined to be compulsorily registered, and, when evidently, it, rather remained unregistered, thereupon, resultantly no reliefs, on its anvil, can be claimed by the plaintiff.

11. Even otherwise, Ex.D-1, is, a registered deed of conveyance, executed on 27.3.2003, hence, inter se defendant No.1, and, defendant No.2. The factum of its valid, and, due execution, is, evidently proven. Since, defendant No.2 has thereunder acquired, a, valid title to the suit land, and, has, also proven qua his being bonafide purchaser, for value or for consideration, vis-a-vis, the suit property, (a) besides when the afore factum probandum hence for validating Ex. D-1 remained unshred, of its, efficacy, thereupon, the entire edifice of the plaintiff's claim errected, upon, Ex.PW1/1, hence, for rendition of decrees, vis-a-vis, the afore reliefs is legally frail, and, does inevitably suffer collapse. Furthermore, with the plaintiff, during, the course of his being subjected to cross-examination, by the counsel for the defendant, (b) admitting qua his being, not, in possession of the suit land, thereupon, when the relief of injunction is renderable only, upon, the plaintiff, rather being evidently in possession of the suit land, (c) whereas, the afore admission made by the plaintiff, during, the course of his being subjected to cross-examination, by the counsel for the defendant, does bely, the afore propagation(s), (d) thereupon, the declining, of, the afore relief(s) to the plaintiff, under concurrent decrees, rendered by both the learned courts below, is, both befitting, and, meritworhty.

12. The above discussion, unfolds, that the conclusions as arrived by both the learned courts below, being based, upon a proper and mature appreciation of evidence on record. While rendering the findings, both the learned Courts below have not excluded

germane and apposite material from consideration. Accordingly, all the substantial questions, of law are answered in favour of the defendants/respondents, and, against the appellant/plaintiff.

13. In view of the above discussion, there is no merit in the instant appeal and it is dismissed accordingly. In sequel, the impugned judgments, and, decrees, rendered by both the learned Courts below, are, affirmed, and, maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

Maya Pradhan(since) deceased through her legal heirs.

.....Appellant/defendant.

Versus

Brijinder Thakur and others. .....Respondents.

RSA No. 36 of 2018.
Reserved on : 5th April, 2019.
Decided on : 30th April, 2019.

Code of Civil Procedure, 1908 (Code) –Order XXVI Rule 9 – Report of Local Commissioner- Objections thereto- Justiciability- Lower Courts decreeing suit of plaintiff after placing reliance on report of Local Commissioner- In RSA, defendant assailing report on ground that demarcation was not conducted in accordance with required procedure- Local Commissioner, however, had conducted demarcation by following triangular method- It was method applicable to land(s) in question- Statements of parties also recorded by him after conducting demarcation and defendant accepted it as correct- Local Commissioner also examined as witness during trial but nothing helpful to defendant revealed during cross-examination- Held, defendant cannot challenge report of Commissioner- RSA dismissed. (Paras 3 to 5)

For the Appellant:	Mr. N.K. Sood, Senior Advocate with Mr. Hemant Kumar, Advocate.
For Respondents No.1 and 2:	Mr. Anand Sharma, Advocate with Mr. Karan Sharma, Advocate.
For Respondent No.3:	Mr. Pawan Gautam, Advocate.
	Respondents No.4 and 5 already ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed, against, the concurrently recorded pronouncements, by both, the learned Courts below, wherethrough, the plaintiffs' suit for rendition of a decree for permanent prohibitory injunction, and, for vacant possession, vis-a-vis, the suit land, stood hence decreed. The aggrieved defendant, through, the instant

appeal, contests the validity of the afore pronouncements, and, also therethrough, strives to reverse the concurrent verdicts recorded, upon, Civil Suit NO. 246/09/06.

2. The entire fulcrum of the lis engaging the parties at contest, is, harboured, upon, a report of the local commissioner, borne in ExPW2/A. The author of Ex.PW2/A, stepped into the witness box, as PW-2, and, thereat rendered proof qua contents thereof, and, despite his being subjected, to the rigor of an exacting cross-examination, no firm elicitations, were evinced from him, for hence negating Ex.PW2/A, and, emphasisingly on the hereinafter extracted legal principles:-

> "(i) Before starting demarcation, to locate the boundary, ix points should be ascertained from the parties and statements of parties regarding fix points should be recorded.
>
> (ii) If the parties cannot agree on any such fix recognizable points then the official will find such point themselves with the help of field map and changing on the point which e finds undistrubed since the last settlement.
>
> (iii) Where triangle system of measurement is adopted then three fix points should be fixed in field map so that disputed land falls within three points and then measurement should be carried out from all three points.
>
> (iv) Where square system of measurement is adopted then disputed land should be shown in square system in field map and measurement should be carried out from all points in square system.
>
> (v) After demarcation, boundary should be fixed by erecting the boundary so that there would be no dispute later on. Statements of parties after demarcation is over must be recorded which should form part of demarcation report.
>
> (vi) Before going at the spot revenue officer must inform all parties by notice in writing regarding time and date of his visit to the spot and copy of such notice should be retained on record of demarcation report.
>
> (vii) Copy of musabi shall be used for measurement."

3. Since, only upon, the afore principles, hence, being evidently proven to be not complied, or infractions thereof, rather erupting, through emanations, of, admission(s), if any, made by PW-2, during, the course of his being subjected, to cross-examination, hence, thereupon only Ex.PW2/A, would be inferred to stand ridden, with, a legal fallibility, hence rendering, any placing, of, reliance thereon, being infirm, whereas, (a) with the afore principles rather coming to be affirmatively proven, (b) and, more importantly, testified compliance therewith, rather remaining unshattered, during, the course, of, an exacting cross-examination, whereto PW-2 hence stood subjected, (c) besides when defendant No.1 (now deceased), through, her statement comprised in Ex.PB, statement whereof stood recorded, by the Local Commissioner, in contemporaneity, vis-a-vis, his holding demarcation proceedings, rather accepting the report borne in Ex.PC, (d) hence engenders an inference qua the report of the Local Commissioner, borne in Exts. PW2/A, and, in Ex.PC, hence, acquiring, the, fullest legal vigour, importantly, for want, of, the afore extracted legal principles, rather not evidently coming under any cloud, (e) thereupon, the signatured acceptance by defendant Maya Pradhan, vis-a-vis, the report of the local Commissioner, and, also with cogent proof hence being adduced by the plaintiffs, vis-a-vis, the report of the local commissioner rather not infringing, the, afore extracted trite principles, (f) obviously, thereupon a firm inference, is, bolstered, that the rendition of concurrent decrees by both the learned courts below, rather not, being ingrained with any legal fallibility.

4. Be that as it may, this Court may have proceeded, for putting to rest, the controversy engaging the parties at contest, appertaining to encroachment(s), being made, upon, the suit property, by the defendant, to, (i) hence, either direct appointment, of, a local commissioner or after making a limited remand, vis-a-vis, the afore purpose, to, the learned First Appellate Court, thereafter, also direct the latter Court, to, upon, the report as may emanate from the Local Commissioner concerned, hence, make, a, fresh decision, upon, the issue connected therewith. However, the afore recoursing(s), would be made, by this Court only, upon, the report, of, the local commissioner concerned, evidently not falling, within the afore extracted parameters, or upon, the litigants concerned, proving through, the afore referred recoursings, qua the report of the local commissioner, being not amenable for any reliance hence being placed thereon, (ii) whereas, reiteratedly, when, infringement(s), vis-a-vis, the afore parameters, for, hence making a forthright successful onslaught, upon the report of the local commissioner, is rather wanting, (iii) thereupon, it is concluded that this Court, is, constrained not to either make any appointment, of, a local commissioner nor this Court would be constrained to make any limited remand, of, the lis, to the learned First Appellate Court, conspicuously, for, appointing a fresh Local Commissioner, vis-a-vis, the afore purpose, and, for thereafter making a fresh decision, upon, the connected therewith issue.

5. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court, as well as, of the learned trial Court being based, upon a proper and mature appreciation of evidence on record. While rendering the findings, both the learned courts below have not excluded germane and apposite material from consideration. Consequently, no substantial question of law, much less a substantial question of law, arises, for determination in the instant appeal.

6. For the foregoing reasons, there is no merit in the instant appeal, and, it is dismissed accordingly. In sequel, the impugned judgments and decrees are affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

M/s Paramount Tech. ...Appellant.
Versus
Ms. Sumeti Vij ...Respondent.

Cr.Appeal No. 484 of 2012
Reserved on : 2.4.2019
Decided on: 30.4.2019

Negotiable Instruments Act, 1881 - Sections 138 & 139– Dishonour of cheque- Complaint– Presumption of consideration- Rebuttal- Onus of ?- Held, once issuance of cheque and its dishonor is proved, onus shifts to accused to prove by preponderance of probabilities that cheque was not issued towards consideration in whole or part of debt- Further, held on facts, mere bald assertion in statement recorded under Section 313 of Code of Criminal Procedure, that cheque was issued as 'Security' towards goods supplied by complainant does not discharge this onus- Appeal allowed- Accused convicted. (Paras 9 to 11)

Cases referred:
State Bank of India vs. Anil Kumar Sharma, 2008 SCC Online HP 228 (2009) 2 BC 374

For the Appellant: Mr. B.C. Negi, Senior Advocate with Mr. Nitin Thakur, Advocate, for the appellants.
For the Respondent: Mr. Karan Singh Kanwar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed, against, the verdict rendered by the learned Judicial Magistrate, 1st Class, upon, criminal complaint bearing No. 102/3 of 2010.

2. Briefly, the facts of the case are that the accused approached the complainant in its factory at Moginand, and expressed her desire to purchase, non-woven fabric from the complainant. On the basis of order placed by the accused, non-woven fabric was sold to the accused vide invoice No. 120 dated 1.10.2010 amounting to Rs. 5,07,062/-. The material was sent to the accused in truck No. HR-38G-5607 and after receiving by her, in lieu of which she issued a cheque bearing No. 323930 dated 15.10.2010, in favour of the complainant in order to discharge her liability. The complainant presented the cehque for encashment before State Bank of India, Branch, Kala Amb, but the same was dishonoured on the ground of insufficient finds in the account of the accused. The cheque was returned vide memo, dated 19.10.2010, from Punjab National Bank, Karnal. A legal notice dated 29.10.2010 was sent to the complainant on two addresses. The accused refused to receive the notice deliberately in order to evade her liability. She failed to make the payment and hence, the present complaint under Section 138 of the Negotiable Instrument Act, (hereinafter, referred to as, "the Act") was preferred by the complainant against the accused.

3. The complainant led preliminary evidence, before the learned trial Magistrate, and, thereafter the accused was directed to be summoned, for, his committing, an, offence punishable, under, Section 138 of the Act. After securing the presence of accused, the learned trial Magistrate, put, notice of accusation, vis-à-vis the accused, for an offence, allegedly committed by her, under, Section 138 of the Negotiable Instrument Act, whereto, she pleaded not guilty, and, claimed trial.

4. The complainant, in substantiation of the complaint, hence examined three witnesses. On conclusion, of, recording of complainants' evidence, the statement of the accused, under, Section 313 of the Code of Criminal Procedure, was, recorded by the trial Court, wherein, the accused claimed innocence, and, pleaded false implication in the case. However, she did not lead any evidence, in defence.

5. On an appraisal of evidence on record, the learned trial Court, recorded findings of acquittal upon the accused/ respondent herein.

6. The complainant, is aggrieved by the judgment of acquittal, recorded by the learned trial Court. The learned counsel for the appellant/complainant, has concertedly and vigorously contended qua the findings of acquittal, recorded by the learned trial Court standing, not, based on a proper appreciation, by it, of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by it, of the material on record. Hence, he

contends qua the findings of acquittal, being reversed by this Court, in, the exercise of its appellate jurisdiction, and, theirs being replaced by findings of conviction.

7. On the other hand, the learned counsel appearing for the respondent, has with considerable force and vigour, contended that the findings of acquittal, recorded by the learned Court below rather standing based on a mature and balanced appreciation, by it, 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 respondent/accused, issued a cheque, borne in Ext. C-1, vis-à-vis, the complainant. The afore cheque bears No. 323930, and, carries, therein a sum of Rs. 5,07,062/-. The factum, of, Ext. C-1, upon its presentation, rather being dishonoured, for want of sufficient funds, in the account(s) of respondent/complainant, stands proven, by CW-1. CW-1 has, during the course of his examination- in chief, has hence proven Ext. C-2, whereunder Ext. C-1, stood returned, wherefrom it is palpably imminent qua, upon presentation of Ext. C-1, before the Bank concerned, whereon it was drawn, it, for want of sufficient funds, hence thereat, in the account(s), of the respondent/complainant, rather standing refused to be honoured. The learned trial Magistrate, had proceeded, to record an order of acquittal, upon, the respondent/accused, upon, hers alluding to evidence, existing on record, and, hence, therefrom made a conclusion, qua the statutory presumption, embodied in Section 139 of the Negotiable Instrument Act, provisions, whereof stand extracted hereinafter, rather standing rebutted;

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

(i) and wherein an explicit voicing, hence occurs, qua the apt statutory presumption being leveraged, vis-à-vis, the, holder of a cheque, conspicuously, qua his being, hence presumed to be holding it, for, hence therethrough, the apt discharge in whole or in part of any debt or other liability, arising interse the person, issuing it, and, the holder thereof, rather ensuing. However, the occurrence therein, of, the coinage "unless contrary is proved", rather, purveys the apt leeway and latitude, to the respondent/accused, or the person issuing it, to disprove or rebut the afore presumption.

10. The afore inference, and, conclusion, is rested upon a statement, rendered by the accused, hence, in proceedings drawn under Section 313 Cr. P.C., (i) wherein she renders a communication qua a salesman, of, the complainant partnership concerned, hence, meeting her at Karnal, and, showing to her, certain products of the firm, and, hers', rendering an order for supply thereof to him, and, hers also issuing a cheque borne in Ext. C-1, rather only as a security, towards supply thereof, (i) and, that, the material ordered to be supplied to her, remaining un-supplied, and, hence, a communication being meted to the Bank concerned, to decline the encashment, of, the apposite cheque. Furthermore, another reason, in addition to the afore, as stands, ascribed by the learned trial Magistrate concerned, to hence pronounce an order of acquittal, upon the accused, and also hers, concluding, that, the afore statutory presumption, standing rebutted, is, rested upon the complainant, a) though testifying qua the goods being transported, to the accused, through truck, bearing No. HR-38G-5607, and, the goods being received by her, yet, with the complainant not adducing any documentary evidence rather making hence bespeaking(s), qua the goods being received, by the accused at Karnal, (ii) and, further with the

complainant, also failing to adduce documentary proof, vis-à-vis, the date whereat the respondent/accused, had, received, the supply of goods, (iii) besides the driver of the truck, engaged for, transporting the goods to Karnal, namely Karam Singh, rather remaining un-examined, vis-à-vis, the goods being carried in the afore truck, upto Karnal, hence, concluded that the statutory presumption, coming under a cloud, and, rather it working obviously against the complainant.

11. For the reasons to be ascribed, hereinafter, all the afore reasons, as ascribed by the learned trial Magistrate, to, pronounce an order of acquittal, upon the accused, are rather hinged, (i) upon, gross mis-appreciation(s), of, the mandate of Section 139 of the Negotiable Instrument Act, (ii) and, also upon a gross-mis-application, thereon, vis-à-vis, the afore material, and emphatically, hence she has committed a gross fallibility, (iii) qua, hence, on anvil(s) thereof, the afore statutory presumption, rather being rebutted, (iv) undisputedly, the signatures, occurring on Ext.C-1, and, also all the other scribings, borne thereon, remained un-disputed. Whether, the afore-referred statutory presumption, bestowable, vis-à-vis, the complainant, hence works qua him or, whether hereat exists adequate rebuttal thereto evidence, is, the trite conundrum, besetting this Court. The apposite statutory important coinage, "unless contrary is proved", has immense import, and, relevance, for, determining, whether rebuttal or dis-proof, of, the afore statutory presumption, hence enjoins the respondent/accused, to lead cogent evidence, for hence his therethrough being construed to rather discharge, the, onus (v) or whether the latter part of Section 139 of the Act, leveraging, vis-à-vis, the holder, of, the Negotiable Instrument, a presumption, qua his holding it, in discharge of, in whole or in part of the liability, (vi) rather hence enjoins him, to also, adduce further cogent proof, hence, in consonance therewith. Necessarily, a plain reading of the coinage, "unless contrary is proved", as occurs, in the opening part of Section 139 of the Act, naturally renders it, to, galvanize a signification, (vii) qua the accused being statutorily injuncted to adduce, hence, evidence, whereupon he would rather, be hence construed, to, therethrough rather discharge the rebuttal onus, (viii) the apt corollary therefrom, is, that the holder of a negotiable instrument, when, is statutorily leveraged, to draw succor, from, the statutory presumption, qua his holding, the negotiable instrument, in discharge, in whole or in part of any debt or any other liability, rather not being statutorily injuncted, to, after, proving that the apposite instrument, holds hence the authentic writings, and, signatures, of the accused, (ix) to also thereafter fortify the afore statutory presumption, by adducing hence strengthened proof, qua it being issued, in discharge, of any, enforceable debt, or other liability, (x) if any, contrary therewith, construction is made, upon, an incisive reading, of, the subtle innate mandate(s) of Section 139, of the Negotiable Instrument Act, it would tantamount, to rather untenably injuncting the complainant , to adduce evidence, beyond the mandate, of, the afore statutory presumption, even when it holds leaning(s), vis-à-vis, him (xi) also would tantamount, qua his being untenably injuncted, to, adduce cogent proof, vis-à-vis, in its issuance, it, working towards, discharge in whole, or in part, of, any legally enforceable debt or any other liability, (xii) whereupon rather the efficacy and import, of the afore statutory presumption, hence would be rather rendered redundant, besides the afore imports, and, signification(s) as afore made vis-à-vis, the prior thereto statutory coinage, "unless contrary is proved", would be diluted, (xiii) whereupon the accused, though, is statutorily injuncted to lead cogent proof, for disproving, the apt statutory presumption, would, render the afore injunction, to, suffer untenable detraction, and, also dilution, and, hence would also, preclude the befallments, upon him, of the afore statutory entailments, rather statutorily exclusively encumbered upon him.

12. Since, as aforesaid, the signatures of the accused, and, also all the scribing(s), thereon, are, in the hands of, the accused, thereupon, the veracity, of, the

communication(s) made by the complainant, in his testification, comprised, in her examination-in-chief, wherein he made echoing(s), qua the accused, visiting, the factory premises, of, the complainant firm, and, hers after inspecting the products, hers ordering them to be supplied, and thereafter, bills of 1.10.2010, comprised in Ext. C-3, being prepared, and, the goods being transported to Karnal, rather being enjoined to be tested. The complainant was subjected, to, an incisive cross-examination, qua therewith, and, reading(s) thereof, hence unfold qua his being put suggestion(s) in the affirmative, qua the goods being dispatched, on 1.10.2010, to the respondents, and thereto, rather an affirmative echoing, emanated from him, (i) and also his, making a further echoing, qua his being equipped to prove the afore factum, from the requisite records, as brought thereat by him, and, before the Court concerned, records whereof remained un-inspected by the learned defence counsel. In sequel, the effects, of the afore affirmative echoing(s), emanating from CW-1, vis-à-vis, the affirmative thereto suggestion(s), being put to him, during the course of his cross-examination, rather remained un-alluded, to, by the learned trial Magistrate, nor the effect thereof, came to be fathomed, (ii) whereas, the afore echoing(s) make a vivid display, vis-à-vis, the afore goods being dispatched, at Karnal, by the complainant, (iii) and, rather merely qua the date of theirs being received at Karnal, by the respondent, remaining not cogently proven by adduction of documentary evidence, hence the trial Magistrate, concluded qua theirs', not, being dispatched thereupto, (iv) hence pronounced an order of acquittal upon the accused, (v) and, further for non-examination of the driver of the truck, she proceeded to conclude, qua the goods, never being received at Karnal, by the respondent/complainant. Further more, given, in the last part of the cross-examination of CW-1, as conducted, by the learned defence counsel, a suggestion being meted to him, qua the cheque being issued, as security, for the supply, of, goods and with, the complainant, not, dispatching the ordered goods, (vi) thereupon, in, the dishonour of the negotiable instrument, it is projected, qua no statutory sustenance(s), being hence thereupon drawable by the complainant, nor it being concludable qua its issuance, working towards, discharge, of, any legally enforceable debt, or liability, existing or substing interse both. The afore suggestion, though, was denied, yet the trial Magistrate, drew succor therefrom, on anvil, of the accused, in her statement, recorded, under, proceedings drawn, under Section 313 Cr. P.C., denying the factum, qua hers visiting the factory premises, with the complainant, rather her employee visiting the afore premises. However, placing any reliance thereon, is both gross, and, inappropriate, as the appropriate motion, for rebutting the afore echoing(s), as emanated in the examination-in-chief, of the complainant, rather stood comprised in meteing, of, suggestion(s), to CW-1, during, the course of his being held to cross-examination, (vii) however, with no apt therewith suggestion(s), being meted to him, during, the course of his cross-examination, by, the learned defence counsel. (viii) Consequently, the afore echoing(s), as occurs in the statement(s), made by the accused, in proceedings, drawn under Section 313 Cr. P.C., were discard-able, nor credence was meteable thereto, rather, upon, prior thereto, afore admission(s), hence emanating and, visibly at an appropriate stage, (ix) thereupon, the respondent rather is to be concluded to acquiesce, qua the afore testified factum, qua hers, visiting the factory premises, and hers, making an order for supply of goods. In aftermath, her prevarications, are, to be dis-countenanced. Since, for all the aforesaid reasons, the complainant had, apart from his holding, the, apt statutory leverage, sparked by his, holding the dishonoured negotiable instrument, qua it hence being issued to him, in satisfaction of part or in whole, of, the entire enforceable contractual liability, (x) rather had also remained un-scathed, during, the course of his cross-examination, as conducted by the learned defence counsel, (xi) wherein, suggestions, were put to him, wherethrough, the afore statutory presumption was rather unsuccessfully, strived to be rebutted, (xii) importantly, also, when a perusal of his exacting cross-examination, unfolds, qua all the apt rebutting suggestion(s), available, vis-à-vis, the

erosion(s), hence befalling afore statutory presumption, being purveyed, to him, and, all coming to be denied, (xiii) and with Ext. C-3, being placed on record, and it making articulation(s), qua the engagement, of, services of a transport company, by the complainant/firm, for therethrough the booked goods, being transported hence at Karnal, (xiv) thereupon, merely, for any suggestion, being put, to him, qua the date of its issuance, being incorrectly reflected as 26.10.2010, no initialed corrections being made thereto, hence, no probative sustenance can be drawn therefrom, by the accused, given (xv) for the reasons aforestated, the accused acquiescing qua the goods being received by her, on 1.10.2010, at Karnal, (xvi) and also, when hence accepting the afore contention of the accused, would rendered effaced, the, afore inferences, drawn, from the affirmative suggestions, being put to the complainant, during, the course of his examination, in-chief, and, whereto the afore apposite affirmative answers emanated from him, (xvii) and also, hence therethrough the edifice, of, the statutory presumption, rather, begets fortification, and, also conclusivity. Reiteratedly, and conspicuously, proof qua the falsity, of, preparation of Ext. C-3, was rather enjoined to be adduced by the accused, or proof qua therewith, was to be adduced by the accused, by his eliciting from the transport company, the originals, thereof, (xviii) strikingly, and imperatively, when thereupon the afore signification as made to the apt statutory coinage, "unless contrary is proved", as occur(s) in the first part, rather would, therethrough beget, hence deference, and, as a corollary, qua Ext. C-3, being inefficaciously drawn, whereas with the proof, qua it being not efficaciously drawn, rather remaining un-adduced, by the accused, (xix) thereupon when within the ambit of the signification acquired by the coinage, "unless contrary is proved", rebuttal evidence, vis-à-vis, the Negotiable Instrument Act, being not issued, rather towards satisfaction in whole or in part of debt, or any other contractual liability, hence remains not adduced, (xx) thereupon dehors, the afore purported incorrected embossed reflections borne therein render, the, apt statutory presumption, to remain uneroded, vis-à-vis, its vigor. However, the learned counsel appearing for the respondent/accused, has placed reliance, upon, a judgment rendered by this Court in, case titled as, "**State Bank of India versus Anil Kumar Sharma**, reported in 2008 SCC Online HP 228 (2009) 2 BC 374, wherein, in paragraph-15, paragraph whereof is extracted hereinafter:

> *"It has been held in M.S. Narayana Menon Alias Mani Vs. State of Kerala, III (2006) CCr 76 (SC): V (2006) SLT 252:III (2006) BC 433 (SC): (2006) 6 SCC 39, that the presumption both under Sections 118 (a) and 139 of the Act are rebuttable in nature. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon. It is not necessary for the defendant to disprove the existence of consideration by way of direct evidence. The standard of proof evidently is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials on record but also by reference to the presumption case in its entirety. Moreover, the onus on an accused is not as heavy as that of the prosecution. It may be compared with that on a defendant in a civil proceeding. Thus, only the accused is only required to discharge the initial onus of proof. He is not necessarily required to disprove the prosecution case.*

(xxi) it is mandated, that, the statutory presumption, cast in Section 139 of the Act, being rebuttable, through rearing, of, a probable defence, (xxii) the standards of proof, being preponderance of probabilities, and, therefrom he contends, that the suggestion(s), existing in the cross-examination, of, the complainant, rather being sufficiently, construable, to, (xxiii) constitute hence material, personificatory of evidence, rather rebutting the afore presumption, and, hence, the accused is to be concluded to be disproving, the factum, qua

in the holding of Ext. C-1, by the complainant, his not holding it, in discharge of any contractual or legally enforceable liability, existing or subsisting interse the complainant, and, the accused, (xxiv) however, the dependence made by the respondent, upon, the hereinafter extracted paragraph, would be, of immense succor, in case, the hereinbefore extracted paragraph, is read, in consonance with the preceding thereto paragraphs 12, 13, and 14, paragraphs whereof are extracted hereinafter:

> *'12. The respondent has not disputed the issuance of cheque Ext. P1 for a sum of Rs. 7,93,538.80, however, the defence raised by the respondent is that it was a post-dated cheque issued in favour of M/s Wadhwa Pharmochem Pvt. Ltd, as a security for the supply of 1100 kgs. Mebendazole (Ex. D1) and vide letter Ext.D2 M/sWadhwa Pharmochem Ltd., had acknowledge the receitof post dated cheque Ext. P1 for the above amount aforesaid against part payment of the supply of Mebendasole and assured the supply by 3.6.1996, but the order for its supply was subsequently, cancelled vide letter Ext.D3, dated 6.6.1996, as the quality of the sample ofl the aforesaid item was not found satisfactory, as such the respondent had made the request to return the cheque vide letter Ex.D2 informed the respondent that cheque aforesaid had already been presented for clearance with State Bank of India, Kala Amb, and it would be returned as soon as they would get it back. Further letter Ext. P-12, dated 10.6.1996, referred to the above cheque No. 928960, dated 6.6.1996 for Rs. 7,93,538.90 (Ex. P1) having been issued by the respondent, for the Bill Nos 18-A and 20-A whereas the appellant Bank latter produced on record the Bill Nos 18 and 20 as against their original case set up for 18-A and 20-A and no copies of the Bil Nos 18-A and 20-A were even placed on record.*
>
> *13. PW- S.S. Randhawa, the Branch Manager of the appellant Bank in his earlier statement testified that the cheque was issued for Bill Nos. 18-A and 20-A dated 31.1.1996 and 3.2.1996 for discharging its liability by the respondent. Further, vide legal notice Ext. P-2 dated 10.7.1996 sent through its Advocate by the appellant Bank requested the respondent to pay the amount of Rs. 7,93,538.90 within 15 days from the receipt of the notice, but the appellant did not specify against which liability the cheque in question was issued.If this notice is read with the statement of PW-1 S.s. Randhawa , it makes crystal clear that it is with respect ot Bil Nos 18-A and 20-A. After the remand of the case finding itself at a tight corner, in his statement dated 17.1.2001, Mr.S.S.Randhawa when re-examined, totally backed out from the earlier contentions made in the complaint and his statement and took U-turn that the disputed bills were Exts. A/3 and A/1 which are Bill Nos 18 and 20 were alleged to havge been purchased from M/s Wadhawa Pharmochem Pvt.Ltd. for which they had paid 75% amount to the said concern and further that no payment to the extent of 75% qua the amount of Bill Nos 18-A and 20-A were ever credited to their account and there was no distinct entry regarding the payment in their account. However, in his cross-examination conducted by the learned Counsel for the appellant-Bank,he stated that the letter Ext. P-12 was wrongly given by M/s Wadhawa Pharmochem Pvt. Ltd, whereby they had made the reference of Bill Nos 18-A and 20-A which was credited to their accounts since there was no distinct entry regarding this payment, but again theis statement appears to be prima-facie incorrect as the letter aforesaid (Ex. P-12) makes the distinct entry of Bills Nos 18 and 20, dated 15.11.1995 and 19.11.1995 with respect to a sum of Rs. 2, 92,001 and Rs. 2,20,497.35, respectively and the Bills No 18-A and 20-A have been distinctly shown as aforesaid in the name of the respondent.*

> *14. Further Mr. Yash Pal Jain (DW-1) of M/s Wadhawa Pharmochem Pvt.Ltd, has caused a severe dent to the case of the appellant Bank, by admitting the case of the respondent that the cheque Ext. P-1 was taken by them as a security amount and proved his letters, Ext. D2- to D4 which substantiated the plea of respondent. He has also proved the letter of confirmatiove Ext. D5 dated 19.9.1996 whereby it was certified to him that there were no dues towards the respondent and M/sWadhawa Pharmochem Limited owed all liabilities of the appellant Bank against the bounced cheque. Thus the above facts which have emerged from the evidence, the legal presumption attached to the cheque stands rebutted.*

(xxv) whereas, reading it in isolation therefrom, and, reading paragraph- 12, in a fragmentary manner, would not enable hence eruptions, of all the efficacy(s), and, imports thereof and also, would erode, the afore signification made by this Court, vis-à-vis, all the coinages, occurring, in Section 139 of the Act, (xxvi) besides would untenably render paragraph-15 of the judgment(supra), to hold absolute generalized overriding effect, dehors, the prior thereto discussion, held, in paragraphs No. 12, 13, and 14 of the judgment (supra).

13. A reading of paragraphs No. 12, 13 and 14, paragraphs whereof, hence precedes paragraph-15, unfold, that the evidence adduced, by the accused, hence making palpable echoing(s), qua the purported existing or legally enforceable liabilities, rather being indemnified or liquidated, thereupon this Court, proceeding to render the subsequent thereto paragraph-15, of, the judgment(supra), and it hence concluding qua rather adequate rebuttal evidence, in dis-proof, of, the statutory presumption, hence being adduced. However, extantly, the complainant apart from meteing, the afore suggestion, to the complainant while holding him, to cross-examination, and, with this Court, in the afore discussion, dwindling the force of the afore suggestion, meted to the complainant, during, his cross-examination, and, it concluding qua, the statutory presumption, striven to hence therethrough, being belittled, rather suffering futility. Contrarily, when a complete connected, and, harmonious readings of paragraphs 12, 13 and 14, along with paragraph-15 of the judgment (supra) underscores, qua hence therefrom, no firm ratio-decideni, rather emerging, nor in isolation rather paragraph-15 of the judgment (supra), (a) holding therein any omnibus, and, all prevailing clout in all situations, dehors, incisive readings being made, of, preceding thereto paragraphs 12, 13 and 14, (b) conspicuously, when hence isolated and fragmentary reading of paragraph-15, of the judgment would rather spark contradiction, vis-à-vis, the apt provisions, of the Negotiable Instrument Act, (c) wherethrough, the apt statutory presumption, is, abundantly, leveraged, vis-à-vis, the holder of the Negotiable Instrument, and, when the afore statutory presumption, enjoins adduction of rebuttal thereto evidence, by the accused, and, not by the complainant.

14. 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 and the analysis of the learned trial Court hence suffers from a perversity or absurdity of mis-appreciation and non-appreciation of evidence on record.

15. There is merit in the appeal, and the same is allowed. The impugned judgment is quashed and set aside. The accused/respondent be produced before this Court, for hers being heard on quantum of sentence, on 14.5.2019.

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

New India Assurance Company Ltd. .....Appellant.

Versus

Bhuvnesh Thakur and others ....Respondents.

FAO No. 292 of 2018.
Reserved on : 16th April, 2019.
Decided on : 30th April, 2019.

Motor Vehicle Act, 1988 (Act)– Section 166– Motor Accident- Claim application- Maintainability- Whether legal representatives not financially dependent upon deceased entitled to file application under Section 166 of Act?- Held, liability of insured to pay compensation to legal representatives of deceased does not cease in absence of their dependency on the deceased- Entitlement is the key. (Paras 2 & 3)

Motor Vehicle Act, 1988 (Act) – Section 140– No fault liability- Nature of- Held, Section 140 of Act creates statutory liability to pay compensation in circumstances specified therein irrespective of whether claimants were dependent or not on deceased. (Para 3)

Case referred:

Manjuri Bera (Smt) vs. Oriental Insurance Company Ltd. and another, (2007) 10 SCC 643

For the Appellant:	Mr. Ashwani Sharma, Sr. Advocate with Mr. Jeevan Kumar, Advocate.
For Respondents No. 1 & 2:	Ms. Megha Kapur Gautam, Advocate
For Respondent No. 3 and 4:	Mr. Dushyant Dadwal and Mr. Subhash Chander, Advocates.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The Insurer of the offending vehicle, has, instituted the instant appeal before this Court, wherethrough, it, casts, a, challenge, upon, the award pronounced by the learned Motor Accident Claims Tribunal, Bilaspur, upon, Claim Petition No. 36/2 of 2016, as stood, cast therebefore, under, the provisions of Section 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as the Act), (i) AND, whereunder, compensation amount comprised, in, a sum of Rs.47,97,424/- alongwith interest accrued thereon, at the rate of 7.5% per annum, and, commencing from, the date of petition till realization thereof, stood, assessed, vis-a-vis, claimants, (ii) and, the apposite indemnificatory liability thereof, was, fastened upon the insurer/appellant herein.

2. The learned counsel appearing, for, the appellant/insurer, has, not contested, the, validity, of, rendition of affirmative findings, upon, issue No.1, hence appertaining to the demise of Poonam Kumari, being a sequel of rash, and, negligent manner of driving of the offending vehicle, by respondent No.4 herein, nor he has contested the validity of fastening of the apposite indemnificatory liability, upon, the insurer, vis-a-vis, the afore compensation amount. However, the learned counsel appearing for the insurer has with much vigour contended before this Court, (a) that with uncontrovertedly, the deceased being in government employment, and, also her surviving husband one Sanjeev Kumar, also being in government employment, (b) thereupon, the requisite canon for

validity applying, vis-a-vis, the last drawn salary of the deceased, hence the multiplier method, did, obviously require qua it being rested, upon, loss of dependency to her surviving husband, and, her child, (c) whereas, with the latter admittedly rather serving in government employment, thereupon, obviously no loss of dependency stand encumbered, upon, him, nor the learned tribunal was enjoined to apply, the, multiplier method, for computation of compensation qua him, nor qua his minor son, given, the latter's father continuing in government employment, hence, all his requisite dependencies, rather being sufficiently taken care, of, by his surviving father.

3. The afore submission has immense merit, and, is anchored, upon, a therewith concurring judgment rendered, by the Hon'ble Apex Court, in a case titled as ***Manjuri Bera (Smt) vs. Oriental Insurance Company Ltd. And another***, reported in ***(2007) 10 SCC 643,*** the relevant paragraphs No. 13 to 15 & 20 whereof are extracted hereinafter:-

> "13. There are several factors which have to be noted. The liability under Section 140 of the Act does not cease because there is absence of dependency. The right to file a claim application has to be considered in the background of right to entitlement. While assessing the quantum, the multiplier system is applied because of deprivation of dependency. In other words, multiplier is a measure. There are three stages while assessing the question of entitlement. Firstly, the liability of the person who is liable and the person who is to indemnify the liability, if any. Next is the quantification and Section 166 is primarily in the nature of recovery proceedings. As noted above, liability in terms of Section 140 of the Act does not cease because of absence of dependency.
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> 14.Section 165 of the Act also throws some light on the controversy. The explanation includes the liability under Sections 140 and 163A.
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> 15. Judged in that background where a legal representative who is not dependant files an application for compensation, the quantum cannot be less than the liability referable to Section 140 of the Act. Therefore, even if there is no loss of dependency the claimant if he or she is a legal representative will be entitled to compensation, the quantum of which shall be not less than the liability flowing from Section 140 of the Act. The appeal is allowed to the aforesaid extent. There will be no order as to costs. We record our appreciation for the able assistance rendered by Shri Jayant Bhushan, the learned Amicus Curiae.
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> 20. In my opinion, "No Fault Liability", envisaged in Section 140 of the said Act, is distinguishable from the rule of "Strict Liability". In the former, the compensation amount is fixed. It is Rs. 50,000/- in cases of death [Section 140(2)]. It is a statutory liability. It is an amount which can be deducted from the final amount awarded by the Tribunal. Since, the amount is a fixed amount/crystallized amount, the same has to be considered as part of the estate of the deceased. In the present case, the deceased was an earning member. The statutory compensation could constitute part of his estate. His legal representative, namely, his daughter has inherited his estate. She was

entitled to inherit his estate. In the circumstances, she was entitled to receive compensation under "No fault Liability" in terms of Section 140 of the said Act. My opinion is confined only to the "No Fault Liability" under Section 140 of the said Act. That section is a Code by itself within the Motor Vehicles Act, 1988."

Consequently, in consonance therewith, the, application of the multiplier method of computation of compensation, by the learned tribunal concerned, is, declared to be outside the ambit of the afore extracted paragraph, and, the claimants/respondents No.1 and 2, herein, are, entitled to for a sum of Rs.50,000/-, in, concurrence with the mandate of Section 140(2) of the Motor Vehicles Act. In addition to the afore amount, the claimants are also entitled to compensation under the conventional heads, namely, loss of estate, loss of consortium, and, funeral expenses, as adjudged, by the learned tribunal.

3. For the foregoing reasons, the instant appeal is allowed, and, the impugned award is modified in the afore terms. All pending applications also stand disposed of. Records be sent back forthwith.

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

Oriental Insurance Company ...Petitioner
Versus
Veena Devi and others ...Respondents

FAO No. 409 of 2018
Reserved on :29.3.2019
Decided on : 30.4.2019

Motor Vehicle Act, 1988 (Act) – Section 166 – Motor accident – Death case- Claim application by legal representatives- Compensation under conventional heads- Entitlement- Held, compensation under conventional heads cannot be granted more than what is mandated in Pranay Sethi's case. (Paras 5 & 6)

Case referred:
National Insurance Co. Ltd vs. Pranay Sethi and others, 217 ACJ 2700

For the petitioner : Mr. Lalit Kumar Sharma, Adv.
For the respondent : Mr. Ajay Shandil, Advocate, for respondents No. 1 to 4.
Mr. Hemant Sharma, Advocate, vice counsel, for respondents No. 5 and 6.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed against the impugned award pronounced by the Learned Motor Accident Claims Tribunal-1, Solan, H.P., wherethrough the learned Tribunal adjudged the compensation amount, comprised in a sum of Rs. 20,49,560/- along with interest at the rate of Rs. 6% per annum, commencing from the date of filing of this petition, till the realization/deposit of the amount, vis-à-vis, the dependants of the deceased,

and, the apposite indemnificatory liability, was, fastened upon the insurer of the offending vehicle concerned.

2. The learned counsel appearing for the Insurer, does not contest, the validity of the findings recorded, by the learned MACT, Solan, upon the issue, appertaining the ill-fated mishap, involving the offending vehicle, being a sequel of rash and negligent driving thereof, by the respondent No. 2. However, he contends, that, computation of an amount of Rs. 1,00,000, under the conventional head, "Loss of consortium", being beyond the ambit of the verdict rendered by Hon'ble Apex Court, in case titled as **National Insurance Co. Ltd vs Pranay Sethi and others,** reported in **217 ACJ 2700.** His contention is weighty, and, is accepted.

3. Furthermore, the learned counsel for the appellant has also contended with much vigor, before this Court, that the computation, of, the salary of the deceased, by the learned Tribunal, in a sum of Rs. 9102/- per mensem, and, additions thereon, of, 40 percentum accretion(s), towards future prospects, also being beyond the mandate of, a, verdict recorded by the Hon'ble Apex Court, in Pranay Sethi case (supra). However, the aforesaid submission is not acceptable, as the afore computation, of, per mensem salary, of the deceased, comprised in a sum of Rs. 9102/-, is made on anvil, of Ext. PW1/A, (i) exhibit whereof stands cogently and efficaciously proven, (ii) thereupon, and when, within the ambit of a verdict pronounced by the Hon'ble Apex Court, in Pranay Sethi's case, it is permissible to mete 40% hike thereon, towards, future prospects, (iii) thereupon, the, meteing of the afore hikes in the afore percentum, upon per mensem slaray, and, working, towards future prospects, is obviously not beyond the domain, of the, verdict recorded by the Hon'ble Apex Court, in Pranay Sethi's case (supra), and, the afore meetings, does not warrant any interference.

4. Lastly, the learned counsel for the Insurer, has contended that the policy of insurance, issued, vis-à-vis, the offending vehicle, rather making an interdiction against the fastening, of, the indemnificatory liability, upon, the insurer, upon the vehicle being used, for hire and reward, (i) and with the deceased rather occupying the offending vehicle, not, as a gratuitous passengers, rather for hire and reward, (ii) thereupon the afore interdiction, as embodied, in the Ext. RW1/C, being attracted, thereupon the apposite indemnificatory liability, being not amenable for being fastened, upon the insurer. However, the afore submission is meritless, as no evidence is adduced in support thereof, comprised in the insurer, through, affirmative suggestions being put to the claimants' witnesses, with echoings therein, qua in the deceased hence occupying the vehicle, his occupation thereof rather being, not, as a gratuitous passengers, rather being for hire and reward, nor hence any affirmative echoing(s), thereto, hence emanating from the claimants' witnesses, (iii) thereupon, the afore omissions, hence, beget a conclusions, that, in the deceased rather occupying, the vehicle, his occupation thereof being as a gratuitous passenger, and, not for hire and reward, hence, the fastening of the apposite indemnificatory liability, upon the Insurer, is, re-emphasisingly, concluded to be aptly fastened.

5. However, the quantification, of damages, by the learned Tribunal in a sum of Rs.1 lacs vis-a-vis, the widow of deceased, (i) under the head, loss of consortium, (ii) and quantification, of compensation vis-a-vis the claimants No. 2, 3 and 4, under the head, loss of consortium, loss of love and affection, and Funeral expenses is (a) in, conflict with the mandate of the Hon'ble Apex Court rendered in **Pranay Sethi's** case (supra), (b) wherein, it has been expostulated, that reasonable figures, under conventional heads, namely, loss to estate, loss of expectation of life, and, funeral expenses being quantified, only upto, Rs.15,000/-, (only to widow) Rs.40,000/-, and Rs.15,000/- respectively, (iii) and, with no expostulation occurring therein vis-a-vis the compensation amount(s), being awardable, to

the mother, and, to the offspring(s) of the deceased, especially under the head, loss of love and affection, hence reliefs in respect thereto being impermissibly granted. Consequently, the award of the learned tribunal is interfered, to the extent aforesaid, of, its determining compensation, under, the aforesaid heads vis-a-vis the widow of the deceased, as also, vis-a-vis the off springs, and, mother of the deceased. Accordingly, in addition to a sum of Rs. 18,34,560 /-, under the head, (loss of dependency to the family), the claimants, are, entitled under conventional heads, namely, loss to estate, loss of consortium, (only to widow) and, funeral expenses, sums of Rs.15,000/-, Rs.40,000/- and Rs.15,000/- respectively, as such, the total compensation to which the petitioners are entitled comes to Rs. 18,34,560/-+ 15,000/- + Rs. 40,000 +15,000/-= Rs. 19,04,560-(Rs. Nineteen lakhs, four thousand, and five hundred sixty only).

6. For the foregoing reasons, the appeal filed by the insurer is partly allowed, and, the impugned award, is, in the aforesaid manner, hence modified. Accordingly, the petitioners, are, held entitled to a total compensation of Rs.19,04,560 /- along with pending and future interest @ 6%, from, the date of petition till the date, of, deposit, of the compensation amount. The amount of interim compensation, if awarded, be adjusted in the aforesaid compensation amount, at the time of final payment. Compensation amount be apportioned, amongst the claimants in the hereinafter extracted manner:-

> "Petitioners No.1 and 2, are entitled to 40% amount each, along with proportionate interest and consortium (only to widow), as also funeral expenses, and, the remaining amount of 20% with proportionate interest shall fall in equal shares vis-à-vis,the petitioners No. 3 and 4.

7. The shares of the minor child, petitioner No. 2, shall remain invested, in FDR, upto, the stage of his attaining majority. However, interest accrued thereon, shall be releasable vis-a-vis his mother, only when she explains, of, its being required, for, the upkeep and benefit of the minor children. All pending applications also stand disposed of. Records be sent back forthwith.

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

Smt. Parvati Devi (since deceased) through her legal representatives and others .....Appellants/Defendants.

Versus

Smt. Savitri Devi .....Respondent/Plaintiff.

RSA No. 130 of 2004.
Reserved on : 2nd April, 2019.
Decided on : 30th April, 2019.

Code of Civil Procedure – Order VI Rule 1 and Order VIII Rule 6A- Counter claim- Inconsistent pleas of tenancy as well as of adverse possession over suit land- Maintainability- Held, pleas of tenancy as well as as of adverse possession over same land, are mutually destructive- Stand of tenancy negates defendant's claim of her having become owner of land by adverse possession. (Paras 8 to 10)

For the Appellants: Mr. Romesh Verma, Advocate.

For the Respondent: Mr. J.L. Bhardwaj, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal is directed, against, the concurrently recorded verdicts by both the learned Courts below, whereby, the plaintiff's suit for rendition, of, a decree for declaration, besides, for rendition, of, a decree, for, permanent prohibitory injunction qua the suit khasra number(s), was, hence decreed.

2. Briefly stated the facts of the case are that the plaintiff in her suit, has averred that she was owner in possession of the land measuring 11.13 bighas as detailed in the plaint, and, in her suit, she has questioned the validity of the entries in the revenue record being illegal, wrong, and, not binding on her. She further, in her suit, sought the relief of permanent prohibitory injunction against the defendant besides sought the relief in the alternative for possession of the suit land. It has been pleaded that she was married to Sh. Bhag Singh s/o Sh. Rama Ram. Shri Rama Ram was serving in the Indian Armed Forces, who died in the year 1971, during the war qua liberation of Bangla Desh. The plaintiff being the widow was allotted Nautor land measuring 12.8 bighas, comprised in khasra No.2085, and, accordingly entered in possession of the suit land, which was developed by her and brought under cultivation. In the year 1977, the plaintiff sold the piece of land measuring 15 biswas bearing khasra No.2085 for a consideration of Rs.2,000/- to one Ram Rattan and Shri Mahant, but further submits that she had been continuing in possession of remaining piece of land measuring 11.13 bighas bearing Khasra No.2085/2 being its owner. The plaintiff aver that the defendant who managed to procure the entries qua the suit land in her name, has been threatening to dispossess th said plaintiff from the suit land. The plaintiff submits that on inquiry, she came to know that the defendant had procured an order from the revenue agency of 13.2.1980, in her name, which entries are void ab initio vide which the said defendant was recorded as a tenant in respect of the suit land. It is averred by the plaintiff that the entries in the name of the defendant being a tenant are patently illegal, inoperative, and, against the factual position, and, as the defendant had been threatening to oust the plaintiff from the sit land on the basis of said entry, hence, has filed the present suit for the reliefs as set out in the plaint.

3. The defendant contested the suit and filed written statement, wherein, she has taken preliminary objections inter alia maintainability, bad for non joinder and mis joinder of necessary parties, limitation valuation, estoppel etc. On merits, though the defendant admitted the sanction of the suit land under Nautor in favour of the plaintiff, but denied the possession of the plaintiff in respect of the suit land. It is also controverted that part of the suit land was sold by the plaintiff. To the contrary, the defendant took the plea that the part of the suit land was illegally encroached by Ram Rattan, Prem Lal, Mahant Ram and Harnam Singh. The defendant further submitted that since June, 1975, she was inducted as a tenant by the plaintiff on payment of rent, and, as the plaintiff re-married with one Dayal Sing in the year 1970, as such she never entered in possession of the suit land. The defendant further submits that she has become owner of the suit land by operation of law, i.e. H.P. Tenancy and Land Reforms Act and thus right, title and interest of the plaintiff as such extinguished. Above all the defendant has submitted that since the order dated 13.2.1980 of the then A.C. 2nd Grade qua correction of the revenue entries is legal in the eyes of law, thereupon, the plaintiff is not entitled for the relief and has prayed for dismissal of the suit.

4. The defendant has also filed the counter claim to the effect that she be declared as owner in possession of the suit land firstly on the ground that she by operation of law of H.P. Tenancy and Land Reform Act; and in the alternative as she had been coming in possession of the suit land, since June 25, 1975, openly, peacefully, continuously, and, adverse to the rights of the plaintiff, hence, to be declared owner by way of adverse possession having perfected her rights, as such. The defendant has further submitted that as part of the suit land bearing Khasra No.2085/1 was forcibly occupied upon by Ram Rattan, Prem Lal, Mahant Ram, Harnam Singh, hence, a decree for possession of the said part of the land after demolition of structure thereon be also passed n her favour, for a consequential relief of permanent prohibitory injunction against the plaintiff not to cause interference in the suit land.

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

1. Whether the plaintiff is owner in possession of suit land, as alleged? OPP.
2. Whether the plaintiff has sold 15 biswa out of suit land measuring 12-8 bighas to S/Sh. Ram Rattan, Prem Lal, Mahant Ram, and, Harnam Singh for a consideration of Rs.2000/- as alleged? OPP.
3. Whether the entries in the revenue record are wrong and illegal? OPP.
4. Whether the defendant was not inducted as a tenant over the suit land by the plaintiff on payment of rent? OPP.
5. Whether the defendant has become owner of the suit land by way of adverse possession, as alleged? OPD.
6. Whether the suit is not maintainable? OPD.
7. Whether the suit is bad for non joinder and mis joinder of necessary parties? OPD.
8. Whether the suit is barred by time? OPD
9. Whether the suit has not properly valued for the purpose of court fee and jurisdiction? OPD.
10. Whether the the suit is bad for want of better particulars? OPD.
11. Whether the plaintiff is estopped to file the suit by her act, conduct, commission and omission as alleged? OPD.
12. Whether the defendant is entitled to a decree of ownership and possession with respect to the suit land by way of counter claim as alleged? OPD.
13. Whether the plaintiff is also entitled to the relief of permanent injunction, as prayed?OPP.
14. Whether the defendant is entitled to possession of land comprise din Khasra No.2085/1 after demolishing the construction, as alleged? OPD

14-A. Whether the order dated 13.2.1980 of Naib Tehsildar effecting the entry of the suit land in favour of the defendant is null and void? OPP.

15. Relief.

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

7. Now the defendant(s)/appellant(s) herein, has instituted the instant Regular Second Appeal, before, this Court, wherein she assails the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, on 2.12.2004, this Court, admitted the appeal instituted by the defendant/appellant(s), against, the judgment and decree, rendered by the learned first Appellate Court, on, the hereinafter extracted substantial questions of law:-

1. Whether the respondent/plaintiff having failed to contest the counter claim of the appellant, and, the fact that no written statement thereto was filed, therefore, on the basis of material on record, claim was required to be allowed?
2. Whether keeping in view the subject matter of the controversy, the civil court has no jurisdiction in the matter, especially in view of the bar as contained under the provisions of H.P. Tenancy and Land Reforms Act, which debar the jurisdiction of the civil court, because the mutation No.932, Ex.P-3 was attested on 16.9.1986, which order was at no stage was challenged by the respondent/plaintiff.
3. Whether the order, as passed by the Revenue Officer/Naib Tehsildar dated 13.2.1980, Ex.P-4 having not been assailed within the period of one years by way of filing the appeal or revision, nor this order was challenged before the civil court within one year, therefore, the same became final and the parties are bound by the same?
4. Whether the application, as filed under Order 6, Rule 17 CPC by the appellant for the amendment in the written statement read with Order 1, Rule 10 of the CPC has been wrongly rejected and the proposed amendment was not only necessary for determination of all the points of controversy, but even otherwise, liberal approach was required to be adopted by allowing this application?

Substantial questions of Law No.1 and 6:

8. Apparently, the respondent/plaintiff, neither by filing replication to the written statement nor by instituting any written statement, to, the counter claim, as, enclosed within the written statement, hence, instituted to the plaint, by the aggrieved defendant, rather therethrough, contested the factum of the defendant, acquiring title, by adverse possession, vis-a-vis, the suit khasra number, (i) yet the afore omission cannot constrain any conclusion, qua per se thereupon, the aggrieved defendant being entitled, to, rendition, of, affirmative findings qua hers being entitled, to be declared, as owner of the suit khasra number, through, adverse possession. The reason for making the afore conclusion, (ii) is, rested upon the factum, of, apposite issue No.5, extracted hereinabove, rather coming to be struck by the learned trial Court, and, thereon, hence, disaffirmative findings being recorded. Since, the discharging onus, vis-a-vis, the afore issue was obviously cast, upon, the aggrieved defendant, and, when the anvil of the plaintiff's suit, for possession, vis-a-vis, the suit khasra numbers, stood harboured, upon, the invalidity of an order, borne in Ex.D-4, (iii) wherethrough, the aggrieved defendant was recorded in possession of the suit khasra numbers, (iv) and, with the application whereon the afore

order was made, rather not making, any bespeaking qua the defendant claiming correction, of, the revenue entries, appertaining to the suit land,emphatically on anvil of hers acquiring title, vis-a-vis, the suit khasra numbers, through adverse possession, (v) besides when the afore omission is construed, along with, the apposite possession, rather standing obtained under order EX.D-4, exhibits whereof, obviously bespeaks qua the defendant being ordered to be incorporated, in, the apposite column of the jamabandi, appertaining to the suit property, qua his hence, being in possession thereof, and, further more, with the defendant espousing qua prior thereto, hers being inducted as, a, tenant by the plaintiff, upon, the suit khasra number, (vi) thereupon, an obviously inference, is bolstered, qua the aggrieved defendant hence acquiescing qua her purported possession, vis-a-vis, the suit khasra number, being squarely harboured upon the espoused factum, of, hers being, a, tenant thereon, (vii) whereupon, hence, the contra therewith plea, of, hers acquiring title thereto, rather by adverse possession being obviously negated, and, rather, a, further accentuated inference, is, drawable qua in hers rather propagating the plea of hers being, in, permissible lawful possession, of, the suit khasra numbers, being in stark negation, of, his holding possession thereof, hence, with an animus possidendi. Consequently, with the afore discharging onus, vis-a-vis, the afore extracted issue, remaining undischarged by the aggrieved defendant, thereupon, reiteratedly, any omission, on the part of the plaintiff, to, aptly contest the afore plea, hence, reared by the defendant in her written statement, wherein, also stood enclosed a counter claim, rather through hers filing, a, replication or a written statement thereto, cannot fillip any inference that, thereupon, the plaintiff hence acquiescing qua the afore propagated relief, reared by the aggrieved defendant.

9. Even though, the afore counter claim, does, contain a plea qua rendition of a decree for possession, by way of demolition, vis-a-vis, khasra No.2085/1, measuring 15 biswas, on anvil, of it being illegally and unathorisedly hence encroached, upon, by one Ram Rattan, Prem Lal, Mahant Ram and Harnam Singh, (a) and, when a part of the suit khasra number hence was propagated by the plaintiff, to be alienated, vis-a-vis, Ram Rattan and, others, (b) and, when oral evidence adduced in respect, of, a part of the suit kahsra number, rather being possessed, by Ram Rattan, and others, is proven, through, the oral testification rendered by Ram Rattan and others, (c) and, despite the defendant holding the apt opportunity before the learned trial Court, to move an application, under Order 6, Rule 17, CPC, for seeking addition, of, Ram Rattan, Prem Lal, Mahant Ram, and Harnam Singh, in the array of legal combatants, in the apposite lis, and, yet hers at the earliest, despite, holding knowledge, vis-a-vis,the afore erupting controversy, rather failing to, make an appropriate endeavour, before the learned trial Court, (d) thereupon, the belated endeavour, made by the aggrieved defendant, before the learned First Appellate Court, through, hers instituting an application, cast under, Order 6, Rule 17 CPC read with Order 1 Rule 10 CPC, hence, seeking therethrough the relief of addition, in, the array of legal contestants of Ram Rattan, Prem Lal, Mahant Ram, and, Harnam Singh, and, also hers seeking relief qua theirs, being prohibited, from interfering in the ownership and possession, of, the suit land, was, apparently and justifiably discountenanced, by the learned First Appellate Court. Consequently, also when the judgment, and, decree rendered on 16.2.1995, and, enclosed in Ex.D-2 and D-3, against the afore persons, in a suit instituted thereagainst, by the aggrieved defendant, rather was entirely unworkable, vis-a-vis, the rights of the plaintiff in the suit property, nor also, hence the afore exhibits operate, as estoppel or as constructive res judicata, vis-a-vis, her rights in the suit property, (e) given hers remaining unimpleaded in the apposite suit, whereon Ex.D-2 and Ex.D-3 were rendered, (f) preeminently also when hence the plaintiff, had, omitted to claim any relief against the afore. In sequel, both the afore substantial question of law No.1 and 4 are decided in favour of the respondent/plaintiff, and, against the defendant/ appellant(s).

Substantial question of law No.2 & 3.

10. The learned counsel appearing for the aggrieved defendant, has contended, with much vigour before this Court, (i) that since the order of mutation serialized at No.932, and, enclosed in D-4, hence, stood attested on 13.2.1980, and, it remaining unchallenged within, the statutorily ordained period of limitation, (ii) thereupon, the suit being time barred, and, also the statutory embargo, borne in the H.P. Tenancy and Land Reforms Act, against, the exercise of jurisdiction, by the civil court also being attracted, (iii) and, hence, the concurrently pronounced decrees against the aggrieved defendants rather holding no force, (iv) given theirs being beyond, the jurisdictional competence, of, both the learned courts below. However, the afore addressed argument(s) before this Court by the counsel, for the aggrieved defendant, is, eroded of its vigour, (v) given the order of mutation, borne in Ex.D-4, and, attested on 16.9.1986 rather coming, to, in transgression of the mandate of sub-section (4) of Section 100 of the H.P. Tenancy and Land Reforms Act, hence rendered by the Assistant Collector 2nd Grade, than, by the statutorily empowered Assistant Collector 1st Grade, (vi) thereupon, with the afore order being gripped, with, a vice of jurisdictional disempowerment, hence, it acquires no validity, (vii) rather it is construable to be nonest, and, thereupon, it is challengeable, only, since the acquisition of knowledge qua its making, by the plaintiff, and, when the order challenged in the civil suit, does not, display that in contemporaneity, vis-a-vis, its making the plaintiff, hence, recorded her presence before the officer rendering its, (viii) thereupon, when the plaintiff rather proving qua, upon, hers acquiring knowledge, vis-a-vis, its making, hers thereafter within the apposite statutorily prescribed period of limitation, as aptly computable therefrom, hence, instituting the extant suit, hence renders her suit to be maintainable, (ix) and, also the afore void order rendered, by the Assistant Collect 2nd Grade, does not attract, the apposite statutory bar, enclosed in the H.P. Tenancy and Land Reforms Act, against, the exercise of jurisdiction by civil courts, against any orders recorded, by the statutorily contemplated authority(ies), under, the H.P. Tenancy and Land Reforms Act. Both the afore substantial questions of law are answered in favour of the plaintiff/respondent, and, against the defendant/ appellant(s).

11. The above discussion, unfolds, that the conclusions as arrived by both the learned Courts below, being based, upon a proper and mature appreciation of evidence on record. While rendering the findings, both the learned Courts below have not excluded germane and apposite material from consideration.

12. In view of the above discussion, there is no merit in the instant appeal, and, it is dismissed accordingly. In sequel, the judgments, and, decrees impugned before this Court are maintained and affirmed. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

Praveen Kumar .....Petitioner.

Versus

Atma Ram ....Respondent.

Cr. Appeal No. 532 of 2010
Reserved On : 2.4.2019
Decided on: 30.4.2019

Negotiable Instruments Act, 1881- Section 138 – Dishonour of cheque– Complaint – Service of statutory notice- 'Refusal to accept' registered article containing notice, whether amounts to 'due service'?- Held, it is only on failure of payment within 15 days after valid service of statutory notice, complaint can be filed- Without valid service of notice, complaint bound to be dismissed- Endorsement to the effect that drawer 'refused to accept' notice, does not amount to valid service unlike Code of Civil Procedure (CPC) where it is considered as valid service- Court cannot draw inference of valid service by invoking provisions of CPC. (Paras 3 & 4)

Case referred:
Yogendra Pratap Singh vs. Savitri Pandey, (2014) 10 SCC 713

For the Petitioner: Mr. Pushpinder Verma, Advocate, vice counsel.
For the Respondent: Mr. Vikram Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J

The instant appeal is directed, against, the impugned judgment, of, 25.6.2010, rendered by the learned Judicial Magistrate, Ist Class, Court No.1, Palampur, District Kangra, H.P. in Criminal Complaint No. 129/III/2009, whereby the respondent herein (for short 'accused'), stood acquitted, by the learned trial Court, for, an offence punishable under, Section 138 of the Negotiable Instrument Act (for short "NI Act").

2. Cheque bearing CW-1/A, carrying therein a sum of Rs. 2,50,000/-, stood issued by the accused, vis-a-vis, the complainant. The afore cheque, upon its presentation, before the Bank concerned, stood, as divulged by Ex. CW-1/E, hence declined, for want of sufficient funds, occurring in contemporaneity vis-a-vis its presentation, before the bank concerned, for being honored. Subsequently, on 18.4.2009, the complainant through his counsel, issued, a, statutory notice, borne in Ex. CW-1/C, upon, the accused, detailing therein the afore factum. The notice was sent through registered AD, and, the postman concerned, made an endorsement therein, qua the addressee refusing to accept it.

3. The complaint was filed on 12.5.2009. The apt statutory notice, is, contemplated in clause (c) of the proviso appended to Section 138 of Negotiable Instruments Act (for short " NI Act"), provisions whereof stand extracted hereinafter, qua hence, it, being imperatively served upon the accused, (i) and, only upon elapse of 15 days, from, valid service of the statutory notice upon the addressee, (ii) thereupon the complainant being entitled to institute, a, validly constituted, and, a maintainable complaint, before the Magistrate concerned. However, the mandate of the afore clause (c) of Section 138 of the NI Act, is palpably infringed hereat, (iii) given, the peremptory mandate, borne therein, qua the apt statutory notice, being imperatively proven to be received by the addressee, remaining contravened, (iv) the afore inference is both expressly besides explicitly, acquired hence by the coinage "within 15 days of the receipt of the said notice" occurring in clause (c) of section 138 of NI Act.

> "(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."

4. Moreso, when the statutory coinage "receipt" occurring therein, cannot hold any signification, than qua, the statute explicitly contemplating qua it being imperative for the addressee, being validly served, and, contrarily when hereat no valid service of notice, is, made upon the noticee, rather an endorsement is occurring therein, qua his refusing to accept the notice, and, when no provisions analogous to the apt provisions borne in the Code of Civil Procedure, wherein it stands contemplated qua upon refusal of the litigant concerned, to, accept summons, he is deemed to be statutorily served, rather exist in the NI Act, (i) thereupon, for want of any provisions in the NI Act bearing likeness or similarity therewith, hence, the complainant, cannot derive any leverage therefrom, to, dehors, effectuation of, valid service, being made upon the noticee, hence institute the extant complaint, nor, thereupon, the order of acquittal recorded by the learned trial Court is to be concluded to be either invalid or unsustainable, contrarily the complaint is to be held to be premature. In making the afore conclusion, this Court derive strength from a judgment reported in (2014) 10 SCC, titled as ***Yogendra Pratap Singh vs. Savitri Pandey***.

In view of the above, the present appeal stands dismissed, as, also the pending applications if any.

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

Prem Chand ....Appellant
Versus
Babur Ram and others ....Respondents

RSA No. 450 of 2002
Reserved on : 1.4.2019
Decided on: 30.4.2019

Specific Relief Act, 1963- Section 38- Permanent prohibitory injunction- Grant of- Plaintiff claiming possession of house pursuant to agreement of parties- Agreement not specifically mentioning any Khasra number in it- Defendant admitting on oath regarding dispute between them pertains to a house- No evidence from his side as to existence of any other house in suit- Recitals in agreement showing transfer of possession of house to plaintiff- Plaintiff entitled for decree of prohibitory injunction. (Paras 8 & 9)

For the Appellant : Mr. Rahul Mahajan, Advocate.
For the respondent(s) : Mr. Ramakant Sharma, Senior Advocate with Ms. Devyani Sharma, Advocate, for respondents No.1(a) and 1(b) and respondent No. 3.
Respondents No. 4 to 7 exparte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed against the verdict recorded by the learned first appellate Court, upon Civil Appeal No. 99-N/2000, wherethrough, the first appellate Court rather reversed the judgment and decree, pronounced by the learned trial Judge, and

hence, dismissed the plaintiffs' suit. The plaintiffs are aggrieved therefrom, hence motion this Court, through the instant Regular Second Appeal.

2. Briefly stated the facts of the case are that plaintiff Prem Chand claimed himself to be owner in possession of suit property, consisting of two rooms and verandah, which was previously owned by Nathu Ram, the father of the plaintiff and appellant Babu Ram, father-in-law of defendant No. 2 Rattni Devi and grand father of defendants No. 3 to 6. As per plaintiff, Nathu Ram, was tenant at Willon the land of original owner and had constructed his residential Abadi and acquired the proprietary rights. Nathu Ram had four sons, namely the plaintiff Prem Chand, defendant No.1,Gian Chand and Jaishi Ram. Jaishi Ram and Gian Chand got separated from Nathu Ram, and also constructed their own Abadi and were living separately for more than 38 years. Defendant/appellant Babu Ram also got separated from his father, in the year 1975-76, but he was not having his own house, therefore, he continued to live with Nathu Ram. Plaintiff used to serve his parents. Defendants No. 1 and 2 Babu Ram and Rattni Devi never served Nathu, and in lieu of the services rendered by plaintiff, Nathu Ram executed a registered Will dated 1.6.1979. It was further alleged that defendants No. 1 and 2, sought permission to live in the house of Nathu Ram from the plaintiff and the plaintiff allowed them to stay in the house. The name of defendant No. 1, in the revenue record as Hissedar alongwith plaintiff was wrong and against the factual position. The entire residential Abadi owned by Nathu Ram, after his death, came to the plaintiff, the plaintiff is entitled to take back the possession of residential house from the defendants No. 1 and 2. The plaintiff and defendants also enters into a compromise on 17.11.1991 and as per the said compromise defendant No. 1, agreed to vacate the disputed portion in favour of the plaintiff and plaintiff agreed to pay compensation of Rs. 5,000/- and also to provide adjacent land for the residence of defendant No. 1 and to deduct Rs. 1200/- from Rs. 5000, as value of the trees. The plaintiff was ready and willing to perform his part of agreement and as such filed a suit for possession by way of specific performance of the Contract Act.

3. Defendants filed written statement to the effect that defendant No. 1 alongwith plaintiff and defendants No. 3 to 7 purchased the land comprised in Khata No. 105, Khatauni No. 166, 169, Khasra Number 201 min 201, land measuring 20 kanals 10 marlas, vide registered sale deed dated 28.1.1971 from Surjit Singh and thereafter all the parties except the plaintiff and defendant No. 1 separated from each other. The defendant No. 1 constructed the residential house over the said land and Nathu Ram the father of the plaintiff and defendant No. 1 also held defendant No. 1 in the construction of house to the extent of half share as owners. It was denied that the residential Abadi continued to be owned and possessed by Nathu Ram till his death. It was further denied that the defendant No. 1, got separated from his father Nathu Ram since 1977. It is denied that Nathu Ram while in sound disposing state of mind, voluntarily executed a Will dated 1.6.1979 in favour of the plaintiff in lieu of the services rendered by the plaintiff. It was also denied that the defendant No. 1 entered into any compromise on 17.11.1991 with the plaintiff.

4. Replication has been filed, wherein contentions made in the written statement are denied and those made in the plaint are re-asserted. On the pleadings of the parties, the following issues were framed on 11.3.1996:

1) Whether the plaintiff is entitled to recover possession of suit land being owner? OPP

2) If ownership of the plaintiff is not proved whether in the alternative the plaintiff is entitled for possession of suit land by way of specific performance of the contract as alleged? OPP

3) Whether the suit is not maintainable in the present form? OPD

4) Whether the plaintiff has got no cause of action to file the present suit? OPD

5) Whether the suit is bad for mis-joinder of the parties? OPD

6) Whether the plaintiff is estopped by his act and conduct from filing the present suit? OPD

7) Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the plaintiffs' suit. In an appeal, preferred therefrom by the defendants/appellants, before the learned First Appellate Court, the latter Court allowed the appeal, and, dis-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, this Court, on 1.10.2002, admitted the appeal instituted by the appellant(s), against, the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial question(s) of law:-

(i) Whether the learned appellant Court below has given a contradictory finding and committed error of law on face of record by holding that a valid and proper Will was executed and that it cannot be enforced on account of agreement?

(ii) Whether the learned appellant Court below has misconstrued and misinterpreted Ext. P1, resulting in wrong and erroneous finding bad in law and facts?

(iii) Whether the learned appellant Court below has misconstrued and misinterpreted Ext. PW4/A, as agreement instead of a family settlement thus arriving at a wrong finding?

(iv) Whether the learned appellate Ciourt has erred in law by relying on agreement Ext. PW4/A and holding that it has superseded the Will Ext. P-1?

Substantial questions of Law

7. The suit Khasra No. 355, is, in the Jamabandi, appertaining therewith rather reflected to be assigned Khasra No. 201, and, in the column of possession thereof, the names, of, the father of defendant No. 1, and, of defendant No. 2, stand reflected rather, as a non-occupancy tenant(s), hence thereon. The plaintiff averred, that, the afore reflection(s), carried in the Jamabandi, appertaining to Khasra No. 201, being erroneous, and, espoused, (i) qua rendition of a declaratory decree, for hence the afore reflections being quashed and set aside, and, also sought rendition, of, a decree of permanent prohibitory injunction, for, restraining the defendants, from, interfering, in the, peaceful possession of the plaintiff, upon the aforesaid Khasra No. The aforesaid suit Khasra No., is further averred by the plaintiff, to be hence, acquired by him, through a testamentary disposition, executed vis-à-vis, him by his predecessor-in-interest. The apposite testamentary dispositions, is, comprised in Ext. P-1. The learned trial Court, and, the learned first appellate Court, both concluded qua Ext. P-1, being cogently proven to be validly, and, duly executed by the deceased testator. The recording, of, the afore concurrent findings, vis-à-vis rather cogent proof being adduced, qua valid, and, due execution, of Ext. P-1, do not come under contest,

nor obviously any substantial question of law, qua therewith, hence stood formulated by this Court. Consequently, the afore concurrent findings, recorded by both the learned trial Court, vis-à-vis, the afore facet, obviously not require any interference.

8. Be that as it may, the acerbic contest, making visible sprouting(s), interse, the contesting litigants, is, confined, vis-à-vis, suit Khasra No. 355, falling or not falling within the domain of Ext. P-1. Upon an adjudication being, thereon hence meted adversarial, to the plaintiff, (i) thereupon, this Court may affirm the judgment and decree, rendered by the learned first appellate Court, upon civil appeal No. 99-N of 2000, (ii) contrarily, in case findings, adversarial to the defendants, are, recorded upon the aforestated, *res-controversa*, (iii) thereupon this Court may be prodded to accept the appeal, and, decree the plaintiffs' suit. In sequel, hence the entire fulcrum, whereon the lis stands embroiled, is embodied in, (iv) whether Khasra No 436, as stands delineated in the Will, hence bearing consonance, with, the suit Khasra No. 355, or not. Un-controvertedly, the plaintiffs, had, acquired Khasra No. 436, through a testamentary disposition, borne in Ext. P-1, (v) wherethrough, he stands rather constituted as a sole legatee, of, one Nathu Ram, (vi) whereas in stark contradiction thereof, Khasra No. 355, stands ascribed, vis-à-vis, the suit land. Prima-facie, on anvil of the afore incongruities, occurring, interse, suit Khasra No., and, vis-à-vis, the Khasra no., as enumerated in Will, borne in Ext. P-1, rather disable the plaintiff, to, contend that the afore espoused, decrees being renderable qua him. (vii) Nonetheless, the plaintiff has, on anvil of Ext. PW4/A, yet made, as assiduous effort to make an espousal, qua the espoused decrees being renderable qua him. However, to gauge the relevant efficacies, and, effects of Ext. PW4/A, a surgical perusal thereof, is, imperative. However, a perusal of Ext. PW4/A, as propounded by the plaintiff, to, succor his espousal, qua given thereunder, rather defendant No. 1, (a) hence agreeing to vacate the house, situated, on a part of the suit Khasra No. 355, in lieu of the plaintiff, agreeing, to pay compensation of Rs. 5000/- and also, in lieu of plaintiff, providing land adjacent, to the residence/abode of the defendant No. 1, also underscores qua, the suit Khasra No. rather not standing enumerated therein, whereupon, he is, prima-facie, estopped, to, make the afore espousal (vii) Nonetheless, the effects, of, the afore incompatibilities, interse Khasra No., embodied in Ext. P-1, and, as ascribed, vis-à-vis, the suit land, besides, qua no Khasra number(s) being recited in Ext. PW4/A, are qua thereupon, rather the plaintiff being, yet not, estopped to propagate, qua the defendant No. 1, (viii) hence therethrough abandoning his right, title or interest, vis-à-vis, the residential house, if any, existing on a part of suit Khasra No. 355. The afore contention, also not, in its entirety, hence suffering any erosions qua its worth, given execution thereof, being cogently proven, (ix) their being a recital therein qua parting of sale consideration, and, also possession of property, as enunciated therein, and, when the afore enunciation, as borne in Ext. PW4/A, dehors, no Khasra nos being disclosed therein, is read, in conjunction, with, the testification, rendered by Babu Ram, (x) wherein he voices, qua one disputed residential house, being in existence, since the time of his father, and, the latter being recorded, as non-occupancy tenant, vis-à-vis, Khasra No. 201, and, in part whereof, the afore residential house is situated, and, when it is further testified by him, that, during the lifetime of his father, it was KHAPRAIL, nowat it being a slate-roofed, (xi) besides when the entries appertaining to suit Khasra No. 355, and, as borne in the Jamabandi, prepared qua therewith, are, alike the one appertaining, therewith, and, appertaining to, the year 1963-64, and, when the afore, concurrent reflections, qua, hence a house existing, upon, Khasra No. 201, thereupon the afore Khasra No. 201 reflected in Ext. P-3, is to be construed, to be the extantly assigned Khasra No., vis-à-vis, the suit land (xii) conspicuously, also when the drawing of Ext. PW4/A, dehors, no Khasra Nos being ascribed/mentioned thereon, is to be concluded, to be drawn, in respect of the afore old Khasra No., whereto, stands ascribed the extant Khasra No., given no revenue record(s) making marked upsurging(s), vis-à-vis, the afore incompatibilities, rather

being adduced. The further preeminent reason, for making the afore conclusion, is, rested upon, with defendant Babu Ram, testifying vis-à-vis, the residential house, and, with the dispute engaging, the parties, also appertaining therewith, and, when the defendant Babu Ram, not adducing any further evidence qua the afore deposition, appertaining, to a, Khasra No. other, than, the suit Khasra No. (b) and whereas, upon his making, a, further deposition, and, whereat, an apt clarification may emerge, especially upon, his being recalled by the counsel, for the defendant, whereas, the afore omission(s), in the making, of, the afore endeavour, (xiii) rather begets a conclusion, qua his deposition appertaining to the suit Khasra No., hence, the decree of permanent prohibitory injunction, as claimed qua therewith rather being renderable, vis-à-vis, the plaintiff. The substantial questions, of law are answered accordingly.

9. Be that as it may, PW4/A, though, may constitute firm evidence, qua it, appertaining to the suit Khasra No., and, also may empower the plaintiff, to only claim rendition of, a decree of permanent prohibitory injunction, (i) yet when no registered deed of conveyance rather stands executed, interse the plaintiff, and, the defendant, whereas, only upon execution, of, the afore registered deed of conveyance, and, thereafter attestation of mutation, in consequence therewith, would erode the efficacy(s) of the relevant entries, appertaining, to, the suit Khasra No. However, when the afore registered deed of conveyance remains un-executed, interse, the parties, thereupon, want thereof, and, only when thereupon, the plaintiff would stand bestowed, title, vis-à-vis, the suit Khasra No., and, would thereafter be enabled to hence espouse, qua the revenue entries, being amenable, for being quashed and set aside, (ii) hence for afore wants, his afore prayer is rejected, excepting his being only entitled to, a, decree, of, permanent prohibitory injunction.

10. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court, being not based, upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court has excluded germane and apposite material from consideration. Accordingly, the substantial questions of law are answered in favour of the appellant/ plaintiff, and, against the respondents/defendants.

11. In view of the above discussion, the present Regular Second Appeal is partly allowed. In sequel, the judgment and decree rendered by the learned first appellate Court, is partly set aside, and, the suit of the plaintiff is decreed, only, for relief, of permanent prohibitory injunction. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

Rajinder Singh Verma .....Appellant.

Versus

Haji B.K. Hanchnmani .....Respondent.

Cr. Appeal No. 582 of 2017.
Reserved on: 3rd April, 2019.
Date of Decision: 30th April, 2019.

Negotiable Instruments Act, 1881– Section 138– Dishonour of cheque- Complaint- Dismissal of- Appeal against- Held, onus to prove basic ingredients always lies on

complainant- Complainant failed to identify accused- Also failed in telling whether accused is author or signatory of cheque in question- Bank return memo not bearing any seal or stamp- Complainant failed to prove basic facts of his case- Complaint rightly dismissed by Trial Court- Appeal dismissed. (Paras 5 to 8)

Negotiable Instruments Act, 1881 – Section 146– Bank return memo- Presumption thereunder- When can be drawn?- Held, when bank return memo is not containing any seal or stamp of bank which allegedly returned cheque as unpaid, no presumption under Section 146 of Act can be raised against accused. (Para 9)

For the Appellant: Mr. Hardeep Verma, Advocate.
For the Respondent: Mr. Mukesh Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal, is, directed by the complainant/appellant herein, against, the verdict of acquittal pronounced by the learned trial court, upon, Cr. Case No.2593-3 of 2014/05.

2. The facts relevant to decide the instant case are that in September, 2004, the accused offered to purchase apple from the complainant, who readily agreed as the accused was offering a good rate. The accused assessed the gross, value of the apple crop at Rs.6,00,000/-, and, issued a post dated cheque No. 968127 of 1.10.2004, drawn on ICICI Bank, Shimla in favour of the complainant. The accused requested him to present this cheque for ecashment in December, 2004. The complainant contacted the accused on telephone before presentation of the cheque. The accused assured that the cheque would be cleared on its presentation. Accordingly, the complainant presented the cehque issued by the accused before the ICICI Bank, Shimla on 12.01.2015. The said bank informed the complainant that the cheque had been dishonoured due to "insufficient funds". The complainant immediately contacted the accused and intimated him about the dishonour of the cheque. The accused told the complainant that he would clear the payment very soon. However, he did not make the payment. The complainant sent a legal notice to the accused on 11.2.2005 by registered post, however, the accused failed to pay the cheque amount. Hence the complaint.

3. The learned trial Court, on, finding sufficient material on record, to proceed against the accused, hence, issued notice to the accused. On his appearance before the learned trial Court, notice of accusation for his committing an offence punishable under Section 138 of the Negotiable Instruments Act, stood put to him. In proof of the case, the complainant examined himself as a witnesses. On conclusion of recording of the complainant's evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure, was recorded by the learned trial Court, wherein he claimed innocence and pleaded false implication.

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

5. The learned counsel appearing for the complainant/appellant herein, has, concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial court, standing, not based on a proper appreciation, by it, of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation by it, of the material on record.

Hence, he contends qua the findings of acquittal warranting reversal by this Court in the exercise of its appellate jurisdiction, and, theirs standing replaced by findings of conviction.

6. On the other hand, the learned counsel appearing for the accused/respondent herein, has with considerable force and vigour, contended qua the findings of acquittal recorded by the learned trial court, rather standing based on a mature and balanced appreciation by it, of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

7. The charge against the accused would be concluded hence to be cogently proven, upon, (a) cheque, borne in Ex.CW1/A being proven to be in the handwriting of the accused, (b) return memo, borne in Ex.CW1/B, containing recitals qua, upon, presentation of Ex.CW1/A, before the bank concerned, it being refused to be honoured also hence being proven, to, be issued, from, the bank concerned.

8. The factum probandum, of, Ex.CW1/A containing the signatures of the accused, is, apparently not cogently proven, (a) given, the complainant in his cross-examination rather feigning ignorance qua Ex.CW1/A containing the signatures of the accused or not, therefrom, an inference is bolstered, that, the complainant being unaware of the identity of the accused, (b) and, also qua Ex.CW1/A being issued by the accused or not, remaining engulfed, in a shroud of doubt, more particularly, qua its issuance working towards discharge, of, any legally enforceable debt or other liability or the apposite therewith statutory presumption rather also becoming hence beclouded. (c) Further corollary thereof, is that Ex.CW1/A is to be concluded to be not issued by the accused, rather it is to be inferred to be issued by a person other than the accused, therefrom, a deduction is filliped qua the charge against the accused arising from EX.CW1/A, being on its presentation, before the bank concerned, being declined to be honoured, rather faltering.

9. Even if, assumingly, the complainant may, upon, recoursing to an appropriate remedy, cast under the provisions of Section 45 of the Indian Evidence Act, rather could therethrough strive to prove the afore cheque, borne in Ex.CW1/A, carrying the authentic signatures of the accused, (a) and, thereafter it, was permissible for the complainant, to rely upon the statutory provisions, cast under the provisions of Section 139 of the Negotiable Instruments Act, qua his holding it in discharge, of, a contractual or other legal liabilities, arising inter se him, and, the accused. Nonetheless, dehors, the afore curative recoursings, for, hence, dispelling, the, effect, of Ex.CW1/A, rather being feigned, in the testification rendered hence by the complainant, to, hence assuredly contain the signatures of the accused, also, the mandate, of, Section 146 of the Negotiable instrument Act, provisions whereof stand extracted hereinafter, was, also vis-a-vis, Ex.CW1/B, the purported return memo given Ex.CW1/A, hence enjoined, to be cogently satiated.

> "146. Bank' slip prima facie evidence of certain facts- The Court shall, in respect of every proceeding under this Chapter, on production of bank's slip or memo having thereon the official mark denoting that the cheque has been dishonoured, presume the fact of dishonour of such cheque, unless and until such fact is disporved.

Even though, the court is statutorily empowered, to, qua the apposite return memo hence enunciating, the, declining to honour the negotiable instrument concerned, rather avail the apposite therewith presumption, as, engrafted therein, (a) yet the afore presumption would be aptly galvanized, upon, the memo evidently carrying thereon, the official mark, and, seal, of the bank concerned. However, the afore presumption, as occurring therein, and, with a statutory coinage, "unless and until such fact is disproved", is, rebuttable, only upon, adduction into evidence, the return memo, (b) whereupon hence, it would also stand proven

qua it not carrying the official mark or seal of the bank concerned. The evidence in consonance, with, the afore statutory coinage, occurring, in, the last part of Section 146 of the N.I. Act, is, prima facie, rather upsurging, given, Ex.CW1/B evidently not carrying the seal or official mark, of, the bank concerned, (I) AND, with one Naresh Kumar, Accounts Officer from ICICI Bank, The Mall Shimla, upon, his stepping into the witness box, rather showing his inability to bring the original of Ex.CW1/B, given, it not being traceable in the apposite records, (ii) and, when only on production, of the original in Court of EX. CW1/B, and, evident existence thereon, of the afore statutorily mandated requirements, of it, hence carrying the official mark or seal of the bank concerned, would, hence enable, the, marshalling, of, the statutory presumption qua the apposite cheque being declined, to be honoured, to, rather hold the fullest conclusivity or sway, (iii) besides it would benumb any endeavour of the defence, to rely, upon the afore statutory coinage, occurring in the last part of Section 146 of the N.I. Act, (iv) reiteratedly for want of production of the original of Ex.CW1/B, this court, is, constrained, to, conclude qua the statutory requirement, of, Ex.CW1/B on its presentation, for its, being honoured, hence, being declined to be honoured, rather remaining, within, the ambit, of, Section 146 of the N;I. Act, to be hence, disproven.

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

11. Consequently, there is no merit in the instant appeal, and, it is dismissed accordingly. In sequel, the impugned judgment is affirmed and maintained. All pending applications also stand disposed of. Records be sent back forthwith.

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

Sh. Ranveer Malhotra (since deceased, and, deleted vide order dated 6.4.2017), and,
Smt. Parmod Anand .....Petitioner/Tenant.

Versus

Dayawant Singh .....Respondent/Landlord.

Civil Revision No. 84 of 2010.
Reserved on : 2nd April, 2019.
Decided on : 30th April, 2019.

Himachal Pradesh Urban Rent Control Act, 1987 – Section 14(3)(c) – Eviction suit on ground of rebuilding and reconstruction- Whether bonafide? Held, suit premises of tenants interconnected and interlinked with entire structure- Coordinate Bench allowed petition of another tenant against eviction order passed on same ground by holding that demolition of existing structure and its reconstruction not possible without getting it vacated by all of its occupants- Petition allowed- Eviction order set aside.(Paras 8 to 10)

HP Urban Rent Control Act, 1987 – Section 14(2)(ii) – Subletting- Proof of- Held on facts, Manager of landlord clearly admitting of tenancy being joint and no separate rent was ever collected from petitioners- Petitioners thus were joint tenants and not sub-tenants. (Para 9)

For the Petitioner(s) : Mr. Anuj Gupta, Advocate.
For the Respondent: Ms. Seema K. Guleria, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant petition, stands, directed by the petitioner/tenant against the concurrent verdicts pronounced by the learned Rent Controller, Court No.6, Shimla, and, by the learned Appellate Authority, Shimla, respectively, upon Rent Petition No. 47/2 of 2007, and, upon Civil Misc. Appeal No. 64-S/14 of 2009, whereunder, the eviction of the tenants, from the demised premises, was hence ordered.

2. Briefly stated the facts of the case, are ,that the respondent herein/landlord, had claimed eviction of the petitioners/tenants from one big room, one small room, one glazed verandaha, Kitchen along with unauthorized construction in ground floor, Set No.2, Kethi, Chor View, Sanjauli, Shimla-6, on the grounds that the tenanted premises is bona fide required by the landlord for the purpose of rebuilding on old lines which cannot be done without its being vacated by the tenants, the building in question was constructed almost 100 years ago, and, it has no outlived its original span of life. The upper floor of the building is under the tenancy of Shayam Lal against whom the eviction application had already been filed. It is averred that the landlord intends to reconstruct and rebuild the entire building known as Chor View by puling down the existing old structure which is more than 100 years and is made of Dhajji and bricks walls, he has got the sufficient amounts to reconstruct the building and for such reconstruction, he is taking steps for approval of the plans on old lines and on the basis of said averments, the landlord has claimed eviction of the tenants.

3. The tenants/petitioners herein filed contested the petition by filing the reply, wherein, they have taken preliminary objections qua maintainability etc. On merits, the tenants refuted that the tenanted premises is used by the sub tenants and claimed that the tenanted premises were taken by one tenant Ranvir Malhotra along with sister Sarla, who has since expired and tenant Parmod Anand is widow of son of Smt. Sarla, who too has expired and that the tenanted premises are occupied by both the tenants in their capacity as tenants, and, none has left the same permanently. It was pleaded that the landlord has suppressed the fact that some of the portion of the building has been sold by him to the tenants, and, such tenants have become exclusive owners of their respective sets in question. It has been pleaded that the entire structure of the building "Chor View" is interconnected and depending upon the side wall of other sets, the rebuilding of entire structure is not possible unless the owners of adjoining sets having exclusive rights of their own sets vacate the same. The flooring of the building is also of wooden with the wooden planks interlinking each other to provide stability to entire structure and any attempt to remove the same will result in collapse of entire structure including the portion owned by other owners. It has been pleaded that the application has been filed with malafide intention and ulterior motive to harass the tenants.

4. The landlord/respondent herein filed rejoinder to the reply of the tenants/petitioner herein, wherein, he denied the contents of the reply and re-affirmed and re-asserted the averments, made in the petition.

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

1. Whether the applicant is entitled for the eviction order on the ground that the tenanted premises is bonafidely required for the purpose of rebuilding and reconstruction, as alleged? OPA.
2. Whether the tenant is liable to vacate the premises as the same is unsafe and unfit for human habitation, as alleged? OPA.
3. Whether the application is not maintainable? OPR.
4. Whether the applicant has not come to the court with clean hands, as alleged? OPR.
5. Whether the applicant has suppressed the material facts, as alleged? OPR.
6. Relief.

6. On an appraisal of evidence, adduced before the learned Rent Controller, the learned Rent Controller, hence, allowed the apt petition preferred therebefore by the landlord/respondent herein. In an appeal, preferred therefrom, by, the tenant/petitioners herein, before, the learned Appellate Authority, the latter dismissed the appeal preferred by the tenants/petitioners herein, hence, affirmed the verdict, of, the learned Rent Controller concerned.

7. Now the tenants/petitioners herein, have instituted the instant Civil Revision Petition, before this Court, for hence assailing the findings recorded, in its impugned order, by the learned Appellate Authority.

8. During the pendency of the instant civil revision petition before this court, one of the co-petitioners/tenants, one Ranvir Malhotra, expired on 30.12.2015, and, CMP No. 1246 of 2017, was preferred herebefore, wherethrough, relief(s) for the afore being ordered to be deleted, from, the array of the petitioners, and, for the extant civil revision petition being odered, to, be continued by petitioner No.2, was, espoused, (i) given the interest in the tenanted premises being sufficiently represented, by one of the co-petitioner/tenant, namely Smt. Pramoda Nand. Upon the afore CMP, an affirmative order was pronounced by this Court on 6.4.2017. However, a perusal of the order made on 6.4.2017, upon, the afore CMP, brings forth a trite factum (ii) qua despite an affirmative order, being pronounced by this Court, upon, the afore CMP, (iii) yet this Court granting liberty to the landlord, to contest, the entitlement, of, the surviving purported tenant, to, continue, with, the extant civil revision petition. Consequently, the learned counsel appearing for the landlord/respondent herein, has, contended with much vigour before this Court (iv) that the afore liberty reserved, by this Court, by its making an order on 16.4.2017, upon, CMP No. 1246 of 2017, also entitles her to contest the entitlement, of, the surviving purported tenant(s), in, the demised premises, to yet, continue with the extant civil revision petition. The afore submission, vis-a-vis, the afore factum is rested, upon, the factum (v) that the afore Parmod Anand being, a, sub-tenant in the demised premises, (vi) and, hers being not inducted, as, a co-tenant in the relevant premises along with deceased tenant, one Ranvir Malhotra, (vii) and, with Ranvir Malhotra, expiring issueless, and, when the right to sue survives, only upon, the statutorily enumerated heirs, and, further when the afore heirs, are, wanting, (viii) thereupon, with the afore Pramod Anand, apparently, and, evidently being not the surviving heir of deceased original tenant, thereupon, the extant petition, on the demise of Ranvir Malhotra, hence abates.

9. Though, the afore submission appears to be impressive, on is facade, (i) however, the afore submission, for the reasons assigned hereinafter, rather falters, (ii) given the contesting litigants contrarily pleading qua the afore Ranvir Malhotra being inducted, as,

a tenant in the demised premises, importantly without the written consent of the landlord, and, qua both being inducted as co-tenants, in, the demised premises, by the landlord/respondent. Even through, the afore pleaded fact hence enjoined qua separate connected therewith issue, rather being formulated by the learned Rent Controller. However, a perusal of the issues, as stand ordered to be formulated, for adduction of evidence thereon, makes clear voicings, qua no issue appertaining to the original tenant, one Ranvir Malhotra inducting one Parmod Anand, as a sub tenant therein, and, importantly without the permission of the landlord rather standing framed. Even, when an appeal was carried by the tenants/petitioners herein, before, the learned Appellate Authority, against, the verdict of eviction pronounced, upon, the tenants, yet in the apposite grounds of appeal also the afore omission, remained unpleaded, for hence, thereupon, any valid onslaught being cast, upon, the verdict rendered by the learned Rent Controller, upon, the afore rent petition. The afore omission, causes, a, casualty to the landlord's/respondent's espousal, before this Court, that Pramod Anand, without the written consent, of the landlord, standing inducted, as, a sub tenant, by one Ranvir Malhotra. The further effect thereof , when construed, in conjunction, with the factum, that the, testification rendered by AW-4, a person appointed by the landlord, to collect, the, rent from the tenants, housed in the building concerned, not, unveiling qua his receiving rent qua the demised premises, only from Ranvir Malhotra, and, not from Pramod Anand, nor his testification making any voicings qua his issuing receipts qua attornment(s) of rent hence, vis-a-vis, the demised premises, only to afore one deceased Ranvir Malhotra. Consequently, wants of the afore open voicings, being testified by AW-4, rather bolsters an inference qua both Ranvir Malhotra, and, Pramod Anand, jointly tendering rent qua the demised premises to AW-4, (I) emphatically when the best evidence to erode the efficacy, of, eruption of the afore inference, was comprised, in adduction into evidence, of, the afore rent receipts, whereas, reiteratedly, omission(s) of adduction thereof into evidence, strengthens the afore inference. In nutshell, the afore argument addressed before this Curt by the counsel for the landlord, is, meritless, and, is rejected, in sequel, the co-petitioner No.2, is, entitled to prosecute the instant petition, dehors, the demise of co-petitioner No.1 Ranvir Malhotra.

10. Be that as it may, since the counsel appearing for the respondent/landlord, has, placed on record a copy of the judgment, rendered by a co-ordinate bench of this Court, upon, Civil Revision No 83 of 2010, and, when, the counsels appearing for the contesting litigants, make a conjoint submission, that, the afore judgment, is, appertaining to the building, in part whereof, the, demised premises are located, (a) thereupon, when the ground of eviction, as, reared herein, is, anchored, upon the demised premises, enjoining eviction of the tenants housed therein, rather by hers/theirs, being ordered to be evicted therefrom, for, hence, facilitating reconstruction or rebuilding of the building, in part whereof the demised premises stand located, (i) and, when the afore ground reared herein, is, also reared in C.R. No.83 of 2010, (ii) thereupon, when civil revision petition No.83 of 2010, rather came to be allowed, and, the concurrent orders of eviction pronounced, upon, the tenant, in, the afore eviction petition, came to be set aside, hence, in consonance therewith, the instant civil revision petition is also allowed, and, the concurrent verdicts rendered by both the learned Courts below, hence, ordering, for, eviction of the tenant/petitioner, from, the demised premises, are, set aside. All pending applications also stand disposed of. No order as to costs.

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

Reeta Devi Appellant

Versus
Ravi Kumar Respondent

RSA No. 157 of 2016
Reserved on : 29.3.2019
Decided on: 30.4.2019

Joint land- Partition suit- Construction by co-sharer in exclusive possession- Nature and effect- Held, construction raised upon by co-sharer over land in his exclusive possession would not erode factum of joint ownership- Exclusive possession is construable as his holding possession constructively even for other co-sharers not in physical possession thereof. (Paras 10 to 12)

Joint land- Partition suit- Construction by co-sharer over land in exclusive possession- Whether raises estoppel against partition of such land? Held, mere raising of construction over land in his exclusive possession by co-sharer does not raise any estoppel against other co-sharers from seeking partition simply by lack of protest or objection with respect to said construction. (Para 9)

For the Appellants : Mr. J.L. Bhardwaj, Advocate.
For the respondent(s) : Mr. Vijay Chaudhary, Advocate, for respondents No. 1 and 2.
Respondents No. 3 to 11 exparte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed by the aggrieved defendants, against, concurrently recorded verdicts by both the learned Courts below, wherethrough, the plaintiffs' suit for possession, through, partition of the suit land, comprised in khevat No. 31/1 khatauni No. 34/1, Khasra No. 81, measuring 52 sq yards 4 sq feet, and, also for hence rendition of a decree of permanent prohibitory injunction, qua therewith, hence stood decreed.

2. Brief facts of the case are that the respondents No. 1 and 2 (hereinafter referred to be the plaintiffs) filed a suit for possession by way of partition and for permanent prohibitory injunction claiming themselves to be owners in possession of 60 shares in the property consisting of two storeyed pucca shops over land comprising khevat No. 31/1, Khatauni No. 34/1, Khasra No. 81, measuring 52 Sq. yards 4 Sq. feet, situated at Mauza Banikhet, Tehsil Dalhousie District Chamba (hereinafter referred to be as the suit property), against appellants and respondents No. 3 to 11 (hereinafter referred to be as the defendants) on the grounds that the suit property is joint between the parties and has not been partitioned. Defendants are in possession of more share and plaintiffs requested them time and again to get the suit property partitioned, but they did not do so. The plaintiffs requested defendants not to demolish the suit property till, partition, but they are adamant and have started demolishing it with a view to raise new construction.

3. The suit has been contested only by defendants No. 1 to 6 by filing written statement to the plaint. They have raised preliminary objections of maintainability and estoppels. On merits, the defendants have admitted that the plaintiffs are owners of 30 shares, but the defendants are in possession of whole premises, for the last so many years

and question of demolishing it does not arise. The premises in dispute has been constructed exclusively by Shri Ashwani Kumar, son of defendant No. 1 and husband of defendant No. 2, by spending huge amount about 23 years back in the presence of plaintiffs and at that time, plaintiffs never objected. The shop is in the ground floor and the first floor is being used by defendants as their residence.

4. Replication has been filed, wherein contentions made in the written statement are denied and those made in the plaint are re-asserted. On the pleadings of the parties, the following issues were framed on 21.4.2008:

1) Whether the plaintiffs are entitled for the partition as prayed for? OPP
2) Whether the plaintiffs are entitled for the relief of permanent prohibitory injunction as prayed for? OPP
3) Whether the suit of plaintiff is not maintainable in the present form? OPD
4) Whether the plaintiffs are estopped by their own act and conduct to file the present suit? OPD
5) Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the plaintiffs' suit. In an appeal, preferred therefrom by the defendants/respondents, 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 defendants/respondents herein, have instituted the instant Regular Second Appeal before this Court, wherein they assail, the, findings respectively, recorded in the impugned judgments and decree(s), as, rendered by both the Courts below.

7. In the operative part of the concurrently recorded verdicts, the, shares of the contesting litigants, in the suit Khasra Nos., are, enumerated as under:

Plaintiffs:	60 shares
Defendant No. 1	13 shares
Defendants No. 2 to 6	5 shares
Defendants No. 7 and 8	12 shares
Defendants Nos 9 to 11 and 12	120 shares

8. For the reasons to be recorded hereinafter, no question of law, much less, any substantial question of law, rather arises for determination, interse the contesting litigants, in, the disputed suit property, as disclosed in the Jamabandi, appertaining therewith, to be rather, hence, undivided interse the contesting litigants. The drawing(s) of the shares of the contesting litigants, in, the operative part, of the concurrently recorded verdicts, by both the learned Courts below, does un-contestedly, bear consonance, vis-à-vis, their shares, as reflected in the Jamabandi(s), as appertaining to the suit property. However, the learned counsel for the aggrieved defendants, has contended with much vigor, before this Court, that all the reflections borne in the Jamabandi(s), appertaining to the disputed suit property, rather suffering diminution, diminution whereof being sparked by (a) construction, over, the suit land, being exclusively raised, by the son of one Pushpa Devi, and, from his funds, and, when hence thereat the plaintiffs, rather omitted, to make any apt remonstrance, (b) thereupon, the plaintiffs being, estopped to claim, any share in the disputed suit property. (c) However, DW-1 and DW-2, in their respectively recorded

deposition(s), borne in their respective cross-examination(s), acquiesce qua the disputed suit property, being undivided, and the plaintiffs, along with other defendants rather holding co-ownership(s) thereon. The effect of the afore admission, is, qua the afore reared contention, by the learned counsel, for the aggrieved defendants, that hence the revenue entries, carried in the Jamabandi, appertaining to the suit property, suffering rebuttal (d) despite, theirs hence making candid articulations, qua the disputed suit property, being jointly owned by the parties at contest, rather coming, to, therefrom hence suffer apt, dilution(s), (e)contrarily rather on anvil, of, the afore admission, the afore referred reflections, as carried in the revenue records, hence acquire apt conclusivity. The effect thereof, is qua hence, the possession, if any, or construction, if any, (f) if assumingly stands raised, upon, the suit property, exclusively by the son of one Pushpa Devi, would not yet erode, the trite canon, embedded in the jurisprudential concept, of, joint tenancy, tenet whereof, is, comprised in each of the recorded co-owners, in the undivided property, holding unity of title and community of possession, vis-à-vis, every inch, of the, undivided suit property, (g) and thereupon exclusive possession, if any, by any co-owners, vis-à-vis, any portion of the undivided suit property, being construable, to be his holding constructive possession thereof, even for other co-owners, who do not hold any physical possession thereof, nor any physical possession, of, the undivided suit property, by any co-owner, hence being not construable, to hence oust the co-owners, not, in exclusive possession thereof, to, claim dis-memberment of the undivided suit property, by metes and bounds, (f) and also, theirs not being debarred, to, on culmination of partition proceedings, receive apt exclusive physical possessions', of, tracts of the dismembered property, in, consonance with their shares, as reflected in the revenue records.

9. Further more, no estoppel is generated, by any lack of remonstrance, by the plaintiffs, vis-à-vis, construction, if any, and, assumingly raised exclusively, by the son of one Pushpa Devi, and, from his own funds, upon the suit property, (a) and, nor any purported afore estoppel hence holding any baulking effects, vis-à-vis, any indefeasible right, of, any co-owner, to rather seek partition, of, evidently undivided suit property.

10. Be that as it may, the defendants by raising the afore plea, strived to erect obviously, a plea of estoppel, with tacit underlinings, of, their completely rather ousting the plaintiffs, from theirs enjoying the, undivided suit property. However, the afore estoppel, is not well-entrenched, as no firm pleadings, in consonance therewith, hence exist in the apt written statement, as instituted to the plaint. (a) since importantly, subsequent to the accrual, of the apt cause(s) of action, comprised in the defendants' concerned, in excess of their shares, in the undivided suit property, hence raising construction thereon, rather the instant suit being instituted, (b) and, the defendants, though controverted the factum, of, accrual of cause of action, hence commencing in, the first week of March, by rendering deposition(s), qua earlier thereto, the suit property, upon it, being set ablaze, hence it being re-constructed, from, the exclusive funds, of, son of DW-1, (c) yet the afore deposition, is discardable, given it being beyond the pleadings, existing in the written statement, instituted to the plaint, by defendants No. 1 to 6, besides when the afore defendants also omitted to specify, upon, theirs purportedly striving to rather bely the afore factum, of, accrual of cause of action, as reared in the plaint, hence the exact date whereat rather, and, in the afore manner, the, son of DW-1, proceeded to raise construction, upon the suit property, (d) thereupon, too, the afore espousal rather remains unrested, upon, any consonance therewith apt pleadings.

11. In aftermath, the effects of the afore non-disclosure(s), in the written statement, instituted by defendants No. 1 to 6, to the plaint, also engenders an inference, qua no estoppel, purportedly, arising from, no, remonstrance being, at the earliest stage, vis-

à-vis, construction, raised exclusively by them, hence getting sparked, vis-à-vis, the plaintiff, and nor hence, the defendants' claim, vis-à-vis, any purported ouster of the plaintiffs, from the suit property, is, workable, vis-à-vis, the defendants.

12. The upshot of the afore discussion, is that the drawing of, a preliminary decree, by both the learned Courts below, rather in the operative part, of the verdict, pronounced by the learned trial Judge, not, hence bearing any dis-concurrence, vis-à-vis, all the reflections, in consonance therewith, as existing in the revenue records, and, when the afore drawing, of shares, is not, the acerbic contest interse the litigating parties, (a) thereupon when the aggrieved defendants, can validly anvil, their claim for setting aside the rendition, of, a preliminary decree, of, partition, upon it bearing dis-concurrence, vis-à-vis, the reflections appertaining therewith, as, carried in the revenue record, whereas, with the afore purported dis-concurrence(s) rather remaining, un-canvassed, besides un-established, thereupon, the concurrently recorded verdicts, are not, amenable for interference.

13. The above discussion unfolds the fact that the conclusion as arrived by the learned Courts below, is based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned Courts below, have not excluded germane, and, apposite material from consideration.

14. In view of the above discussion, the present Regular Second Appeal is dismissed. In sequel, the judgments and decrees rendered by both the 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.

Reliance General Insurance Co. Ltd. ...Petitioner

Versus

Veena Rana and others ...Respondents

FAO No. 339 of 2018
Reserved on :29.3.2019
Decided on : 30.4.2019

Motor Vehicles Act, 1988 – Section 149(2)– Motor accident- Claim application- Defences- Validity of driving licence- Proof- Insurer challenging award of Tribunal on ground that driver of offending vehicle was not having valid and effective driving licence to ply it at time of accident- Held, evidence of insurer with respect to driving licence of driver is merely in shape of information gathered by it under RTI Act- Driver of said vehicle not examined as witness nor person who supplied such information under RTI Act- Best evidence not put forth by insurer to prove invalidity of driving licence- Appeal dismissed- Award upheld. (Paras 2 to 4)

Cases referred:

National Insurance Co. Ltd vs. Pranay Sethi and others, 217 ACJ 2700
Sarla Verma vs. DTC, (2009)6 SCC 12

For the petitioner : Mr. Chandan Goel, Advocate.

For the respondent : Mr. Virender Singh Rathour, Advocate, for respondents No. 1 to 4.
Mr. Imran Khan, Advocate, for respondents No. 5 and 6.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed, against the impugned award, pronounced by the Learned Motor Accident Claims Tribunal-(II), Kangra at Dharamshala, wherethrough the learned Tribunal, adjudged hence, compensation amount, comprised in a sum of Rs. 22,23,740/- along with interest at the rate of 9% per annum, commencing from the date of filing of the petition, till its, realization, vis-à-vis, the dependants of the deceased. The apposite indemnificatory liability thereof, was fastened upon the insurer of the vehicle.

2. The learned counsel for the appellant has contended, that, the computation, as made by the learned Tribunal, of, the per-mensem salary of the deceased, and, comprised in a sum of Rs. 15,000/-, being not founded, upon, any appropriate therewith evidence, (i) however the afore submission is meritless, given the afore factum rather being proven by the employer, of the deceased, upon, his stepping into the witness box. Furthermore, the additions meted thereto, in a 25 percentum, and, working towards future hikes, or future prospects, is, also within the domain of the verdict, pronounced by the Hon'ble Apex Court, in case titled as **National Insurance Co. Ltd vs Pranay Sethi and others,** reported in **217 ACJ 2700.** Also, thereafter, and thereupon, the computation, of, compensation amount, falls within the domain, of, the verdict, rendered by the Hon'ble Apex Court, in case, tilted as **Sarla Verma vs. DTC**, reported in ***(2009)6 SCC 12.***

3. The learned counsel appearing for the Insurer has also contended, that, the driver of the offending vehicle, at the relevant time, was not possessed, of a valid, and, effective driving license, and, hence the fastening, of, the indemnificatory liability, upon the Insurer, being ingrained with an inherent vice, of, fallacy, and, warranting interference.

4. In making the afore submission, the learned counsel for the Insurer has also depended, upon, Ext. RY, exhibit whereof, underscores an intimation, being purveyed, by the Public Information Officer, DTO, Office, Zunheboto, Nagaland, to one Sanjay Singh, and it carries echoing(s) qua the driving license held, by the driver of the offending vehicle, not being found, to be entered, in the records of the RTO, (i) however, any reliance as placed thereon, is grossly unfounded, as neither Sanjay Singh stepped into the witness box, to prove the requisite information, as embodied in Ext. RY, (ii) nor the author of Ext. RY, stepped into the witness box, for proving the afore intimation, embodied therein, (iii) in sequel, and, preponderantly with the best evidence, for rather proving the afore factum, and comprised, in, elicitations, by the Insurer, from the records of the RTO concerned, vis-à-vis, the driving license concerned, held, at the relevant time, by the driver concerned, rather remaining unadduced, (iv) thereupon, the effect of the afore omission, is, qua the findings recorded vis-à-vis, the validity, of, the driving license, rather warranting no interference.

5. Consequently, there is no merit in the appeal, and the same is dismissed. All pending application(s), if any, are also disposed of.

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

Reliance General Insurance Company Ltd. ....Appellant.

Versus

Krishna Devi (since deceased) through her legal heirs and others.

....Respondents.

FAO No. 89 of 2018.
Reserved on : 8th April, 2019.
Decided on : 30th April, 2019.

Motor Vehicles Act, 1988 – Section 166– Motor accident- Death case- Claim application by legal representatives- Increase towards future prospects and compensation under conventional heads- Held, increased on established income of deceased towards future prospects and compensation under conventional heads have to be in accordance with ratio of Pranay Sethi's, case 2017 ACJ 2700. (Paras 2 to 6)

Case referred:

National Insurance Co. Ltd. vs. Pranay Sethi and others, 2017 ACJ 2700

For the Appellant:	Mr. Jagdish Thakur, Advocate.
For Respondent No.1(i) & 1(ii):	Nemo.
For Respondent No.2:	Ms. Devyani Sharma, Advocate.
For Respondent No.3:	Mr. Rakesh Kumar Thakur, Advocate.
For Respondents No.4 and 5:	Mr. Sanjay Bhardwaj, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal, stands directed, by the aggrieved insurer/appellant herein, against the award pronounced, by the Motor Accident Claims Tribunal-II, Solan, District Solan, H.P. camp at Nalagarh, H.P., upon, MAC Petition No. 23-NL/2 of 2014, whereunder, compensation amount comprised, in, a sum of Rs.40,68,604/- along with interest accrued thereon, at the rate of 8% per annum, commencing, from, the date of petition till realization thereof, stood, assessed, vis-a-vis, the claimants, and, the apposite indemnificatory liability thereof, was, fastened upon the insurer.

2. The learned counsel appearing for the insurer,(i) does not contest, the, validity, of the, affirmative findings rendered, upon, issue No.1, appertaining to the demise, of, deceased Lal Bahadur, being a sequel of rash and negligent manner of driving, of the offending vehicle, by its driver, respondent No.4 herein, (ii) nor he contests, the validity, of, the disaffirmative findings rendered, upon, issue No.4 appertaining to the driver of the offending vehicle, at the relevant time, not, holding a valid, and, effective driving licence, (iii) nor he obviously contests the fastening, of, the apposite indemnificatory liability, upon, the insurer.

3. However, the learned counsel appearing for the insurer, has with much vigour contended (i) that the sustenance meted upon Ex.P5/A, and, upon Ex.PW5/B, by the learned tribunal, wherein, the last drawn salary, of, the deceased is reflected, rather being, grossly fallacious, (ii) given, the afore exhibits being computer generated, (iii) hence, with

signatures of their author being not borne thereon, whereas, proof qua authorship(s) thereof, hence, was imperative for meteing credence thereto. However, the afore submission, is, rudderless, (iv) as both the afore exhibits are proven by an employee, of the company concerned, whereat the deceased was employed, and, when during the course of his cross-examination by the counsel for the insurer, a, suggestion was metered thereat, (a) vis-a-vis, the salary register being maintained in the records of the company, (b) and, his thereafter making a disclosure qua his not bringing, the salary register, whereafter, though the counsel for the insurer was enjoined to elicit the scribed records, appertaining to the salary of the deceased, (v) and, apparently, with the afore endeavour remaining unrecoursed by the insurer, thereupon, it is invincible to conclude that dehors Ex.PW5/A, and, Ex.PW5/B, being computer generated documents, rather theirs acquiring immense evidentiary worth or in other words, theirs rather being amenable to be construed, to, emanate, hence from the salary register, as, maintained in the company concerned, whereat the deceased was employed. In sequel, the dependence made thereon, by the learned tribunal concerned, for computing the last drawn salary, of the deceased, is, both apt and valid.

4. The learned counsel appearing for the insurer has contended with much vigour before this Court, that the meteing of hikes in a 50 per centum, vis-a-vis, the last drawn salary of the deceased, and, its working towards future incremental prospects, is, beyond the domain of the mandate of the Hon'ble Apex Court, rendered in case titled as ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** reported in ***2017 ACJ 2700.*** The afore submission as made before this Court, has vigour, given the Hon'ble Apex Court in Pranay Sethi's case (supra) expostulating (i) that where the deceased concerned, was self employed or on a fixed salary, as, is the apt employment, of, the deceased, (ii) thereupon, hikes or accretions, on anvil of future incremental prospects, and, emphatically, vis-a-vis, the last salary drawn by him, at the time contemporaneous, to, the ill fated mishap, from his employer, being also meteable thereto. However, before applying the afore mandate, borne in the judgment supra, it is significant to also bear in mind, the age of the deceased, (ii) since the postmortem report reflects, the deceased, at the relevant time, to be, hene, aged 28 years, thereupon, with the mandate encapsulated in Pranay Sethi's case (supra), qua accretions towards future incremental prospects, vis-a-vis, the last drawn salary of the deceased, being enjoined to be pegged upto 40% thereof, besides being tenably meteable, vis-a-vis, the apposite last drawn salary. Consequently, after meteing 40% increase(s), vis-a-vis, the apposite last drawn salary, thereupon, the relevant last gross salary, of, the deceased is recoknable to be Rs.25,691/-, [Rs.18351/-(last drawn salary of the deceased)+Rs.7,340/-(40% of the last drawn salary). Significantly, the number of dependents, of, the deceased, are, two, hence, 1/3rd deduction is to be visited, upon, a sum of Rs.25,691/-, hence, after making, the, apt aforesaid deduction vis-a-vis Rs.25,691/-, the per mensem, dependency hence comes to Rs.17,128/-. In sequel whereto, the annual dependency, of the dependents, upon, the income of the deceased is computed, at Rs.17,128 x12=2,05,536/-. After applying thereon, the apposite multiplier of 17, the total compensation amount, is assessed in a sum of Rs.2,05,536/- x 17=Rs.34,94,112/- (Rs. Thirty four lacs, ninety four thousand, one hundred twelve only).

5. Furthermore, the quantification, of damages, by the learned Tribunal in a sum of Rs.1 lac each, vis-a-vis, the claimants, (i) under the head, “loss of love, and affection”, (ii) and quantification, of a sum of Rs.25,000/-, vis-a-vis, the claimants, under the head, “Funeral Charges”, is in, conflict with the mandate of the Hon'ble Apex Court rendered in **Pranay Sethi's** case (supra), (iii) wherein, it has been expostulated, that reasonable figures, under conventional heads, namely, loss to estate, loss of consortium, vis-a-vis, the widow of the deceased, and, funeral expenses being quantified only upto

Rs.15,000/-, Rs.40,000/-, and Rs.15,000/- respectively. Accordingly, in addition to the aforesaid amount of Rs.34,94,112/-, the petitioners No.2 and 3/claimants/respondents No.2 and 3, are, entitled under conventional heads, namely, loss to estate, loss of consortium (only vis-a-vis the widow of the deceased), and, funeral expenses, sums of Rs.15,000/-, Rs.40,000/- and Rs.15,000/- respectively, as such, the total compensation to which the petitioners are entitled comes to Rs.34,94,112/- + Rs.15,000/- + Rs.40,000/- + Rs.15,000/-= Rs.35,64,112/-(Rs. Thirty five lacs, sixty four thousand, one hundred twelve only).

6. For the foregoing reasons, the appeal filed by the insurer is partly allowed, and, the impugned award, is, in the aforesaid manner, hence modified. Accordingly, the petitioners, are, held entitled to a total compensation of Rs.35,64,112/-(Rs. Thirty five lacs, sixty four thousand, one hundred twelve only) along with interest @ 8 %, from, the date of petition till the date, of, deposit, of the compensation amount. The amount of interim compensation, if awarded, be adjusted in the aforesaid compensation amount, at the time of final payment. The afore compensation amount be apportioned amongst the claimants Maya Devi and Veena Devi in the hereinafter extracted manner:

(i) Claimant Maya Devi being the widow of the deceased shall be entitled to a sum of Rs.32,64,112/-(Rs. Thirty two lacs, sixty four thousand, one hundred twelve only).

(ii) Claimant Veena Devi being the unmarried sister of the deceased shall be entitled to a sum of Rs.3,00,000/- (Rs. Three lacs only).

All pending applications also stand disposed of. Records be sent back forthwith.

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

Rohtash and another .....Appellants.

Versus

State of H.P. ....Respondent.

Cr. Appeal No. 433 of 2018.
Reserved on: 9th April, 2019.
Date of Decision: 30th April, 2019.

Narcotic Drugs & Psychotropic Substances Act, 1985 (Act)– Section 20 – Recovery of charas- Proof- Accused challenging his conviction for offence under Section 20 of Act- Held, statements of witnesses qua recovery of contraband from accused clear and consistent- No contradiction in ocular evidence- Signatures on seizure memo not disputed by accused- FSL report stating recovered stuff as 'charas'- Conviction being based on germane record- Appeal dismissed. (Paras 9 to 12)

For the Appellants: Mr. Bhupinder Ahuja, Advocate.
For the Respondent: Mr. Hemant Vaid, Addl. Advocate General

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal, is, directed by the convicts/ accused/appellants, against, the pronouncement made by the learned Special Judge, Kullu, District Kullu, H.P., upon, Sessions Trial No.01/2013, whereunder, he convicted, besides imposed consequent therewith sentence, upon, the convicts/accused/appellants, for theirs committing, an offence, punishable under Section 20(b) (ii) (B), of , the Narcotic Drugs & Psychotropic Substances Act (hereinafter referred to as the "Act").

2. The facts relevant to decide the instant case are that 19.10.2012, as per Rapat, Ex.PW7/D, a police party headed by ASI Dheeraj Singh, HC Krishan Lal and, HHC Jinesh Kumar was on patrolling and traffic checking duty at Temporary Police Barrier, Bajaura. At about 9.00 a.m., the police party stopped a bus bearing registration No. HP-65-3381 of Anjali Bus Service, enroute from Kullu to Mandi, for checking. Its driver, Chet Ram and conductor Lekh Raj and HC Kirshan Lal were associated as witnesses. When ASI Dheeraj Singh reached near seat Nos. 30 and 31, he found two persons were sitting on these seats. One inquiry, one person disclosed his name as Rohtash and another Narender. These persons were found keeping a carry bag concealed with their legs. Their activities raised suspicion in the mind of the IO. On asking, they could not give any satisfactory answer. On checking of bag having inscription Gautam Footwear, Patlikuhal, Charas in the shape of sticks, pancakes and rectangular packed in a transparent polythene packet was found in the bag. Charas so recovered was weighed with the help of electronic scale and was found to be 700 grams. The recovered charas was repacked in the same manner and was sealed in a cloth parcel with six seals of seal impression "T". Sample seal was drawn separately. NCB-1 form was filled in. Seal, after its use, was handed over to driver Chet Ram. The case property was taken into possession. Thereafter, IO prepared rukka and sent the same to the Police Station, Bhunter, through HC Krishan for registration of the case, on the basis of which FIR was registered by SI Lal Chand, who on the registration of the FIR, made endorsement on the rukka and handed over the case file to HC Krishan Lal with the direction to take the same to the Investigating Officer at the spot. Site plan was also prepared by the IO and statements of the witnesses were recorded as per their versions. The accused persons were apprised about the offence committed and grounds of their arrest. Information of arrest was given to the brother of accused Rohtash. Their personal search was conducted at the spot by the IO and memos were also prepared. On completion of the proceedings at the spot accused along with case property were brought to police station, Bhunter. In Police station, accused persons along with the case property were produced before SI Lal Chand, who resealed the parcel of case property with three seals of "O" and he also filled the relevant columns of NCB form and drew sample of seal "o". The case property along with sample seal and other relevant documents was deposited with MHC Tara Chand, and, he made the necessary entries in the Register. The Investigation Officer, on the next day, prepared Special report an submitted the same before Dy. S.P., Sh. Pankaj Sharma. On 14.11.2012, the owner of the bus, Rajesh Kumar handed over copies of the documents, i.e. R.C. and permit of his bus to the IPC in the presence of PW-2 and those were taken into possession vide memo Ex.PW2/D. As per the record of the FSL, the contents of the samples were found to be of charas.

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

4. The accused/appellants herein stood charged, by the learned trial Court, for, theirs committing an offence, punishable under Section 20 of the Act. In proof of the prosecution case, the prosecution examined seven witnesses. On conclusion of recording, of,

the prosecution evidence, the statements of the accused, under, Section 313 of the Code of Criminal Procedure, were, recorded by the learned trial Court, wherein, the accused claimed innocence, and, pleaded false implication in the case.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction, upon, the accused/appellants herein, for theirs hence committing the aforesaid offence.

6. The appellants herein/accused, stand aggrieved, by the findings of conviction, recorded, by the learned trial Court. The learned counsel appearing, for, the appellants herein/accused, has concertedly and vigorously contended, qua the findings of conviction, recorded by the learned trial Court, standing not, based on a proper appreciation, of, the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by it, of the material on record. Hence, he contends qua the findings of conviction warranting reversal by this Court, in the exercise of its appellate jurisdiction, and, theirs being replaced by findings of acquittal.

7. On the other hand, the learned Additional Advocate General, has, with considerable force and vigour, contended qua the findings of conviction, recorded, by the learned trial Court, rather standing based, on a mature and balanced appreciation, by it, of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

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

9. The learned counsel appearing for the appellants/accused would succeed in his endeavour, for, begetting reversal of the verdict, of, conviction pronounced, upon, the accused, (a) upon, his from the evidence on record, hence, bringing forth rather candid evidence, in, display of (b) the apposite link evidence, inter se, the recovery of the seized contraband, made, through Ex.PW1/B, and, in pursuance whereof NCB form, borne in Ex.PW2/B, stood prepared, at the site of occurrence, by the investigating officer concerned, (c) AND, thereafter the Station House Officer concerned, embossed thereon, the, resealing impressions, at the police station concerned, (d) and, whereafter the requisite parcel, stood under Ex.PW2/C, hence, dispatched to the FSL concerned, and, whereon the latter made a pronouncement, qua it, containing traces of charas, opinion whereof, is, embodied in Ex.PW5/D, hence, remaining thoroughly, and, wholly unconnected, vis-a-vis, production of the case property in Court. However, for the reasons to be ascribed hereinafter, the concerted efforts, made by the learned counsel appearing for the accused, to beget reversal of the impugned verdict, (i) is a gross misadventure, on his part, (ii) given the recovery memo, borne in Ex.PW1/B being proven to carry thereon, the, signatures of the witnesses thereto, and, also, of, both the accused, (iii) and, none of the witnesses thereto or the accused making any attempt, to scuttle, the authenticity of their signatures, hence, occurring on Ex.PW1/B. In sequel, all the recitals borne in Ex.PW1/A, and, with a clear communication therein qua the recovery, of, the seized contraband, rather being effected, in the manner as disclosed therein, are, to be imputed, the utmost solemn sanctified credibility.

10. The Investigating officer concerned, under, Ex.PW1/A, permitted the accused to carry, his, personal search. The afore exhibit, carries the signatures thereon, of, the witnesses thereto, and, of the accused, and, with the afore signatures occurring thereon, rather remaining unbelied, and with evidently no incriminatory material being recovered, upon, a personal search, of, the officer concerned, nor with the personal search of both the

accused, as, respectively carried under memos Ex.PW1/D, and, Ex.PW1/E, both exhibits whereof, carry thereon, the, signatures of the witnesses thereto, and, of the accused concerned, besides with the signatures, of, the afore occurring thereon, remaining undenied, (iv) and, evidently with no incriminatory material standing recovered, both from, the personal search of the IO, and, of the accused, (v) nor when the defence rears any espousal qua preceding the accused, being subjected, to, a personal search, there was any necessity qua adherence, vis-a-vis, the mandate of Section 50 of the Act, (vi) thereupon, and, emphatically, with, the recovery of the contraband, being validly effected, through Ex.PW1/B, from, a bag kept inside the bus, and, within the legs of the accused, and, hence, when the afore manner of recovery of contraband, renders unattracted thereto, rather the mandate of Section 50 of the Act, thereupon, also a further conclusion, is marshable qua the defence, prima facie, for the afore assigned reason, rather conceding qua Ex.PW1/B also attaining solemnity.

11. Be that as it may, as afore stated, though, the, recovery of contraband, stands effectuated through Ex.PW1/B, yet preparation thereof, besides, the, opinion of the FLS concerned, as, embodied in ExPW5/D, also was enjoined to be connected, vis-a-vis, production in court, of, the case property, seized through Ex.PW1/B. In the afore endeavour, the prosecution witnesses hence deposed in unison, and, their respectively rendered depositions, are, bereft of any blemish, of, any intra se contradictions, enclosed in their testifications, respectively comprised in their examinations-in-chief, and, in their respective cross-examinations, and, nor their respectively rendered testifications, are, clouded with any stain, of, any inter se contradictions. (a) The effect thereof, when stands construed with the further factum, qua, given each of the prosecution witnesses concerned, upon, the case property being shown to them in Court, rather thereat making a candid echoing qua the memos embodied in Ex.PW1/A, Ex. PW1/B, Ex.PW1/C, Ex.PW1/D, Ex.PW1/E, and, in Ex.PW1/F, carrying thereon, their respective signatures, as well as, of, both the accused, (b) besides when thereat, the requisite parcel embodied in Ex.P-1, and, the seals embossed thereon, werewith the permission of the Court, hence broken, and, thereafter, it, was shown, to the prosecution witness concerned (PW-1), and, rather his, identifying his signatures, occurring on the parcel, (c) and obviously the learned counsel, for, the defence not disputing the signatures, also, of the accused, as, borne thereon, (d) thereupon, even when at the time, of, production of Ex.P-1 in Court, and, it thereat, being shown to PW-1, thereon, the trial Court hence recorded qua the afore exhibit, being embossed, with four seals of FSL-II, and, two seals of English alphabet "T", and, two of English letter "O", and, its thereafter recording qua three seals being broken, and, other two seals being not legible, (e) hence, not permitting any leverage, to, the counsel for the appellants, to, contend qua hence, exhibit P-1, upon, its production in Court, and, its thereat being shown to PW-1, it remaining unconnected, vis-a-vis, seizure, of, the apposite contraband, made under memo Ex.PW1/B, (f) nor hence, they, can contend qua its standing unconnected with FSL report, as, borne in Ex.PW5/D. The afore reason, is anvilled upon (g) with the signatures of PW-1, occurring on Ex.P-1, being admitted by PW-1 to be his genuine signatures nor, the, counsel for the accused/appellants hence contesting the authenticity of the signatures, of, the accused, as, occurring thereon, nor his thereafter further contending that hence, with the, learned trial judge, recording observations, during, the course of the recording of testification of PW-1, vis-a-vis, there seals being broken, and, the English alphabet, occurring in the remaining two seals being illegible, rather the afore disclosure(s) working, vis-a-vis, the accused, (h) thereupon he is nowat disempowered to, contend that the recovery, if any, made through Ex.PW1/B, not being enclosed in Ex.P-1, nor he can contend that hence the relevant connectivity, inter se, the recovery, if any, made through Ex.PW1/B, vis-a-vis, production of Ex.P-1 in Court, hence, remaining unestablished rather by the prosecution. Preeminently, when the afore espousals were

enjoined to be reared by the learned counsel, for, the defence, while cross-examining PW-1, and, the Investigating Officer concerned, whereas, the afore espousals remaining thereat, rather unrecoursed, by the learned defence counsel, (I) comprised, in his omitting to put apposite therewith suggestions, to both, hence, it is concluded qua the defence, upon, the existence, of, undisputed signatures, upon, Ex.P-1 hence, conceding qua the relevant connectivity, emerging inter se the recovery made through Ex.PW1/B, vis-a-vis, the production of Ex.P-1, in Court.

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

13. Consequently, there is no merit in the instant appeal, and, it is dismissed accordingly. In sequel, the impugned judgment is affirmed and maintained. All pending applications also stand disposed of. Records be sent back forthwith.

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

Sh. Shankar Dass (since deceased) through his legal heirs .....Appellants/Plaintiffs.

Versus

Sh. Sobia (since deceased) through his legal and others.

....Respondents/defendants.

RSA No. 339 of 2017.
Reserved on : 5th April, 2019.
Decided on : 30th April, 2019.

Specific Relief Act, 1963- Sections 34 & 39– Suit for declaration and mandatory injunction- Grant of- Plaintiff claiming himself to be co-owner qua suit land, which is abadi-deh and praying for direction to defendant to remove all his encroachments raised by him over it- Trial Court dismissing suit and First Appellate Court upholding decree in appeal- RSA- Held, defendant purchased said abadi-deh land in 1957-58 from "RG" through registered sale deed- He in continuous possession since then- His cowshed existing over said land- Possession also admitted by plaintiff- Plaintiff not original estate holder of that mohal- He himself purchased land in 1994 in that mohal- But without purchasing corresponding share in abadi-deh- Plaintiff cannot claim to be an estate holder qua abadi-deh- RSA dismissed. (Paras 7 to 9)

For the Appellants: Mr. Ajay Kumar, Senior Advocate with Mr. Dheeraj K Vashisht, Advocate.

For the Respondents: Mr. B.P. Sharma, Senior Advocate with Mr. Pratap Singh Goverdhan, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs' suit for rendition of a decree for declaration, as also for rendition of a decree for permanent prohibitory injunction, vis-a-vis, the suit land, stood, hence, under concurrent verdicts pronounced by both the learned courts below, rather dismissed. The plaintiffs/appellants herein are aggrieved therefrom, hence, institute the instant regular second appeal before this Court.

2. Briefly stated the facts of the case are are that the deceased Plaintiff Shankar Dass had filed a suit for permanent prohibitory injunction and mandatory injunction directing the defendants to remove all types of encroachment including house and other structures, lifting of all types of malwa, stones, debris and other waste material and further restraining them from interfering over the ownership and possession of the plaintiff over abadi land measuring 2-5 bighas fully detailed in the plaint, and, the plaintiff being one of the estate holder has right, title or interest over the same, whereas, defendant No.1 has no right, title or interest whatsoever with the same. Besides the afore abadi suit property, the plaintiff is also owner in possession of land measuring 11-12 bighas, comprised in Khata No.11, Khatauni No. 11 to 13, Kitas-3, and, land measuring 39-5, bighas comprised in Khata No.8, Khatauni No.9, Khasra No.12 in mauja Bhajlog, Tehsil and District Solan, H.P. Defendant No.1 had purchased land in mauja Bhajlog but since he had not purchased the rights in the abadi deh from the vendor, defendant No.1` and his sons defendants NO.2 to 5 are strangers to the suit property. The defendants with malafide intention in order to cause irreparable loss and injury to the plaintiff started interference over the suit abadi property without any right, title and interest, and, one of the defendant is serving in H.P. Police, and, he has been advancing threats to use his official status. Not only this, the defendants have also thrown debris over the suit abadi. The defendants have encroached upon three biswas of area out of the suit property and have raised construction over the same despite the fact that they are strangers to the property. Defendants were requested several times to admit the claim of the plaintiff but they refused to do so.

3. The defendants contested the suit and filed written statement to the plaint, wherein, they have taken preliminary objections, qua maintainability and estoppel. On merits, they denied that the plaintiff has no right, title and interest with the suit property. It is submitted that, in fact defendant No.1 had purchased the land in village Bhajlog in the year 1958 along with house, and, cow shed existing over the suit property from Ram Gopal, and, since then he is in peaceful and continuous possession of the abadi, and, there is no question of any encroachment by the defendant over any portion of abadi land. The suit property being abadi deh land is joint amongst the proprietors and the same is yet to be partitioned and there are residential houses and cowsheds of all the proprietors of the village and there is no question of making any encroachment by the defendants. Defendant No.1 being proprietor of the village having 22 bighas of land including abadi deh in village Bhajlog, has every right in the abadi land. The plaintiff is habitual of filing frivolous suits against the defendants as earlier he had also filed civil suit No.138/1 of 2001/96 against defendant No.2 which was also dismissed by the court on 28.2.2002.

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 relief of permanent prohibitory injunction, as prayed for? OPP
2. Whether the plaintiff is entitled for the relief of mandatory injunction, as claimed?
3. Whether the suit is not maintainable? OPD.

4. Whether the plaintiff is estopped due to his own act, conduct and acquiescences? OPD.
5. Whether there is no cause of action in favour of the plaintiff? OPD.
6. Whether this suit is not properly valued for Court fee and jurisdiction? OPD.
7. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff(s)/appellants herein. In an appeal, preferred therefrom, by, aggrieved plaintiffs, before the learned First Appellate Court, the latter Court dismissed the, appeal, and,affirmed the findings recorded by the learned trial Court.

6. Now the plaintiffs/appellant(s) herein, have instituted the instant Regular Second Appeal, before, this Court, wherein, they assail the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court.

7. Deceased defendant Sobia, had, purchased the land, in the year 1957-58, from one Lal Ram Gopal, through a registered sale deed of 17.2.1958, wherethrough, the afore vendor, hence, alienated, the, land owned and possessed, by him along with structure(s) including a cowshed, existing on the abadi land, rather to one Sobia. The afore Lala Ram Gopal, had acquired title to the suit land, through, a purchase thereof, hence, made in, a, public auction. The validity of the afore acquisition of title, vis-a-vis, the afore Lal Ram Gopal, and, qua the suit land, remained unchallenged nor the validity of execution, of, the afore sale deed by Lala Ram Gopal, vis-a-vis, Sobia, stood cast, any onslaught. Consequently, with acquisition of title therethrough, in the suit property, by one Sobia, suit property whereof stands reflected in the apposite column, as abadideh, (a) and, when the plaintiff, in his cross-examination, has made an admission qua, since, the purchase of the suit land, by one Sobia, the predecessors-in-interest of the defendants, and, with, it carrying in the apposite column, of, the jamabandi appertaining therewith, the classification of abadi deh, and, qua possession, of the suit land by the afore, hence commencing since the year 1957-58, (i) and, when the afore admission, is conjoined with the plaintiff's further admission qua prior to 1994, his not holding, any property in the mohal concerned, does render, open erection, of, an imminent inference, (ii) qua with the predecessor-in-interest of the defendants, hence evidently being a member(s) of the village proprietary body, and, in contemporaneity, vis-a-vis, the execution, of the afore sale deed inter him, and, the afore Lal Ram Gopal, (iii) and, further thereonwards his acquisition, of, title, vis-a-vis, the suit land, through, a, validly executed sale deed, rather mobilising to the fullest, the effect qua acquisition, of title by the predecessor-in-interest of the defendants, through, a validly executed sale deed, from, Lala Ram Gopal, being, not gripped with any vice of any invalidity, (iv) Importantly, when, the afore inference, is, also engendered by the predecessor-in-interest, of, the defendants, being for want of his being, a, member of the village proprietary body, hence, standing wholly debarred, to make any valid registered deed, of, conveyance, with the vendor concerned. Further effect thereof, is, when the plaintiff admits qua his prior to 1994, whereat he had acquired title through sale deeds, borne in Ex.PW8/A to Ex.PW8/C, qua lands located in mohal concerned, hence, begetting an inference qua his being disabled to acquire title, therethrough, in the suit abadi, and, the concomitant effect thereof being his also being disentitled, for, rendition, of, the claimed decrees.

8. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court, as well as, of the learned trial Court being based, upon a proper and mature appreciation of evidence on record. While rendering the findings, both the learned

courts below have not excluded germane and apposite material from consideration. Consequently, no substantial questions, of law much less any substantial question of law arise for determination in this appeal.

9. In view of the above discussion, there is no merit in the instant appeal, and, it is dismissed accordingly. In sequel, the concurrent impugned judgments, and, decrees rendered by both the learned courts below are affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

Smt. Sudesh Kumari .....Appellant.
Versus
State of H.P. ....Respondent.

Cr. Appeal No. 16 of 2007.
Reserved on: 9th April, 2019.
Date of Decision: 30th April, 2019.

Indian Penal Code, 1860– Section 201 – Concealment and destruction of evidence of commission of offence- Essential ingredients- Held, in order to attract liability under Section 201 of Code, commission of principal offence must be proved in first instance- Upon its being established, prosecution must prove that accused caused disappearance of incriminatory evidence- Murder of "H" by "SK", son of accused duly proved on record- "SK" murdered 'H' because deceased was having illicit relations with present accused, Sudesh Kumari, his mother- Accused making disclosure statements leading to recovery of incriminatory articles- Prosecution proved that accused Sudesh Kumari caused disappearance of evidence with requisite mens rea. (Paras 9 to 12)

For the Appellant: Mr. R.P. Singh, Advocate.
For the Respondent: Mr. Hemant Vaid, and, Mr. Desh Raj Thakur, Addl. Advocate General with Mr. Vikrant Chandel, Deputy A. G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal, is, directed by the convict/ accused/appellant herein, against, the pronouncement made by the learned Additional Sessions Judge, Fast Track Court, Una, District Una, H.P., upon, Sessions Case No.25/04 RBT 60/05/04, on 22.12.2006, whereunder, he convicted, the accused/appellant herein, for hers, committing an offence punishable under Section 201, of, the IPC, besides consequent thereto sentence, of, simple imprisonment for three years, and, a fine of Rs.5,000/- stood imposed, upon, the convict/accused/appellant, and, in default of payment of fine amount, she, was further sentenced to undergo simple imprisonment, for, six months.

2. The facts relevant to decide the instant case are Sh. Narain Chand (PW-11) is residing as tenant in Masit Bali Gali near Geeta Bhavan, Ward No.6 Una, in a building

owned by the brother of Sh. Pran Nath, Advocate. Accused Sudesh Kumar was also residing in the same building as tenant on the third floor. On 20.06.2002, at about 5.30 a.m., when Narain Chand went near the tap to take water for the purpose of attending the call of nature, he noticed blood near the tap, and, thereafter he saw a dead body wrapped in a bundle lying in the verandah of the building, and, accordingly he informed Sh. Vinod Kumar, Municipal Commissioner, who reached at the spot and saw the dead body lying therein a bundle. They also noticed blood stains on the stairs upto the room of the accused. On this Vinod Kumar went to Police Post and informed the police. Thereafter, Incharge of Police Post City, Una along with other police officials reached at the spot and saw the dead body lying here, and, thereafter he sent a rukka Ex.PW13/A to the police station, upon, which FIR Ex.PW13/B was recorded. Police opened the bundle and saw that there was a dead body wrapped in a bed sheet, mosquito net and blankets with the help of a telephone wire and rope. Thereafter, the photographs of the dead body were taken and it was found that the dead body was of Hoshiar Singh son of Sh. Mandir Singh resident of Village Saloh. The postmortem of the dead body was conducted in ZH, Una, and after postmortem the cause of death was found head injury by multiple blows. During the investigation, the police on 21.6.2002 took into custody scooter bearing No. PB-16-7151, when it was lying parked near Guru Nanak, Medical Store, Una, belonging to the deceased. As per police it was parked thereby accused Sunil Kumar alias Sonu, who had fled away from the scene on the scooter of the deceased. On 22.6.2002 accused Sudesh Kumar made a disclosure statement Ex.PW9/B in police custody that she had concealed the wrist watch belonging tot he deceased in her house and on the basis of this statement the wrist watch in question was recovered from the house at the instance of the accused under recovery memo Ex.PW9/A. Thereafter on 27.6.2002, she made another disclosure statement Ex.PW4/A that she had concealed one “Balla” (wooden plank) and a dagger, both blood stained in a verandah of the building at the instance of her son, and, on the basis of this statement the said 'Balla' and dagger were recovered by the police. On the same day, accused Sudesh Kumar made one more disclosure statement Ex.PW4/B regarding concealing of golden ring and currency notes wroth Rs.220/- belonging tot he deceased in a hole/water out let of her house, and, accordingly the same were recovered from that place. During the investigating, the police also took into custody one blood stained cot through recovery memo Ex.PW1/C which was used by the deceased and Sunil Kumar in the night of 19.6.2002 and 20.6.2002 for sleeping. Thereafter, on 29.6.2002, accused Sudesh Kumar produced one learning licence belonging to her son Sunil Kumar from her house which was having the photograph of Sunil Kumar. After investigation it was found that the murder of Hoshiar Singh was caused by Sunil Kumar, the son of accused Sudesh Kumari, and, after the murder accused Sudesh Kumari helped her son in concealing the dead body and to destroy the evidence of murder. It was also found that after committing the murder accused Sunil Kumar took shelter from accused Partap Singh who was residing in Shahidan-Da Gurdwara, Una. As per prosecution, the motive of the murder of Hoshiar Singh by accused Sunil Kumar was that the deceased was having illicit relation with accused Sudesh Kumar which was not liked by Sunil Kumar. Accused Sunil Kumar could not be apprehended as he absconded after committing the murder.

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

4. The accused/appellant herein stood charged, by the learned trial Court, for, hers committing an offence, punishable under Section 201 of the IPC. In proof of the prosecution case, the prosecution examined 21 witnesses. On conclusion of recording, of, the prosecution evidence, the statement of the accused, under, Section 313 of the Code of

Criminal Procedure, was, recorded by the learned trial Court, wherein, the accused claimed innocence, and, pleaded false implication in the case.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction upon the accused/appellant herein, for hers hence committing the aforesaid offence.

6. The appellant herein/accused, stands aggrieved, by the findings of conviction, recorded, by the learned trial Court. The learned counsel appearing, for, the appellant herein/accused, has concertedly and vigorously contended, qua the findings of conviction, recorded by the learned trial Court, standing not, based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by it, of the material on record. Hence, he contends qua the findings of conviction warranting reversal by this Court, in the exercise of its appellate jurisdiction, and, theirs being replaced by findings of acquittal.

7. On the other hand, the learned Additional Advocate General has with considerable force and vigour, contended qua the findings of conviction, recorded, by the learned trial Court, rather standing based, on a mature and balanced appreciation, by it, of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

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

9. For determining, the validity of the impugned pronouncement, it is necessary to bear in mind, the statutory provisions, borne in Section 201 of the IPC, the relevant portion whereof stand extracted hereinafter:-

> "**201**. **Causing disappearance of evidence of offence, or giving false information to screen offender**.—Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false;"

A perusal thereof makes candid bespeakings, qua a charge under Section 201 of the IPC, attaining success, only, upon, the prosecution, proving the imperative ingredient(s) cast therein, vis-a-vis, (a) the accused holding knowledge or having reason to believe that an offence has been committed, (b) and, hence, causes any incriminatory evidence qua the commission of the principal charged offence, to, disappear, (c) and, further with an intention to screen, the, offender from punishment, his purveying, any, false information with respect to the offence, (d) and, consequently, the prosecution was also enjoined to adduce potent evidence in support thereof, and, only upon evidence, as, adduced by the prosecution, rather unveiling, with, categoricality (a) qua the principal offence being proven to be committed, (b) and, thereafter, the accused facing, the, charge, for an offence punishable under Section 201 of the IPC, also being proven, to, despite his holding knowledge or holding reason to believe, vis-a-vis, the principal offence, hence, being committed, rather, causing incriminatory evidence connected therewith, to, disappear, and, with an intention, to, screen the offender. (c) Imperatively, hence, thereupon, the adduced prosecution evidence, appertaining to a charge, under, Section 201 of the IPC, would reiteratedly hold potency.

10. The incriminatory pieces of evidence, vis-a-vis, the commission, of, an offence hence committed by the principal accused, and, constituted under Section 302 of the IPC, is/are, unfolded, by (a) the deposition of PW-10, wherefromwhom, the prosecution, has efficaciously rendered proof qua accused Sudesh Kumari, making an extra judicial confession to PW-10, vis-a-vis, her son committing the murder of deceased Hoshiar Singh. The afore extra judicial confession meted by accused Sudesh Kumari to PW-10, hence to not hold the gravest entrenched vigour, was, enjoined to be shred, vis-a-vis, its efficacy, upon, during the course of PW-10 being subjected to cross-examination by her counsel, his being thereat rather being purveyed contrary suggestions therewith, (b) however, during course thereof, no suggestion, is, visibly put to him qua the extra judicial confession, made to him, by convict Sudesh Kumari, and, as echoed by him, in his examination-in-chief, hence being concerted to be ripped, of its, efficacy, rather, on, any permissible ground, comprised in (c) PW-10 not being the confidante of convict Sudesh Kumar, (d) nor concomitantly qua any extra judicial confession, vis-a-vis, the incriminatory role of the principal accused, in, the commission of the principal offence, punishable under Section 302 of the IPC, hence, being validly made to him, whereupon, the afore extra judicial confession, vis-a-vis, the commission, of, the principal offence, hence acquire(s) vigour. (e) A perusal of Ex.PW4/A, disclosure statement, made by convict Sudesh Kumari, and, exhibit whereof encloses, both, the disclosure statement, by Sudesh Kumari, and, also the items recovered therethrough, rather making vivid disclosure(s) qua, the, weapons of offence, spoken therein, to be used by principal accused, in the commission of murder of deceased Hoshiar Singh, being thereunder recovered, at her instance. EX.PW4/A is signed by accused Sudesh Kumar, and, marginal witnesses thereof, are, one Jeet Ram, and, Jasbir Singh. One amongst the afore witnesses to Ex.PW4/A, namely, Jeet Ram stepped into the witness box, as PW-4, and, during the course of his testification, comprised in his examination-in-chief, he has proven qua thereon, his signatures, as well as, the signatures of Jasbir Singh, and, of, accused Sudesh Kumari, rather standing borne, and, when during, the course of his cross-examination, no, elicitation emanated from him, for, belittling his afore testification, nor with accused Sudesh Kumari, denying, the, occurrence, of her signatures thereon, (f) thereupon, the afore proven memo, when stands construed alongwith, the, proven extra judicial confession, made by her to PW-10, vis-a-vis, the incriminatory role, of, her son, in, the commission, of, the principal offence, punishable under Section 302 of the IPC, rather bolsters a firm conclusion qua (g) hence the prosecution therethrough, proving qua the son of the convict Sudesh Kumari, committing, the, murder of deceased Hoshiar Singh, (h) the convict Sudesh Kumar holding knowledge, and, reason to believe qua the afore offences, being committed by her son, and, also hence hers thereupon, causing the afore incriminatory evidence, to disappear, comprised in hers hiding, and, camouflaging it/them.

11. Be that as it may, an added impetus to the afore inference is garnered by Ex.PW4/B, which alike Ex. PW4/A, encloses both, the, disclosure statement made,by Sudesh Kumari, as well as, the, recoveries, of, the items, as, reflected therein, and, thereon exist, the, signatures of accused Sudesh Kumari, and, of the marginal witnesses thereto, namely Jeet Ram , and, Jasbir Singh. The factum of valid drawing of Ex.PW4/B, stands proven, by PW-4 Jeet Ram, given his testifying qua thereon his signatures, as well as, of Jasbir Singh, and, of accused Sudesh Kumari existing, and, when for scuttling the effect, of, the afore deposition, rendered by PW-4, comprised in his examination-in-chief, no compatible therewith suggestion, hence, remained purveyed to him, during, his cross-examination, thereupon, alike Ex.PW4/A, it engenders, a, compatible therewith conclusion.

12. The upshot of the afore discussion, is, that the prosecution being able, to, prove, the, commission, of, the, principal offence, by the son of the convict Sudesh Kumari, and, also being able to prove, through, the afore evidence, the, commission of the offence

punishable under Section 201 of the IPC by convict Sudesh kumari. Consequently, this Court holds, that, the learned trial Court, has appraised the entire evidence on record in a wholesome and harmonious manner, apart therefrom, the analysis of the material, on record, by the learned trial court, hence, also does not suffer from any gross perversity or absurdity of mis-appreciation, and, non appreciation of germane thereto evidence, on record.

13. Consequently, there is no merit in the instant appeal, and, it is dismissed accordingly. In sequel, the impugned judgment is affirmed and maintained. All pending applications also stand disposed of. Records be sent back forthwith.

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

Tejinder Singh ....Petitioner.
Versus
Govinder Singh & Others. ....Respondents.

Cr. Revision No. 435 of 2018
Reserved on: 12.4.2019
Decided on : 30.4.2019.

Code of Criminal Procedure, 1973 - Section 372, proviso – Nature and scope of- Held, this provision confers an indefeasible right of appeal in stipulated circumstances against judgment of Trial Court only on 'victim' of offence. (Paras 10)

Code of Criminal Procedure, 1973 - Section 2(wa) – "Victim" of offence- Meaning- Held, word "victim" as used in Section 2(wa) of Code means person who evidently has suffered any loss or injury caused by reason of any act or omission of accused- Further, such entailments of loss or injury upon victim must be embodied in charge framed against accused. (Paras 11)

Case referred:
Mallikarjun Kodagali vs. State of Karnatka, 2018 SCC OnLine SC 1941

For the Petitioner: Mr. R.L Sood, Sr. Advocate with Mr. Arjun Lall, Advocate, for the petitioner.
For the Respondents: Mr. Vivek Sharma, Advocate, for respondent No.1.
Mr. Rajiv Sirkeck, Advocate, for respondent No.2.
Mr. Hemant Vaid, Mr. Desh Raj Thakur, Additional Advocate Generals with Mr. Yudhveer Singh Thakur and Mr. Vikrant Chandel, Deputy Advocate Generals, for respondent No.3.

The following judgment of the Court was delivered:

Sureshwar Thakur, J

The learned Judicial Magistrate, 1st Class, Court No. (6), Shimla, upon, his assuming a valid cognizance upon FIR No. 199 of 2009, thereafter proceeded to charge accused Govinder Singh, for his allegedly committing offences constituted under Sections 420, 467, 468,471 and 120-B of IPC, and, accused Kahan Chand, for, his allegedly

committing offences constituted under Sections 468, 201 and 120-B of IPC. On an appreciation of evidence, adduced by the prosecution, for, hence, sustaining the charge, the learned trial Magistrate proceeded to record an order of acquittal upon the accused.

2. The aggrieved therefrom i.e. State of Himachal Pradesh, preferred an appeal thereagainst, before the learned Sessions Judge (F), Shimla. The appeal preferred before the learned appellate Court is yet pending adjudication.

3. One Tejinder Singh, a person, purportedly aggrieved by, the, afore verdict, of, acquittal made upon the afore accused, vis-a-vis, offences constituted in the afore FIR also hence proceeded, to, make an appeal thereagainst, before the learned appellate Court. However, the afore appeal, was also, strived, to be acquiring an aura of validity, given, his being a victim, within, the ambit of, the, provisions, borne in Section 2 (wa), of, the Code of Criminal Procedure (for short "Cr.P.C"), provisions whereof stand extracted hereinafter. However the appeal preferred by the afore Tejinder Singh, against, the verdict of acquittal, pronounced by the learned trial Magistrate, hence stood dismissed, (i) nonetheless, in the impugned order recorded upon Cr. Appeal RBT No. 42-S/10 of 2018/2015, by the learned first appellate Court, a right was reserved, upon, the afore Tejinder Singh, to, make a representation in the connected appeal, preferred by the State of Himachal Pradesh, as stands reared by the latter, against, the verdict of acquittal pronounced, upon, the afore accused, by the learned trial Magistrate.

> " Section 2 (wa) of Cr.P.C: victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir;]"

4. For determining the validity, of, the pronouncement recorded by the learned first Appellate Court, whereupon, it dismissed, the, afore appeal preferred therebefore, by the afore Tejinder Singh, it is deemed, imperative to allude to the mandate, borne in Section 372 of Cr.P.C, provisions whereof are extracted hereinafter, and, significantly, the proviso borne therein, is also, enjoined to be meted an adjudication.

> "Section 372 of Cr.P.C:- No appeal to lie unless otherwise provided- No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force:
>
> [Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court.]"

5. The proviso opens with the coinage "provided that the victim", however, before proceeding to make an interpretation, upon, the afore coinage, occurring in the opening, of, the proviso to Section 372 of Cr.P.C, (a) the initial legal milestone which is required to be jumped, is, comprised in the necessity of a leave, to appeal being strived, for, and granted, upon, (b) the trial Magistrate assuming jurisdiction or his concomitant thereto taking cognizance, upon, a complaint constituted under the apposite provisions, of, Cr.P.C, (c) and, vis-a-vis the afore dire legal necessity also arising, upon, the learned trial Magistrate assuming jurisdiction, and, also as a corollary thereto, taking cognizance upon a report filed therebefore, under, Section 173 Cr.P.C, by the Investigating Officer concerned, upon, the latter completing investigations, upon, an FIR, being lodged before the Police Station concerned. The answer to the afore conundrum, is, purveyed by a verdict, of, the Hon'ble

Apex Court rendered in case title as *Mallikarjun Kodagali* v. *State of Karnatka*, reported in 2018 SCC OnLine SC 1941, the relevant paragraph 79 whereof, are extracted hereinafter:-

> 79. As far as the question of the grant of special leave is concerned, once again, we need not be overwhelmed by submissions made at the Bar. The language of the proviso to Section 372 of the Cr.P.C is quite clear, particularly when it is contrasted with the language of Section 378(4) of the Cr.P.C. The text of this provision is quite clear and it is confined to an order of acquittal passed in a case instituted upon a complaint. The word 'complaint' has been defined in Section 2 (d) of the Cr.P.C and refers to any allegation mad orally or in writing to a Magistrate. This has nothing to do with the lodging or the registration of an FIR and therefore it is not at all necessary to consider the effect of a victim being the complainant as far as the proviso to section 372 of the Cr.P.C is concerned."

6. A reading, with, the deepest incision of the mandate, borne in the afore extracted paragraph, occurring, in the judgment supra, rendered by the Hon'ble Apex Court, enhances a formidable inference, qua, (a) the mandate borne in paragraph 79 thereof, vis-a-vis, upon, the victim and the complainant, being the same person, thereupon, (b) upon the afore being aggrieved from an order of acquittal pronounced upon the accused, rather being statutorily enjoined to strive for, and, to obtain the requisite leave to appeal, for hence making, before the learned first appellate Court concerned, a valid challenge, vis-a-vis, the verdict of acquittal pronounced upon the accused. However, a further deepest reading of paragraph 79 of the judgment supra, rendered by the Hon'ble Apex Court, does also unveil, qua it also drawing a distinction qua assumption of jurisdiction, and, taking of cognizance, by the learned Magistrate, upon, a private complaint, and, upon a report filed therebefore, under, Section 173 of Cr.P.C, by the Investigating Officer concerned, upon, the latter concluding or completing investigations, vis-a-vis, the offences constituted in the apposite FIR, as, stands lodged before the Police Station concerned.

7. The afore embodied distinction, vis-a-vis, the afore factum, as encapsulated in paragraph 79, of the verdict supra, rendered by the Hon'ble Apex Court, makes a concomitant upsurging, qua, the mandate borne in the proviso, to, Section 372 of Cr.P.C, being restricted, and, also stricto sensu being also trammeled, within, the statutory domain of Section 378(4) of Cr.P.C, (i) in as much as, vis-a-vis, assumption of jurisdiction or taking of cognizance by the learned Magistrate concerned, upon, a private complaint, preferred therebefore under the apposite provisions of Cr.P.C, against, the verdict of acquittal, made upon the accused, by the learned trial Magistrate, (ii) reiteratedly hence, the aggrieved therefrom, victim/complainant being statutorily empowered, to make, a successful onslaught thereon, only upon his prior thereto hence obtaining the requisite leave, from, the learned appellate Court, (iii) however, an enunciation borne in paragraph 79 of the verdict supra, makes clear echoings, qua its clout and mandate neither extending nor encompassing, vis-a-vis, any assumption of jurisdiction or any taking of cognizance, by the trial Magistrate concerned, upon, a report filed therebefore, under Section 173 Cr.P.C by the Investigating Officer concerned, on the latter completing or concluding the investigations, into, the apposite FIR, as, stands lodged before the police Station concerned. The consequent effect thereof, being qua even if the extant FIR, is not lodged, at the instance of the victim, yet upon the latter falling within the ambit, of, the proviso to Section 372 of Cr.P.C, and, upon,his also falling with the ambit of "victim" as embodied in Section 2 (wa) of the Cr.P.C, (a) thereupon, dehors his being not the informant, his rather holding an absolute statutory right, without any necessity, of, striving to espouse, for, an apt leave to hence prefer, an appeal against an order of acquittal rendered by the learned trial Magistrate, and

also, his rather holding an indefeasible right to make an appeal, vis-a-vis, imposition of inadequate compensation or imposition of an inadequate sentence.

8. Reiteratedly, a reading of paragraph 78 of the judgment supra, paragraph whereof, is, extracted hereinafter, makes clear upsurging, that, upon an aggrieved, hence, within the ambit of Section 2 (wa), of the Cr.P.C, being a, victim, of an offence, thereupon, hence his holding an indefeasible statutory right to make a valid challenge, against, an order of acquittal, before the appellate Court concerned, and, also the afore statutory right, to, make an appeal, against the imposition of lesser sentence, upon, the accused, and also the afore right, not being trammeled by the statutory fetter, embodied in Section 378(4) of Cr.P.C, provisions whereof stand, extracted hereinafter, (a) rather the latter provisions only appertaining to assumption, of jurisdiction upon a private complaint, by the learned Magistrate concerned, nor, hence it making it incumbent upon him/petitioner herein, to prior thereto, seek any leave to make an appeal, from, the appellate Court concerned.

> " 78. Under the circumstances, on the basis of the plain language of the law and also as interpreted by several High Courts and in addition the resolution of the General Assembly of the United Nations, it is quite clear to us that a victim as defined in Section 2 (wa) of the Cr.P.C would be entitled to file an appeal before the Court to which an appeal ordinarily lies against the order of conviction. It must follow from this that the appeal filed by Kodagali before the High Court was maintainable and ought to have been considered on its own merits."
>
> "Section 378 (4) of Cr.P.C:- If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the high Court."

9. Be that as it may, even when this Court has put, to rest, the afore controversy, nonetheless, it is also deemed imperative, to allude vis-a-vis the submission made before this Court, by the learned counsel, for the aggrieved petitioner, that, he is a victim, and that, since the trial Magistrate has assumed cognizance, upon, an FIR, (a) thereupon even if the victim/petitioner, is not the informant, or, is an informent, and, also is a purported victim of the offence, borne in the apposite FIR, (b) thereupon he purportedly holds an indefeasible statutory right, to, make a valid challenge to the order of acquittal, pronounced upon the accused, by the learned trial Magistrate, dehors any leave being strived to be asked or obtained by him, for the requisite purpose, from the appellate Court concerned. In aftermath, he obviously submits that since the petitioner herein though was not required to be obtaining the requisite leave from the learned Appellate Court, yet with his espousing for the requisite leave, the afore espoused leave, was, meteable to him, and, refusal/declining thereof, vis-a-vis, the petitioner herein, is grossly illegal.

10. However, the afore espousal made before this Court, by the learned counsel for the petitioner, would, beget success, only upon the aggrieved petitioner being encompassed, within, the definition, of, "victim" encapsulated in Section 2 (wa), of the Cr.P.C, mandate whereof is extracted hereinabove, or rather upon mandate thereof begetting satiation, from, the records germane thereto, and, the material existing hereat, (i) especially from the contents of the FIR,(ii) and from the charge framed against the accused.

11. A reading of the definition of "victim" borne in Section 2(wa) of Cr.P.C, does, beget an inference, qua, a person being construable to be victim, upon, (a) his evidently suffering any loss or injury caused by the reason of any act or omission and (b) the afore

entailments of loss or injury, upon, the victim, being embodied in the charge framed, against, the accused concerned. The making of the afore connotation to the statutory definition, of "victim", as, embodied in Section 2 (wa) of the Cr.P.C, does also make it incumbent upon this Court, to, make a requisite allusion to (a) the FIR concerned, whereupon, the learned trial Magistrate (b) proceeded, to, frame the apposite charges against the accused concerned. However, a reading of the afore material, as, existing on records, fails to make any upsurging, qua, both making any echoing qua any legal injury befalling upon or standing entailed upon the petitioner herein. Precisely, from the afore requisite material, for hence the petitioner herein, being construable to be "victim" rather, satiation, vis-a-vis the afore ingredients, is grossly amiss, whereupon, alone, the statute permits him to be construable to be a "victim". In aftermath, the petitioner, is, not construable to be a "victim".

12. Be that as it may, the learned counsel appearing for the petitioner, has contended with much vigor that the petitioner rather donning the mantle of a "victim", as, encapsulated in Section 2 (wa) of the Cr.P.C, (i) given respondent No.1 in the petition through his counsel meting suggestion, to the petitioner, during the latters' cross-examination, with, echoing therein qua the petitioner herein allegedly fabricating, and, forging an agriculture certificate, and, thereafter meted vis-a-vis the petitioner rather suggestions, also holding echoings qua his subsequently placing it before the Registrar concerned, for, hence falsely implicating respondent No.1. However, the meteing of the afore suggestions, to the petitioner by the respondent/accused, through his defence counsel, may give, leverage to the petitioner herein, to avail all remedies embodied in the apposite penal provisions, yet, the afore meteing of suggestions, by the counsel of the respondent to the petitioner, during, the latter's cross-examination, obviously do not, satiate the requisite statutory ingredients, borne in Section 2 (wa) of the Cr.P.C, and, thereupon the espousal made before this Court, that, he is yet a victim, cannot be countenanced.

In view of the above, there is no merit in the petition, and the, same is accordingly dismissed alongwith all pending applications.

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

The Reliance General Insurance Company ...Appellant.

Versus

Mr. Aditye & Others. ...Respondents.

FAO No. 523 of 2018
Reserved on: 3.4.2019
Decided on : 30.04.2019

Motor Vehicles Act, 1988 – Section 166 – Motor accident- Claim application- Monthly income of housewife- Determination- Held, domestic services rendered by housewife including work done in agricultural and horticultural pursuits need to be monetized- Assessment of income @ Rs.6000/- per month as done by Tribunal not perverse- BPL certificate has no relevance in assessing monetary value of domestic services rendered by housewife. (Paras 4)

Motor Vehicles Act, 1988 – Sections 2(47) & 149(ii)– Motor accident- Claim application- Defences- Driving licence- Validity- Held, driver of offending vehicle having endorsement to

drive 'transport vehicle' is also authorized to drive 'light goods vehicle'- Light goods vehicle is a transport vehicle. (Para 6)

Cases referred:

National Insurance Company Ltd. vs. Pranay Sethi and others, 2017 ACJ, 2700
Sarla Verma and others vs. Delhi Transport Corporation and another, (2009)6 SCC 121

For the Appellant: Mr. Chandan Goel and Mr. Aman Sood, Advocates.
For the respondents: Mr. Romesh Verma, Advocate, for respondents No. 1 to 3.
Mr. Arvind Sharma, Advocate, for respondents No. 4 and 5.

The following judgment of the Court was delivered:

Sureshwar Thakur, J

The instant appeal stands directed, against, the impugned award, rendered by the learned Motor Accidents Claims Tribunal-IV (for short "MACT), Shimla, H.P., upon, MACP No. 34-S/2 of 2016, (a) wherethrough, compensation amount borne, in a sum of Rs.11,72,400/- alongwith 7.5% simple interest, arising, from the date of filing of the afore claim petition till realisation thereof, (b) was assessed, vis-a-vis, all the petitioners therein, and, (c) the apposite indemnificatory liability thereof stood fastened upon the appellant herein/respondent No.3, in the afore claim petition.

2. The learned counsel appearing for the appellant, does not contest the validity of the findings, as, recorded by the learned MACT, upon, issue No.1 appertaining to the relevant fatal collision, inter-se, deceased Malti, and, the offending vehicle concerned, being a sequel of the driver thereof, being, rash and negligent in driving it.

3. However, the learned counsel for the appellant, has contended with much vigor, qua with the claimants placing reliance on Mark C, mark whereof is, a, BPL certificate, (i) thereupon, the computation in the impugned award, vis-a-vis, the per mensem of the deceased, from, her purported agriculture and horticulture work, and, from hers selling milk, being both insagacious besides unbefitting, hence this Court being goaded, to, reduce the compensation amount, assessed, vis-a-vis, the LRs of the deceased Malti.

4. The afore contention of the learned counsel for the appellant, is both frail, and, is legally emaciated, (i) given the learned Tribunal, for, want of cogent and overwhelming proof, being adduced, vis-a-vis, the deceased Malti rather deriving any income, from her, purported agriculture and horticulture work, besides, from her rearing any income from hers selling milk, hence, declining to compute, vis-a-vis, the claimants, in the afore claim petition, the apt loss of dependency therefrom, and, also declined to apply thereon the relevant multiplier, (ii) contrarily, the learned Tribunal proceeded, to, on anchor of the deceased Malti being a housewife, and, hers performing household chores, and, (iii) thereupon there being, a, dire necessity, of, monetization, being visited, vis-a-vis, her performing household work, conspicuously, upon her demise, there being, hence loss to the estate of the afore services rendered during her life time, by the deceased, and, (iv) reiteratedly, hence the claimants suffering deprivation thereof, whereupon, the learned Tribunal proceeded, to, per mensem monetize a sum of Rs.6000-/ qua the domestic services rendered by the deceased vis-a-vis her family. The afore monetization of the domestic service of the deceased, does also, tacitly encompass hence the income derived by the deceased from Agriculture, horticulture, and, from selling milk, dehors non-adduction of any

cogent and overwhelming evidence, for, rather meeting succor thereto, and, (v) thereupon the BPL certificate looses its relevance, for any purpose whatsoever.

5. The learned Tribunal thereafter meted 40% accretion thereto, on, anvil of incremental hikes towards future prospects. The meteing of the afore hikes, towards, future prospects, also, does fall within the ambit, of, a verdict recorded by the Hon'ble Apex Court, in, a case titled as **National Insurance Company Ltd. vs. Pranay Sethi and others**, reported in 2017 ACJ, 2700, (i) given the afore deceased though *stricto sensu* being neither employed in a government organization, nor, being self employed, rather hers being a house wife, thereupon monetization of her domestic services being amenable, for, computation for recokning the apt dependency, (i) preeminently also when in absence of the deceased, hers surviving family rather are deprived of the benefits, of the services rendered by her, (ii) thereupon, the meteing of 40% hikes towards the per mensem monetized sum of domestic services, rendered by the deceased, is rather within the ambit of Pranay Sethi case (supra), as, the meteing of 40% hikes thereto, bears consonance with the age of the deceased, as, borne in Post mortem report embodied in Ex. PW-2/A. Further more, the quantification of annual depenency of the claimants, upon, the income of the deceased, and, the afore quantum of dependency, being applied, a, multiplier of 17, is also, within the domain of the verdict recorded, by the Hon'ble Apex Court in case titled as **Sarla Verma and others versus Delhi Transport Corporation and another**, reported in (2009)6 SCC 121.

6. The learned counsel for the appellant has further contended qua the fastening, of, the indemnificatory liability upon the insurer, being inapt, given, though the offending vehicle being reflected in the Registration Certificate, borne in Ex. RW-1/B, to be classified as a Light Goods Vehicle, yet, with the driving licence borne in Ex. RW-1/C, holding reflections qua the holder thereof, being authorized to drive both transport or non-transport vehicle, hence the afore authorization bestowed upon the holder of RW-1/C, being, in apparent dis-concurrence, with, the afore classification of the offending vehicle, as, delineated in RW-1/B, exhibit whereof, is, the apposite RC. However, the afore submission is rudderless, as, an enunciation, is, borne therein qua the holder of the driving licence, being authorized to drive both non-transport and transport vehicle, hence, also visiting a leverage upon the driver of the offending vehicle, to, hence drive a transport vehicle, in, category whereof, the, offending vehicle rather falls, (i) thereupon the authorization bestowed upon the driver of the offending vehicle, to, drive a transport vehicle, obviously rendered him authorized, to, drive the offending vehicle concerned, given, it being enunciated in Ex.PW-1/B, to be a light goods vehicle, hence a transport vehicle.

In view of the above, I do not find merit in the appeal, the same is accordingly dismissed, alongwith all pending applications.

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

Vijay Ram ...Petitioner

Versus

Sukh Ram and others ...Respondents

CR No. 114 of 2018
Reserved on :1.4.2019
Decided on :30.4.2019

Indian Evidence Act, **1872 -** Section 74 (2) – Public document- Whether registered sale deed is a public document?- Held, registered deed of conveyance though a private document, is construed to be public document since maintained as record in office of Sub-Registrar, in discharge of official duties .(Para 2)

Indian Evidence Act, **1872 -** Section 76 – Public document- Proof of- Held, registered sale deed is a public document- Its certified copy can be used to prove existence of original as well as its contents. (Paras 2)

For the petitioners : Mr. Malay Kaushal, Advocate.
For the respondents : Mr. Manohar lal Sharma, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant petition is directed, against, the dis-affirmative orders pronounced by the earned Civil Judge (Junior Division), Bilaspur, H.P. ,upon, an application, cast under the provisions of 65, of, the Indian Evidence Act, wherethrough the aggrieved plaintiff hence sought leave to adduce secondary evidence, vis-à-vis, the sale deed, of, 3.11.1976, executed by one Reshmu Devi. A perusal of the plaint, unfolds qua a vivid disclosure, standing borne therein, vis-à-vis, the plaintiff seeking rendition, of, a declaratory decree, vis-à-vis, his being owner in possession of the suit land, and, the anvil of the afore espousal, stands rather rested, upon, the afore-referred sale deed. However, it is averred in the plaint, and, in the instant application, qua the original thereof, being purveyed to the Halqa Patwari concerned, in contemporaneity, vis-à-vis, the making, of, an attestation of mutation, (i) and with the plaintiff, in contemporaniety thereof, being a minor, hence his being disabled, to retrieve it, from, the Halqua Patwari concerned. Consequently, the certified copy/attested copy of the aforesaid sale deed, hence, was strived, to, fall within the ambit of clauses (e) and (f) of Section 65 of the of the Indian Evidence Act, provisions whereof stand extracted hereinafter:

> *"**Section 65 (e) of Indian Evidence Act**:- "When the original is a public document within the meaning of Section 74;"*
>
> ***"Section 65 (f) of Indian Evidence Act**:-when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in (India) to be given in evidence"*

(ii) and, naturally, in consonance therewith, the afore espoused leave stood, hence staked by the aggrieved plaintiffs (iii) for determining, the, vigor of the afore contention, it is imperative to therefrom(s), hence mobilize, the, innate nuance, of, mandate(s) thereof. Initially, for any document, hence being construable, to be, a public document, render all the apposite therewith ingredients, borne in Section 74, of, the Indian Evidence Act, the provisions whereof stand extracted hereinafter, to hence beget satiation:

> *" **74. Public document:-** The following documents are public documents:-*
>
> *(1) documents forming the acts or records of the acts-*
>
> *(i) of the sovereign authority*
>
> *(ii) of official bodies and tribunals, and*
>
> *(iii) of public officers, legislative, judicial and executive, [of any part of India or of the Commonwealth], or of a foreign country;*

(2) public records kept [in any state] of private documents.

Sub-section (2) thereof, makes apparent unfoldments, qua all public records, as maintained, and, appertaining, vis-à-vis, any private document, thereupon, rather rendering any private document, being hence construable to be a public document or theirs/it falling within the domain of Section 74 (supra). Since, any registered deed of conveyance, though, is a private document, yet with records thereof, standing maintained, in, the office of Sub-Registrar concerned, thereupon any registered deed of conveyance, is construable to be a public document, whereupon, the, mandate(s) borne in Section(s) 76, and, 77 of the Indian Evidence Act, provisions whereof stand extracted hereinafter:

> ***"Section 76:- Certified copies of public documents:-*** *Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefore, together with a certificate written, at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized bylaw to make use of a seal; and such copies so certified shall be called certified copies.*
>
> ***"Section 77. Proof of documents by production of certified copies:-*** *Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies."*

are also obviously applicable, thereon (iv) and, also certified copies, of, any private document, as, kept in public records, are statutorily injuncted, to be tenderable in evidence, in proof of contents, of, the originals, of, the afore public document, and, the afore tendering(s), of, certified copies, of, private documents, as maintained in pubic records, concomitantly also renders them to be both readable, as well as, admissible in evidence. However, the coinage "may be" produced, occurring in Section 77 of the Act, does leave open space, for forming an inference, qua, the afore tendering of certified copies, of, private documents, as maintained, in public records, rather carrying a presumption(s) qua admissibility thereof, and, also qua hence therethrough originals, thereof, being proven, (v) yet also obviously, the afore presumption is rebuttable, only by adduction, of, cogent rebuttal thereoto evidence.

2. As a sequel, it is to be determined, whether, an attested copy of the afore sale deed, does fall, within the domain of Section 76, of, the Indian Evidence Act, (i) and importantly, only, upon with the hereat, rather attested copy of the afore sale deed, rather satiating all the apposite therewith ingredients borne, in Section 76 of the Indian Evidence Act, thereupon it would be rendered construable to thereafter, fall, within the domain of Section 77, of, the Indian Evidence Act. (ii) However, Section 77 of the Indian Evidence Act, makes vivid echoings, vis-à-vis, the apt certified copy, enjoining satiation, vis-à-vis, all the ingredients borne therein, for thereupon a purported certified copy, being so construable (iii) in as much as, a certified copy, rather carrying thereon, the requisite certification, (iv) and, the, aforestated certificate being enjoined to be also carrying, hence the date, title and the seal of the certifying officer, and, obviously his signatures being also enjoined, to, occur thereon, (v) bearing in mind the afore postulation(s), borne in Section 76, of, the Indian Evidence Act, wherewith hence, satiation is enjoined to be begotton , vis-à-vis, the hereat rather attested copy of the afore sale deed, (vi) obviously enjoins an allusion being made thereto, and, allusion thereto hence unveils qua their occurring thereon, a seal of the officer concerned, exemplifying, qua it being an attested true copy, of the original, and, also his dated signatures are borne thereon. The afore mark(s) of attestation made thereon, besides

the seal of the officer attesting it, alongwith his signatures, rather hence being embossed thereon, prima-facie, does satiate the afore imperative ingredients, borne in Section 77 of the Indian Evidence Act (vii), dehors the mere attestation thereof, without any certification in concurrence with the afore postulations, though, rather stricto-senso, within, the afore postulation, borne in Section 75 of the Indian Evidence Act, rather renders it to not fall within the domain(s) thereof. However, even if, the afore manner of attestation, of the, apt copy derived, from, the requisite originals, is, though stricto-senso, not within, the, domain of the afore postulations, embodied in Section 76 of the Indian Evidence Act, (viii) nonetheless when, upon perusing the reverse, of the afore attested copy, of the sale deed, it emanates qua it being registered, on 5.11.1976, with, the Sub-Registrar concerned, (vi) thereupon, it is to be concluded qua it emanating, from, the records of the Sub-Registrar concerned, and, it, prima-facie, bearing consonance therewith. Further sequel thereof is that, with clause (e) mandating qua, it being permissible, to grant leave to adduce, rather hence secondary evidence, vis-a-vis, the originals, of, a "public document", and, when the registered deed of conveyance, though, is a private document, yet, with its visibly falling, within, the mandate of sub-section (2) of Section 74, of, the Indian Evidence Act, (vii) thereupon, the afore attested copy of the afore sale deed, was receivable, in evidence, (viii) and, furthermore, when the mandate of clause (f) of Section 65 of the Indian Evidence Act, is also attracted hereat, and, when upon conjunctive readings of clause(s) (e) and (f) of Section 65 and 77, of, the Indian Evidence Act, an inevitable conclusion, rather ensues qua the afore attested copy of the apposite sale deed, being both permissibly readable, as secondary evidence, vis-à-vis, originals, thereof, besides, upon its tendering, it proving the originals thereof, thereupon it was befitting to allow the application, rather declining the apt relief. Preeminently, also when the afore marks of attestation, made on the afore copy, though, do not beget the strictest compliance, vis-à-vis, the afore postulations, borne in Section 77 of the Indian Evidence Act, rather when they do beget substantial compliance therewith, hence, when upon making the strictest insistence(s), vis-à-vis, strictest compliance being meted thereto, would rather beget injustice, and, further when the afore presumption, is rebuttable, (ix) thereupon strictest compliance therewith, is, untenable.

3. The learned Civil Judge, in declining the relief, has misconstrued the import of the afore referred provisions, and, has apparently committed a gross illegality and impropriety.

4. The petition is allowed. The impugned order, of, 12.3.2018, pronounced by the learned Civil Judge, (Junior Division) Bilaspur, H.P. is quashed and set-aside. It is open for the respondent/defendant, to, within the mandate of Section 77 of the Indian Evidence Act, adduce, hence evidence, if any, for rebutting the adduced secondary evidence, vis-à-vis, the originals, of, the afore sale deed.

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

Dinesh Kumar .....Petitioner.

Versus

Bachna Ram(now deceased)
through his LRs Uma Devi and others. .....Respondents.

Civil Revision No. 225 of 2017.
Date of decision: 01.05.2019.

Land Acquisition Act, 1894 (Act) - Sections 18 & 30 – **Code of Civil Procedure, 1908**– Order I Rule 10 – Impleadment of additional party in reference proceedings- Permissibility- Held, Act is complete code in itself- A person who has not made any application before Land Acquisition Collector for his impleadment cannot get himself impleaded directly before Reference Court- Reference Court cannot enlarge scope of reference by ordering impleadment of new parties. (Paras 2 & 3)

Case referred:
Ramji Gupta & Anr. vs. Gopi Krishan Agrawal(D) & Ors., 2013(2) Civil Court Cases 668=2013 (9) SCC 438

For the Petitioner	:	Mr. Ashwani K. Sharma, Senior Advocate with Mr. Jeevan Kumar, Advocate.
For the Respondent	:	Mr. Romesh Verma, Advocate, for respondents No.1(a) to 1(c). Mr. Vinod Thakur and Mr. Sudhir Bhatnagar, Additional Advocate Generals with Mr. Bhupinder Thakur, Deputy Advocate General and Mr. Ram Lal Thakur, Assistant Advocate General, for respondent No.3. Mr. Aditya Thakur, Advocate, for respondents No. 5 to 9.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

This revision petition is directed against the order passed by the learned reference Court whereby he rejected the application of the petitioner seeking his impleadment in the reference proceedings.

2. No fault can be found with the order passed by the reference Court as the same has been passed strictly in consonance with law and in tune with the judgment passed by the Hon'ble Supreme Court in ***Ramji Gupta & Anr.*** *versus* ***Gopi Krishan Agrawal(D) & Ors., 2013(2) Civil Court Cases 668=2013 (9) SCC 438*** wherein it has been unequivocally held that the reference Court does not have the power to entertain an application under Order 1 Rule 10 CPC. It was further held that a person who has not made an application before the Land Acquisition Collector, for making a reference under Section 18 or 30 of the Land Acquisition Act, 1894, cannot get himself impleaded directly before the reference Court. This is evidently clear from the following observations of the Hon'ble Supreme Court contained in paragraphs 28 to 32 which read thus:-

> *"28. In the instant case, we have to bear in mind that the proceedings stood concluded so far as the court of first instance is concerned, and that the respondent was not the party before the said court. Permitting an application under Order IX Rule 13 CPC by a non- party, would amount to adding a party to the case, which is provided for under Order I Rule 10 CPC, or setting aside the ex-parte judgment and decree, i.e. seeking a declaration that the decree is null and void for any reason, which can be sought independently by such a party. In the instant case, as the fraud, if any, as alleged, has been committed upon a party, and not upon the court, the same is not a case where Section*

151 CPC could be resorted to by the court, to rectify a mistake, if any was made.

29.The matter basically relates to the apportionment of the amount of compensation received for the land acquired. This Court, in May George v. Special Tahsildar & Ors., (2010) 13 SCC 98, has held, that a notice under Section 9 of the Act, 1894, is not mandatory, and that it would not by any means vitiate the land acquisition proceedings, for the reason that ultimately, the person interested can claim compensation for the acquired land. In the event that any other person has withdrawn the amount of compensation, the "person interested", if so aggrieved, has a right either to resort to the proceedings under the provision of Act 1894, or he may file a suit for the recovery of his share. While deciding the said case, reliance has been placed upon a large number of judgments of this Court, including Dr. G.H. Grant v. State of Bihar, AIR 1966 SC 237.

30. The said case is required to be examined from another angle. Undoubtedly, the respondents did not make any application either under Section 18 or Section 30 of the Act, 1894 to the Land Acquisition Collector. The jurisdiction of the Reference Court, vis-à-vis "persons interested" has been explained by this Court in Shyamali Das v. Illa Chowdhry & Ors., AIR 2007 SC 215, holding that the Reference Court does not have the jurisdiction to entertain any application of pro interesse suo, or in the nature thereof. The Court held as under:

> *"The Act is a complete code by itself. It provides for remedies not only to those whose lands have been acquired but also to those who claim the awarded amount or any apportionment thereof. A Land Acquisition Judge derives its jurisdiction from the order of reference. It is bound thereby. His jurisdiction is to determine adequacy and otherwise of the amount of compensation paid under the award made by the Collector". Thus holding that, "It is not within his domain to entertain any application of pro interesse suo or in the nature thereof."*

The plea of the appellant therein, stating that the title dispute be directed to be decided by the Reference Court itself, since the appellant was not a person interested in the award, was rejected by this Court, observing that the Reference Court does not have the power to enter into an application under Order I Rule 10 CPC.

31. In Ajjam Linganna & Ors. v. Land Acquisition Officer, RDO, Nizamabad & Ors., (2002) 9 SCC 426, this court made observations to the effect that it is not open to the parties to apply directly to the Reference Court for impleadment, and to seek enhancement under Section 18 for compensation.

In Prayag Upnivesh Awas Evam Nirman Sahkari Samiti Ltd. v. Allahabad Vikas Pradhikaran & Anr., (2003) 5 SCC 561, this Court held as under:

> *"It is well established that the Reference Court gets jurisdiction only if the matter is referred to it under Section 18 or Section 30 of the Act by the Land Acquisition Officer and if the Civil Court has got the jurisdiction and authority only to decide the objections referred to it. The Reference Court cannot widen the scope of its jurisdiction or decide matters which are not referred to it."*

While deciding the said case, the Court placed reliance on the judgments in Parmatha Nath Malik Bahadur v. Secretary of State, AIR 1930 PC 64; and Mohammed Hasnuddin v. The State of Maharashtra, AIR 1979 SC 404.

(See also: Kothamasu Kanakarathamma & Ors. v. State of Andhra Pradesh & Ors., AIR 1965 SC 304)

It is evident from the above, that a person who has not made an application before the Land Acquisition Collector, for making a reference under Section 18 or 30 of the Act, 1894, cannot get himself impleaded directly before the Reference Court.

32. In view of the above, the legal issues involved herein, can be summarised as under:-

(i) An application under Order IX Rule 13 CPC cannot be filed by a person who was not initially a party to the proceedings;

(ii) Inherent powers under Section 151 CPC can be exercised by the Court to redress only such a grievance, for which no remedy is provided for under the CPC;

(iii) In the event that an order has been obtained from the Court by playing fraud upon it, it is always open to the Court to recall the said order on the application of the person aggrieved, and such power can also be exercised by the appellate court;

(iv) Where the fraud has been committed upon a party, the court cannot investigate such a factual issue, and in such an eventuality, a party has the right to get the said judgment or order set aside, by filing an independent suit.

(v) A person aggrieved may maintain an application before the Land Acquisition Collector for reference under Section 18 or 30 of the Act, 1894, but cannot make an application for impleadment or apportionment before the Reference Court."

3. Consequently, there is no merit in this revision petition and the same is dismissed, leaving the parties to bear their own costs. However, such dismissal shall have no bearing on merits of the civil suit that has been instituted by the petitioner and the appeal whereof pending adjudication before the learned Additional District Judge, Nalagarh.

4. In view of the dismissal of the revision petition, the interim order dated 20.11.2017 is vacated.

5. The parties through their counsel are directed to appear before the reference Court on **15.05.2019.**

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

OMPs No. 3 & 86 of 2019
in COMS No. 01 of 2019
Reserved on: 30th April, 2019
Decided on: 1st May, 2019

OMP No. 3 of 2019:

Harbansh Kaur & others .....Plaintiffs/applicants.

Versus
Kaushalya Devi .....Defendants/non-applicants.

OMP No. 86 of 2019:

Harbansh Kaur & others .....Plaintiffs/non-applicants.
Versus
Kaushalya Devi .....Defendants/applicants.

Code of Civil Procedure, 1908 – Order XXXIX, Rules 1 & 2 – Temporary injunction- Grant of – Essentialities- Plaintiffs possession on disputed land since time of purchase from original patta-holder- Patta holder had developed land by making investment- Sale can be regularized in favour of seller (plaintiff) under policy of State Government- Defendant total stranger to suit land- Plaintiffs have prima facie case and balance of convenience in their favour- Defendant restrained from interfering in plaintiffs' possession during pendency of suit- Application allowed. (Paras 9 to 11)

OMP No. 3 of 2019:

For the plaintiffs/applicants: Ms. Madhurika Verma, Advocate.
For the defendants/non- applicants: Mr. Bimal Gupta, Sr. Advocate, with Ms. Rubeena Bhatt, Advocate.

OMP No. 86 of 2019:

For the plaintiffs/ non-applicants: Ms. Madhurika Verma, Advocate.
For the defendants/ applicants: Mr. Bimal Gupta, Sr. Advocate, with Ms. Rubeena Bhatt, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

OMPs No. 3 & 86 of 2019

Before dealing with the above enumerated applications, it would be apt to highlight key details pertaining to the present matter. The plaintiffs (applicants in OMP No. 3 of 2019) filed the present suit under Order 7 read with Section 26 of CPC for permanent prohibitory injunction and for peaceful possession against the defendants (non-applicants in OMP No. 3 of 2019). The plaintiffs on various grounds, which find mention in the plaint, prayed for grant of permanent prohibitory injunction against the defendants and sought that defendants be restrained from obstructing and interfering in the peaceful possession of the plaintiffs over the land comprised in khasra Nos. 3612 and 3613, situate at Patti Sosan, Kothi Kanawar, Tehsil Bhuntar, District Kullu, H.P. The plaintiffs alongwith the suit maintained an application under Order 39, Rules 1 & 2 read with Section 151 CPC (OMP No. 3 of 2019) seeking *ex parte ad interim* injunction against the defendants (non-applicants in OMP No. 3 of 2019). On the said application, a co-ordinate Bench of this Hon'ble High Court passed the following order on 03.01.2019:

"OMP No. 3 of 2019

Notice in aforesaid terms. In the meanwhile, respondents are restrained from interfering in the portion of the suit land comprised khasra Nos. 3612 and 3613, situated at Mohal Patti Sosan Kothi Kanwar, Hasbast No. 40/102, Tehsil Bhuntar, District Kullu,

H.P., in the ownership and possession of the plaintiffs as per jamabandi for the year 2015-16, till further orders.

Compliance under Order 39 Rule 3 be ensured within 24 hours."

On 18.01.2019 the co-ordinate Bench of this Hon'ble High Court passed the following order:

"OMP No. 3 of 2019

Reply, if any, be filed on or before the date already fixed. In the meanwhile, Mr. Gupta, learned Senior Counsel makes a statement that non-applicants shall not be interfering over the peaceful possession of the suit land. Learned counsel for the applicants/plaintiffs have also assured the Court that the applicants/plaintiffs shall maintain status quo over the suit land till the next date of hearing."

Ultimately, on 06.03.2019 the co-ordinate Bench of this Hon'ble High Court passed the following order:

"OMP No. 3 of 2019

Vide order dated 3rd January, 2019, respondents have already been restrained from interfering in the portion of the suit land comprised in khasra Nos. 3612 and 3613, situated at Mohal Patti Sasan Kothi Kanwar, Hadbast No. 40/102, Tehsil Bhuntar, District Kullu, H.P., in the ownership and possession of the plaintiffs as per jamabandi for the year 2015-16, till further orders. Therefore, no fresh restrained order is required to be passed. Respondents are expected to comply with the order.

The case was also listed before the Vacation judge on 18th January, 2019, on which date it has been observed that the applicants/plaintiffs shall maintain status-quo over the suit land till next date of hearing i.e. 27th March, 2019.

Learned counsel for the plaintiffs submits that on account of aforesaid observations, defendants are not allowed the plaintiffs to use the suit land despite clear title of plaintiffs and which has compelled plaintiffs to file applications i.e. CMPs No. 30 and 426 of 2019 for suitable modification in the order and for police assistance.

List for consideration along with OMP Nos. 30 of 2019 and 49 of 2019 on 27th March, 2019."

2. The defendants (non-applicants in OMP No. 3 of 2019) on 25th March, 2019, filed their written statement alongwith Counter Claim No. 9 of 2019 and refuted the claim of the plaintiffs. The defendants also maintained an application alongwith their written statement and counter claim under Order 39, Rules 1 & 2 read with Section 151 CPC (OMP No. 86 of 2019) for restraining the plaintiffs (non-applicants in OMP No. 86 of 2019) from alienating, transferring, encumbering, interfering and changing the nature of the land in question in any manner whatsoever either by themselves or their agents, attorneys, heirs etc. during the pendency of the counter claim.

3. Thus, after succinctly narrating the details qua the present case, both OMPs, i.e., 3 and 86 of 2019 are taken up together for consideration and disposal.

4. For the sake of brevity, the parties are being addressed as plaintiffs and defendants, instead of applicants/non-applicants in their respective applications.

5. I have heard the learned Counsel for the plaintiff, learned Senior Counsel for the defendants and examined the records carefully.

6. Learned counsel for the plaintiffs has argued that Shri Mohinder Singh while granting *patta* (lease) to Shri Karan Singh had retained grazing right with him. She has further argued that as per the Policy dated 17.11.1993 enacted by the Government, the *patta* allotted in favour of Shri Karan Singh was regularized and ownership was conferred upon him by the Government. The Government framed the policy after passing of judgment by this Hon'ble Court in Civil Writ Petition No. 4 of 1991 and assent of His Excellency President of Indian was also obtained. She has argued that land was developed by Shri Karan Singh and mutation was attested in his name. The plaintiffs are *bona fide* purchasers of the land and they have purchased the land for huge consideration and in case status quo order is passed against them, the plaintiffs, who have purchased the land after investing huge amount, will suffer irreparable loss. She has argued that defendants have laid challenge to the sale deed executed in favour of the plaintiffs for which they have no locus standi/cause of action to do so and the writ petition has been withdrawn by them and by all the similar persons. She has argued that the suit, which is pending in Civil Court Kullu, has been maintained by the sons and brothers of the present defendants. Lastly, she has argued that even the decision of the learned Financial Commissioner has attained finality and the same is in favour of the seller. In the above backdrop, she has prayed that the defendants be directed not to interfere, in any manner whatsoever, directly or indirectly, personally or through their agents in the suit land and also not to cause any type of obstruction in peaceful use of the suit land till final disposal of the suit.

7. Conversely, the learned Senior Counsel for the defendants has argued that in the year 1957, when District Kullu was part of Punjab, Government enacted The Punjab Resumption of Jagirs Act, 1957, and the jagirs came to an end in Kullu so also the rights of jagirdars. He has further argued that on 10th January, 1972, enactment also came in Himachal Pradesh and the rights of jagirdars were abolished. However, Rai Bhagwant Singh of Kullu continued granting *pattas* and he challenged the H.P. Act in Hon'ble Supreme Court and interim stay was granted, but the same was vacated on 21st September, 1973. He has argued that in CWP No. 4 of 1991 decided on 13th May, 1991, the Hon'ble Court has only protected those persons under the *pattas*, who had developed their lands and none else. He has argued that as the seller in the present case, late Shri Karan Singh, had not developed the suit land, which was granted to him by way of *patta* by his father Shri Mohinder Singh son of Rai Bhagwant Singh, so the right in the suit land got extinct and the sale deed could not have been executed by him and if executed, the same has no force. He has further argued that Shri Mohinder Singh was having grazing rights only in addition to the grazing rights of other persons, as per the policy framed by the Government owing the decision in CWP No. 4 of 1991. It has been argued that as the land was not developed, the State was to take action to get the land back as the land was not covered by the judgment of Court rendered in CWP No. 4 of 1991, as it was not developed by the *patta* holders. He has argued that mutations have been attested by the authorities in favour of seller Shri Karan Singh without verifying the fact whether the land has been developed on the spot or not. He has argued that as the land is barren forest land and without taking no objection from the relevant quarters, the mutation had been attested. On the above grounds coupled with others taken in the written statement and counter claim, the defendants are seeking that during the pendency of the counter claim, the plaintiffs may be restrained from alienating, transferring, encumbering and interfering and changing the nature of the land in question,

measuring 6-12-0 bighas, comprised in khata Khatauni No. 641/904, khasra No. 2612, 2613, kita 2 situated in Phati Sosan, Kothi Kanwara, Tehsil Bhuntar, District Kullu, H.P., in any manner whatsoever either by themselves or through their agents, attorneys, heirs etc.

8. At the very outset, it is seen that the plaintiffs have purchased the land for consideration. CWP No. 4 of 1991 was decided on 13.05.1991 and on the basis of judgment rendered in CWP No. 4 of 1991, the Government framed a policy. As per the policy, the lands which were granted under *pattas* and developed, were protected. The material, which has come on record, demonstrates that the suit land is having an old single storey slate posh house. Thus, the land was developed by the *patta* holder and it was rightly mutated in the name of the seller, who sold this land to the plaintiffs in the year 2015. The order of the learned Financial Commissioner is also on record and the same has attained finality, as the learned Financial Commissioner refused to review the order of mutation. Civil Writ Petition, which was preferred by the defendants was withdrawn. The following extracted documents demonstrate that regularization was done:

"From

Tehsildar Kullu

To

Deputy Commissioner
Kullu.
No. 48/MC
Dated: 17/8/2000

Subject: Regarding Rupi Nautor of Sh. Karan Singh

Sir,

Jai Hind.

In relation to your letter No. 765/Reader Dated 12/7/2000 on the subject cited above, ti is submitted that after inspecting the spot it was found that at present Tukra No. 1 and 2 land 6-12 is in cultivable state. According to the report of Girdawar halqua Rupi dated 26/10/1999 and tatima of spot, Tukra No. 1 measuring 4-18 and Tukra No. 2 measuring 1-14 total area 6-12 was found to be in possession of applicant by erecting a stone wall and fencing with double barbed wires along with the road. 14 trees of rubinia and a slate roofed house which is damaged are present on Tukra No. 1 and 4-18 and no tree is present on Tukra No. 2 land 1-14.

According to the report of the then Tehsildar Kullu dated 4/9/1992 which is in the file, crop of corn and kidney beans planted by applicant and a slate roofed house was found on the above land. In this way the applicant has very old possession on the said land.

Yours faithfully
Sd/-
Tehsildar Kullu"

"Report of spot:

Sh. Karan Singh S/O Raja Mohender Singh Rupi Palace Kullu has submitted an application that Raja Mohender Singh vide patta Nautor No. 173/1 dated 27/2/68 has granted him Nautor land measuring 29-14 Bigha at Phati Sosan Kothi Kanawar ehsil Kullu. Alongwith this application photocopy of affidavit and Patta Nautor is

attached. This application was sent to Kanungo Rupi for spot inspection and report. Kanungo has demarcated the land and found that Sh. Karan singh applicant has possession on 4-18 Bigha area instead of 29-14 Bigha on spot. Raja Rupi has granted this Patta on 27/2/1968 in favour of Sh. Karan Singh. On basis of this Patta, mutation No. 827 dated 9-6-68 was entered at Phati Sosan which was subsequently cancelled on 16-9-71.

Sh. Mohender Singh Raja Rupi and his ancestors were Jagirdars of Kothi Kanawar. Hence they are the bartandars of that Kothi for the year 1911-12. Sh. Karan Singh, applicant has paid nazrana at the Rate of 1 per Bigha as mentioned on the patta. Duration of regularization of patta is between 23-1-1960 to 21-9-1973. Sh. Karan Singh was granted this patta on 27-2-1968 which is within this duration/period.

On basis of Patta of Sh. Karan Singh, I, inspected the spot and found that 4-18 Bigha land is in possession of Sh. Karan Singh at spot. Presently crop of corn and kidney bean is planted and a small one storeyed house is constructed over that land. There are no fruit trees on this land but 18 trees of rubinia are present. The land revenue of this 4-18 Bigha comes to 0-70 Paise as per settlement record. The possession of applicant Sh. Karan singh on spot is shown as Tukra No. 1 area 4-18 in the Tatima attached herewith. On the basis of the aforesaid enquiry and the fact of possession of Sh. Karan singh S/O Raja Mohender Singh on Tukra No. 1 measuring 4-18 land revenue 0-70 Paise per year Phati Sosan, the ownership of which was granted vide Patta Nautor No. 173/1 by Raja Rupi on 27-2-68, may be regularized in fvour of Sh. Karan Singh in the revenue record. The original application of Sh. Karan Singh, report of girdawar halqua, statement on affidavit, Patta, copies of Tatima, statement on spot and Tatima on spot are attached for further action.

9. It is also on record that rest of the land has also been given to other persons as *nautor*. From the documents, it is clear that when the *patta* was granted by Mohinder Singh to the seller, grazing rights were protected, but later on as per the policy of the Government, land was rightly mutated in the name of the seller, as it was found that he has developed the land and a single storey slate posh old house is there on the suit land. It is also found that the land has been cultivated much earlier. It shows that the land was possessed and developed by the seller. The present plaintiffs have purchased the land for huge consideration.

10. In view of the above, the present plaintiffs cannot be restrained by anyone from using the land, as the land was in exclusive possession of the seller and the land was mutated in the name of the seller in accordance with law, as he was in long possession over the land. This Court also finds that the land has been rightly mutated in the name of the seller, as he was a *patta* holder since 1968 and the land rightly devolved in his name. Resultantly, the application filed by the plaintiffs is required to be allowed and the defendants are required to be restrained from interfering in the suit land in any manner whatsoever. At the same point of time, the defendants have neither right to interfere in the suit land nor they have any *prima facie* case in their favour for being granted an order of status quo, as they are complete strangers to the suit land. The right they are claiming, i.e.,

grazing right, is not borne out from the revenue record, as the defendants are completely strangers to the suit land and their claim is liable to be dismissed.

11. In view of what has been discussed hereinabove, this Court finds that the plaintiffs have a *prima facie* case in their favour and balance of convenience also lies in their favour and this Court also finds that in case the defendants are not restrained from interfering in the suit land the plaintiff will suffer an irreparable loss. On the other hand, in case status quo order, as prayed by the defendants, is ordered, the plaintiffs will suffer irreparable loss and injury, which cannot be compensated in terms of money. Thus, at this moment, OMP No. 3 of 2019, preferred by the plaintiffs, is allowed and the defendants are restrained from entering, interfering in the suit land in any manner, whatsoever, directly or indirectly, personally or through their agents etc. and the application preferred by the defendants, i.e., OMP No. 86 of 2019 is dismissed. Accordingly, both the applications stand disposed of.

12. Needless to say that the observations made hereinabove are limited for the disposal of OMPs No. 3 and 86 of 2019 and shall have no bearing on the merits of the main case.

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

Himachal Pradesh Road Infrastructure Development Corporation Limited (HPRIDC).
.....Petitioner.

Versus

M/s C & C Construction Limited & others. .....Respondents.

Arbitration Case No. 92 of 2017
Reserved on: 25.04.2019
Decided on: 01.05.2019

Arbitration and Conciliation Act, 1996 – Section 39 – Arbitrator's fee – Consent thereto by Arbitrator- Effect- Held, if Arbitrator agrees to fee settled by parties, then subsequently he cannot claim fee more than to what he had consented earlier.(Para 13)

For the petitioner:	Mr. J.S. Bhogal, Sr. Advocate with Ms. Shrishti Verma, Advocate.
For respondent No. 1:	Mr. Karan Singh Kanwar and Mr. Naveen Kumar, Advocates.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The petitioner, Himachal Pradesh Road Infrastructure Development Corporation Limited (hereinafter referred to as "HPRIDC"), maintained the present petition under Section 39 of the Arbitration and Conciliation Act, 1996 (hereinafter for the sake of brevity referred to as "the Act") for fixing reasonable fee of the members of the Arbitral Tribunal.

2. Shorn of key details, HPRIDC and M/s C & C Construction Limited (respondent No. 1, hereinafter referred to as "the Construction Company") entered into a contract whereby work of widening and strengthening of Una-Barsar-Bhota-Bhamala-Kalkhar-Ner Chowk road Section Una-Bangana-Barsar from Km 0+000 to Km 46+000 Package No. SRP/RIDC/HP/2/ICB was given to the Construction Company. A covenant was duly executed, which contained various clauses including Clause 20.6 which provides as under:

> ***"20 Claims, Disputes and Arbitration***
>
> ***20.6 Arbitration*** *Substitute sub paragraph (a) with the following:*
>
> *(a) A dispute with an Indian Contractor shall be finally settled by arbitration in accordance with the Arbitration & Conciliation Act, 1996, or any statutory amendment thereof. The arbitral tribunal shall consist of 3 (three) Arbitrators one each to be appointed by the Employer and the Contrator. The third Arbitratory shall be chosen by the two Arbitrators so appointed by the parties and shall act as Presiding Arbitrator in case of failure of the two Arbitrators, appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed in the last the Presiding arbitrator shall be appointed by the Appointing Authority as specified in the Bid Date Sheet. For the purposes of this Sub-Clause, the term "Indian Contractor" means a Contractor who is registered in India and is a juridical person created under Indian law as well as a joint venture between such a Contractor and a Foreign Contractor.*
>
> *In case of a dispute with a Foreign Contractor, the dispute shall be finally settled in accordance with the provisions of UNCITRAL Arbitration Rules. If agreed to by both the parties the disputes shall be settled in accordance with the Arbitration and Reconciliation Act, 1996 or any statutory amendment thereof. The arbitral tribunal shall consist of three Arbitrators. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the parties, and shall act as Presiding Arbitrator. In case of failure of the two Arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the Arbitrator appointed in the last, the Presiding Arbitrator shall be appointed by the Authority specified in the Bid Date Sheet. For the purposes of this Sub Clause, the term "Foreign Contractor" means a Contractor who is not registered in India and is not a juridical person created under Indian Law."*

Subsequently, a dispute arose and the Construction Company, vide letter dated 05.12.2013, sought reference of the dispute to arbitration and in the said letter respondent No. 3 was named as nominee from the side of the Construction Company. In response, HPRIDC, vide letter dated 27.12.2013, called the Construction Company for securing the acceptance of respondent No. 3 qua fee structure notified by the petitioner. The petitioner (HPRIDC) further averred that prior to invoking the arbitration agreement, respondent No. 1-Company notified the fee structure, vide letter dated 18.03.2013. The Construction Company, vide its email dated 15.01.2014 forwarded acceptance letter, dated 08.01.2014, sent by respondent No. 3 to the Technical Director of the Company. Resultantly, the petitioner, vide its letter dated 14.01.2014, nominated respondent No. 4 as its nominee to Arbitral Tribunal. The petitioner further averred that through letter dated 21.01.2014, respondent No. 4 was apprised qua the acceptance of the fee structure, as proposed by respondent No. 3. In fact,

the fee of the members of the Tribunal was fixed @ Rs. 15,000/- per day, subject to maximum of Rs. 2,50,000/- and boarding and lodging expenses @ Rs. 7,000/- per day for hearing and Rs. 3,500/- per day for days other than the meeting days. The travelling expenses were also agreed on actual Economy Class (by air), First Class AC by train and actual AC car charges by road.

3. The petitioner contended that both nominated arbitrators appointed respondent No. 2 as the Presiding Arbitrator and hearing was fixed on 08.03.2014. Vide order dated 25.02.2016, the Arbitral Tribunal was directed to deposit an amount of Rs. 2,00,000/- each under Section 38 of the Act. On the subsequent meeting of the Arbitral Tribunal, i.e., 30.04.2016 the contention qua agreement for fee was raised before the Tribunal, but the same was rejected. On 04.12.2016 the Arbitral Tribunal fixed fee of Rs. 60,000/- per Arbitrator per hearing and the parties were directed to pay the said fee right from the commencement of the proceedings, after adjusting the amounts already paid. The petitioner further contended that the Tribunal directed that boarding, lodging and travelling expenses of respondent No. 3 would be on actual basis and respondents No. 2 and 4 would be paid Rs. 15,000/- per day, so the Tribunal excessively raised these charges too. Thereafter, vide order dated 10.03.2017, the Tribunal directed that hearing will only be for three hours and separate payment will be charged for pre-lunch and post-lunch sessions. As per the petitioner, till date the fee payable to respondents No. 2 to 4 cumulatively is Rs. 2,25,000/-, even if all hearings are to be paid at the agreed rates and though as per the approved structure the fee per arbitrator is fixed at Rs. 2,25,000/- and against such fee respondents No. 2 to 4 are claiming fee of Rs. 12,00,000/-. It is contended that respondents No. 2 to 4 are also claiming boarding, lodging and travelling expenses excessively. In the above backdrop, the petitioner is praying that reasonable fee and expenses may be paid to respondents No. 2 to 4 out of the amount already deposited by the petitioner in the Registry of this Court and the remaining amount be refunded to it.

4. Notice of motion was served upon the respondents, however, only respondent No. 1 chosen to contest the present matter, though, respondent No. 1 also did not file any reply to the present petition. Respondents No. 2 to 4 did not appear before this Court.

5. Noticeably, respondent No. 1 during the pendency of the present petition, approached the learned Tribunal with a prayer to reconsider the order directing payment of fee, but the prayer was rejected.

6. On behalf of HPRIDC (petitioner), the learned Senior Counsel, Mr. J.S. Bhogal, argued that the fee cannot be claimed more than what is fixed and agreed, as the fee was accepted by the Arbitrators. He has further argued that the Arbitrators cannot claim more fee than as agreed between the parties, as the parties have appointed Arbitrators. He has argued that as far as umpire is concerned, though the letter, issued by the petitioner and accepted by respondent No. 1, is silent with regard to the fee, but even then also the concept of reasonable fee applies. Conversely, Mr. Naveen Kumar, learned Counsel, appearing for contesting respondent No. 1, has argued that the Arbitrators can charge the fee as reasonable fee and the letter issued by the petitioner is not binding upon them. He has further argued that Arbitrators are entitled for a reasonable fee and the fee, i.e., 60,000/- per Arbitrator per hearing cannot be said to be unreasonable. He has argued that respondent No. 1 has no objection paying higher fee.

7. In rebuttal, learned Senior Counsel has argued that fee cannot be unreasonable and even taking into consideration the salary of a High Court Judge, the fee, as fixed, vide letter dated 08.01.2014, i.e., Rs. 15,000/- per appearance, is very reasonable fee.

8. I have carefully considered the contentions of the contesting parties and perused the materials on record. The issues which fall for consideration in the present matter are that, are the Arbitrators charging unreasonable fee and is fee payable by the petitioner and respondent No. 1 as per letter dated 08.01.2014?

9. At the very outset, it would be gainful to highlight letter dated 08.01.2014, whereby respondent No. 3 (nominated arbitrator) conveyed his acceptance for fee and other expenses, as proposed and notified by HPRIDC (petitioner), to Shri R.M. Aggarwal, the then Director Technical of respondent No. 1-Company. The above letter, in *extenso,* extracted hereunder:

> "…….
> *(respondent No. 3)* *Dated: 08.01.2014*
>
> *Sh. R.M. Aggarwal,*
> *Director Tehnical*
> *C & C Constructions Limited*
> *Plot No. 70, Institutional Sector-32*
> *Gurgaon – 122001*
>
> *Sub: Widening and Strengthening of Una – Barsar – Bhota – Bhamla Kalkhar – Ner Chowk Road Section Una – Bangarna – Barsar – From Km 0+000 to Km 45+000 (Contact No. PW-SRP/RIDC/HP/2/ICB-2) Acceptance of Arbitration Fees reg*
>
> *Ref: (i) Contractor's letter No. Nil dated 05.12.2013*
> *(ii) Contractors' letter No. C&C/HPRIDC/HP-2/118 dt. 05.12.2013*
> *(iii) Employer's letter No. HPRIDC/SRP/EE-(CM)/ICB-2 Arbn/ 2012:5349-50 dated 27.12.2013*
>
> *Apropos your letter on the above-referred subject, I, as nominee Arbitrator hereby give my acceptance of Arbitration Fees and other expenses as notified by the HPRIDC but subject to the decision of the Arbitral Tribunal in this regard as the Arbitral Tribunal is yet to be constituted in terms of the Contract between the parties with the Presiding Arbitrator to be appointed by the two nominee Arbitrators.* *(respondent No. 3)"*

10. Noticeably, through Annexure P-4, HPRIDC conveyed fee and other expenses of members of the Arbitral Tribunal. Annexure P-4 in *extenso* extracted as under:

> "Himachal Pradesh Road and Center Infrastructure Development Corporation Limited State Roads Projects, Nirman Bhawan, Nigam Vihar, Shimla-171002
>
> Fax: 0177-2620663, Tel : 0177-2620663/2627602 Time Bound
>
> HPRIDC/SRP/EE (CM)-ICB/NCB Contracts (Arbn.)/2010-7942-52 Dated 18-3-2013
>
> 1. M/s Longjian Road & Bridge Company Ltd.,
> Lower Arniyala, War No. 1,
> Friends Colony, Una (HP)-174303.

2. M/s C&C Construction Private Limited,
Site Office : Una-Barsar Road Project,
Village & P.O. Samoor Kalan, District Una HP.

3. M/s C&C Construction Private Limited,
Site Office : Barsar-Jahu Road Project,
Village & P.O. Mundkhar, District Hamirpur, H.P.

4. M/s ANS Construction Limited,
Site Office : Opposite Khadi Gram Udyog,
Main Bazar, V&PO Jahu, District Hamirpur, HP – 176048.

5. M/s Vlecha-Dilip (JV)
Dilip Buildcom Pvt. Ltd.,
E-5/99, Arera Colony,
Bhopal-462016 (M.P.)

6. M/s NKG Infrastructure Ltd.,
Regd. Office : 124, Ground Floor,
World trade Centre, Babar Road,
Connaught Place, New Delhi-110011.

Subject: Fee of Arbitrators in case of Civil Engineering Construction Contractors/Supervision Consultant.

Enclosed herewith is the copy of the Circular No. HPRIDC/SRP/EE (T&D)-ICB-8/Arbit. Despite (Vol.1)/2012-13-7639 Dated 6.3.2013 regarding the notification of fees and other expenses to the Arbitration Tribunal members, approved by the HPRIDC for taking further necessary action.

It is requested to accord your consent in the matter accordingly in consultation with the HPRIDC.

Encl: As above (2 pages)

Sd/-
Chief Engineer-cum-Project Director
State Roads Project, HPRIDC
Nirman Bhawan, Shimla-2

Copy alongwith encloses as above to:

i) The Executive Engineer (CMU), State Roads Project, HPRIDC, Dharamshala, Hamirpur & Una.
ii) Sh. Jatinder S. Bhogal, Senior Advocate, Office : 10, DR Complex, Lakkar Bazar, Shimla-171 001.
iii) The Louis Berger Group Inc. USA in a/w Louis Berger Consulting Pvt. Ltd. India, D-7, Lane-1, Sector, New Shimla (HP)-171009, India.

Encl: As above (2 pages)

Sd/-
Chief Engineer-cum-Project Director
State Roads Project, HPRIDC
Nirman Bhawan, Shimla-2”

11. A bare perusal of the above cited documents shows that the HPRIDC (petitioner) issued a circular to all the contractors qua fee of the arbitrator. Fee of the arbitrator was fixed at Rs. 15,000/- per day, subject to maximum of Rs. 2,50,000/- and further subject to publishing the award within twelve months. The Construction Company (Respondent No. 1) nominated arbitrator, and vide letter dated 08.01.2014, respondent No. 3 (nominated arbitrator from the side of the Construction Company) gave acceptance for arbitration fee and other expenses, as notified by the petitioner. In these circumstances, this Court finds that once the arbitrator accepted the fee and other expenses, then arbitrator is bound by the acceptance and the fee and other expenses proposed by the petitioner. This Court also considered the objection of learned counsel for respondent No. 1 that the acceptance was conditional and cannot be taken as acceptance. The acceptance, as given, was in the first line that the arbitration fee and other expenses, as notified by the petitioner, are acceptable. The agreement concludes in the first line whereby the nominated arbitrator of the Construction Company gave his consent. Meaning thereby arbitrator was ready and willing to perform the duties and the fee/expenses, as proposed by the petitioner, was accepted.

12. As far as other arbitrator appointed by the petitioner is concerned, no objection has been raised that this fee is not acceptable to other arbitrators. Arbitrators were made parties before this Court, but they did not choose to appear and the case of the arbitrator appointed by respondent No. 1 was pleaded by learned counsel for respondent No. 1 on the premise that in case the arbitration is delayed, respondent No. 1 shall suffer, so the fee, as claimed by the arbitrators is just and reasonable.

13. I find no merits in the submissions of the learned counsel appearing for respondent No. 1, as the fee is to be shared by the petitioner also and the fee, as fixed by the petitioner, vide its letter was also accepted by the arbitrator. The arbitrator cannot claim fee more than proposed in the circular. As far as the fee of the umpire is concerned, neither anything was argued by the learned Senior Counsel for the petitioner nor same is required to be adjudicated upon. However, the arbitrators appointed by the parties are bound by the fee and other expenses, as prescribed through circular dated 18.03.2013.

14. In view of what has been discussed hereinabove, the petition is allowed and the petitioner is permitted to deposit its share of fee of arbitrators, as notified by it in its circular dated 18.03.2013 and in case fee is already deposited on higher side, balance amount be refunded to the petitioner (HPRIDC). With the above observations, the petition stands disposed of, so also pending application(s), if any.

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

Virender Kumar ...Petitioner

Versus

State of Himachal Pradesh ...Respondent

Cr.MP(M) No. 439 of 2019
Decided on: 2nd May, 2019

Narcotic Drugs & Psychotropic Substances Act, 1985 (Act) – Sections 18 & 37 – Recovery of opium- Regular bail- Grnat of- Parameters- State resisting bail on ground that petitioner

is already facing trial in another case under Act- Held, petitioner local resident- Material does not indicate that petitioner if released on bail, would tamper with evidence or flee away from justice- Recovered stuff also does not fall in commercial category- Petition allowed- Conditional bail granted. (Para 7)

For the petitioner: Mr. Rajiv Rai, Advocate.
For the respondent/State: Mr. S.C. Sharma, Mr. Shiv Pal Manhans and Mr. P.K. Bhatti, Additional Advocates General with Mr. Raju Ram Rahi, Deputy Advocate General.
SI Jagdish Chand, I.O. Police Station Sadar, Bilaspur, District Bilaspur, H.P.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge. *(oral).*

The present bail application has been maintained by the petitioner under Section 439 of the Code of Criminal Procedure seeking his release in case FIR No. 278 of 2018, dated 07.12.2018, under Section 18 of the ND&PS Act, Police Station Sadar, District Bilaspur, H.P.

2. As per the averments made in the petition, the petitioner is innocent and has been falsely implicated in the present case. He is resident of the place and neither in a position to tamper with the prosecution evidence nor in a position to flee from justice. No fruitful purpose will be served by keeping him behind the bars for an unlimited period, so he be released on bail.

3. Police report stands filed. As per the prosecution story, on 07.12.2018, at about 06:00 p.m., a police team was on patrol duty at place Planighat. When PSI was talking with Gram Panchayat Pradhan and Ward Member, a person appeared from the bushes and on seeing police he threw something. On noticing his abnormal behavior, the person was nabbed and he disclosed his name as Virender Kumar (petitioner herein). Police checked the substance thrown by the petitioner and same was found to be opium. The contraband, on weighment, was found to be 151 grams. Police completed all the sample and sealing formalities. Police recorded the statements of witnesses and *rukka* was sent to the police station for registration of FIR. The petitioner was arrested and sample of recovered contraband was sent for scientific analysis and as per the report, the sample was of opium. As per the police, the petitioner is also involved in other matters and in case he is enlarged on bail, he may flee from justice and may also tamper with the prosecution evidence. Lastly, it is prayed that the bail application of the petitioner be dismissed as the petitioner was involved in a serious offence and in case he is released on bail, he may tamper with the prosecution evidence and may also flee from justice.

4. I have heard the learned Counsel for the petitioner, learned Additional Advocate General for the State and gone through the record, including the police report, carefully.

5. The learned Counsel for the petitioner has argued that the petitioner has been falsely implicated in the present case. It has been further argued that that no fruitful purpose will be served by keeping the petitioner behind the bars for an unlimited period. The petitioner 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 enlarged on bail.

Conversely, the learned Additional Advocate General has argued that the petitioner was found involved in a serious offence and in case he is enlarged on bail, he may tamper with the prosecution evidence and may also flee from justice. It has been argued that the bail application of the petitioner may be dismissed.

6. In rebuttal the learned Counsel for the petitioner has argued that the petitioner cannot be kept behind the bars for an unlimited period. He has further argued that the petitioner is neither in a position to tamper with the prosecution evidence nor in a position to flee from justice, so he may be enlarged on bail.

7. At this stage, after taking into consideration the age of the petitioner, quantity of the recovered stuff and the material, which has come on record, and without discussing the same at this stage, and also the fact that the petitioner is resident of the place neither in a position to tamper with the prosecution evidence nor in a position to flee from justice and he cannot be kept behind the bars for an unlimited period, this Court finds that the present is a fit case where the judicial discretion to admit the petitioner on bail is required to be exercised in his favour. Accordingly, the petition is allowed and it is ordered that the petitioner, who has been arrested by the police, in case FIR No. 278 of 2018, dated 07.12.2018, under Section 18 of the ND&PS Act, Police Station Sadar, District Bilaspur, H.P., shall be released on bail forthwith in this case, subject to his furnishing personal bond in the sum of `25,000/- (rupees twenty five thousand) with one surety in the like amount to the satisfaction of the learned Trial Court. The bail is granted subject to the following conditions:

(i) That the petitioner will appear before the learned Trial Court/Police/ authorities as and when required.

(ii) That the petitioner will not leave India without prior permission of the Court.

(iii) That the petitioner will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Investigating Officer or Court.

8. In view of the above, the petition is disposed of.

Copy *dasti.*

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

Anwar Hussain .....Appellant.

Versus

Sarvar Hussain & others .....Respondents.

Cr. Appeal No. 148 of 2012
Reserved on: 28.02.2019
Decided on: 2.5.2019

Code of Criminal Procedure, 1973 (Code) – Section 378 - Appeal against acquittal- Mode of disposal- Principles summarized - Held, Code makes no distinction between an appeal from acquittal and an appeal from conviction so far as powers of Appellate Court are concerned- Certain unwritten rules of adjudication are followed- While dealing with an appeal against acquittal Appellate Court has to bear in mind that there is general presumption in favour of innocence of accused and that presumption is only strengthened by his acquittal- Accused is entitled to retain benefit of reasonable doubt in Appellate Court also- Thus, Appellate Court in appeal against acquittal has to proceed more cautiously- If there is absolute assurance of guilt upon evidence on record only then order of acquittal is liable to be interfered with- Unless there are 'substantial and compelling reasons', 'good and sufficient grounds' and 'very strong circumstances', it is more than safe to hold that prosecution has failed to prove guilt of accused beyond reasonable doubt and findings of acquittal recorded by Trial Court need no interference. (Paras 18, 21 & 22).

Cases referred:

Arun vs. State, (2008) 15 SCC 501
Chandrappa vs. State of Karnataka, (2007) 4 SCC 415
Dhanna vs. State of M.P., (1996) 10 SCC 79
T. Subramanian vs. State of Tamil Nadu, (2006) 1 SCC 401

For the appellant:	Mr. N.K. Thakur, Sr. Advocate, with Mr. Divya Raj Singh, Advocate.
For respondents No. 1 to 13:	Mr. Sanjeev Kuthiala, Sr. Advocate, with Ms. Kamlesh Kumari, Advocate.
For respondent No. 14/State:	Mr. Vikas Rathore, Mr. Narinder Guleria, Additional Advocates General, with Mr. J.S. Guleria and Mr. Kunal Thakur, Deputy Advocates General and Mr. Sunny Dhatwalia, Assistant Advocate General.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present criminal appeal has been maintained by the appellant against impugned judgment dated 31.12.2011, passed by learned Additional Sessions Judge, Mandi, H.P., in Sessions Trial No. 7 of 2006, whereby the respondents/accused persons (hereinafter referred to as "the accused persons") were acquitted for the commission of the offences punishable under Sections 147, 148, 149, 326, 324, 323, 504 and 506 of Indian Penal Code, 1860 (hereinafter referred to as "IPC").

2. The facts giving rise to the present case, as per the prosecution story, can tersely be capsulated as under:

Anwar Hussain (complainant) was running a shop in village Dhaban and on the upper story of the shop there was flour mill. Shamshad alias Guddi alongwith her children used to reside over the first floor of the shop. As per the prosecution, on 01.11.2004, at about 06:00 a.m., the complainant and his father, Ashraf Mohammd, were returning after performing *Namaaz* and they reached the shop at 06:15 a.m. At about 07:45 a.m., when the complainant and his father were opening the flour mill and shop, the complainant heard noise and when he came outside, Talib Hussain, Sarvar Hussain, Nazir Hussain, Sadiq Mohamad, Mansab Ali and Gulsad Mohamad (the accused persons) armed

with stick, *gandasa* and sword were present there. The accused persons came inside the shop of the complainant and told that they do not accept the boundary pillars affixed by the Panchayat. They also threatened the father of the complainant to bury him where the boundary pillars exist. When the complainant came out, he saw that the accused persons were beating his father and they also dragged the complainant towards the fields. The complainant raised alarm and Rozina, Parvej Mohammad, Shamshad Begum and Ashraf Mohammad came on the spot, but accused persons gave beatings to them. Accused Sarvar Hussain inflicted injury on the head of the complainant with axe and accused Nazir Hussain inflicted blow with sword. Accused Sarvar Hussain and Talib Hussain inflicted injuries on the father of the complainant with axe. The complainant and his father, who suffered injuries, were shifted to hospital and the police were informed. SI/SHO Uttam Singh visited the spot and got recorded the statement of Anwar Hussain, which was sent to Police Station, whereupon FIR was registered. Police took into possession clothes of Parvej, Anwar and Ashraf and the same were put in a parcel, which was sealed and sample impression was taken on a separate piece of cloth. Dr. Devinder medically examined the injured persons and issued their medico legal certificates. Police recorded the statements of the witnesses and after completion of investigation, *challan* was presented in the Court.

3. The prosecution, in order to prove its case, examined as many as eleven witnesses. Statements of the accused persons were recorded under Section 313 Cr.P.C., wherein they pleaded not guilty. The accused persons did not examine any defence witness.

4. The learned Trial Court, vide impugned judgment dated 31.12.2011, acquitted the accused persons for the commission of the offence punishable under Sections 147, 148, 149, 326, 324, 323, 504 and 506 IPC.

5. The learned Senior Advocate for the appellant has argued that the learned Trial Court has wrongly appreciated the facts and law and the impugned judgment is based on surmises and conjectures, thus the same is liable to be set aside. He has further argued that there is ample material on record which clearly shows that the accused persons were aggressors and they committed the crime. He has argued that the learned Trial Court did not appreciate the evidence in its right and true perspective and the accused persons were wrongly acquitted. The evidence, which has come on record, is sufficient to convict the accused persons. He has argued that the accused persons be convicted by setting aside the judgment of the learned Trial Court. Conversely, the learned Senior Counsel for the accused persons has argued that nothing has come on record, which could establish the guilt of the accused persons beyond the shadow of reasonable doubt. He has further argued that the learned Trial Court has correctly appreciated the material, which has come on record, and the judgment of acquittal, rendered by the learned Trail Court, is the result of appreciating the facts and law to their right and true perspective. He has argued that the judgment of acquittal needs no interference, so the appeal be dismissed.

6. In rebuttal, the learned Senior Counsel, for the appellant has argued that after re-appreciating the evidence, which has come on record, the accused persons be convicted by setting aside the impugned judgment passed by the learned Trial Court.

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

8. PW-1, Dr. Devinder Sharma, the then Medical Officer, CHC Ratti, medically examined the injured persons, including the complainant. This witness, after medically examining the injured persons, issued medico legal certificates, which are Ex. PW-1/A, Ex. PW-1/B and Ex. PW-1/E to Ex. PW-1/H. He noticed injuries on the complainant and other

injured persons. It is apposite to examine what PW-1 has opined after medically examining Anwar Hussain (complainant), on whose statement (Ex. PW-3/A) recorded under Section 154 Cr.P.C., the FIR was registered against the accused persons. PW-1, Dr. Devinder Sharma, observed the following injuries on the person of the complainant:

> ***"1. 1" long lacerated wound on left parietal region of the scalp. Bleeding was present.***
>
> ***2. 2" long lacerated wound on the left occipital parietal region of the scalp. Bleeding was present.***
>
> ***3. 1" long lacerated wound on the right occipital parietal region of the scalp. Bleeding was present.***
>
> ***4. 2" long lacerated wound on the right parietal region of the scalp. Bleeding was there."***

PW-1 has further opined that both the injuries were simple in nature and caused with blunt weapon. He issued Medico Legal Certificate, Ex. PW-1/H, qua the complainant.

9. PW-9, is Dr. P.K. Soni, the then Radiologist, Regional Hospital, Hamirpur. He did not notice any fracture after examining the skiagrams of injured Shabana and Rozina Bibi. This witness also examined the skiagram of injured Ashraf Mohammad and noticed fractures of both bones upper one third of left leg.

10. PW-2, ASI Arjun Dass, is a formal witness. He has arrested the accused persons. The deposition of PW-3, Anwar Hussain (complainant) is very important. As per this witness, on 01.11.2004, at about 07:30 a.m., Talib Hussain, Sarvar Hussain, Nazir Hussain, Sadiq Ali, Mansab Ali and Gulshad Mohammad came to their land and started uprooting the boundary marks. He has further deposed that Nazir Hussain was armed with a sword, Sarwar Hussain was having an axe, Talib Hussain was armed with *gandasa* and others were armed with sticks. He has further deposed that Nazir Hussain was killed by above mentioned persons. On 28.10.2004, the boundary marks were affixed by the Panchayat and the demarcation was carried out by Panchayat and police personnel and also by Kanungo and Tehsildar. He has further deposed that accused Sarvar Hussain inflicted blows of axe on his head and neck. As per this witness, when he and his father raised alarm, his sister Shamshad alias Guddi informed other family members of his family. Thereafter, Parvej (brother of the complainant), sister-in-law Shabana and Rozina, wife of the complainant came on the spot, but lady members of the family of the accused persons blocked their path towards the spot. He has further deposed that he became unconscious and regained consciousness in the hospital. His statement, Ex. PW-3/A, was recorded by the police and his shirt, pants and vests, which were stained with blood, were handed over by him to the police. This witness, in his cross-examination, has deposed that he did not state before the police that Nazir Hussain was given beatings and killed by the accused persons. He has further deposed that he disclosed to the police that boundary marks were affixed by the Panchayat, but in his statement, Ex. PW-3/A, it is not so recorded. This witness has specifically deposed that accused Sarwar Hussain inflicted three axe blows on his head and back. He has further deposed that accused gave blows with full force from sharp side of the axe on his head and from the blunt side of the axe on his back. This witness, no doubt, exaggerated the facts, as PW-1, Dr. Devender Sharma, who has medically examined him, did not notice single incised wound on his person. Now, if PW-3 had been given axe blows with full force on his head, he must have sustained severe cut injuries, but the medical evidence does not support what has been stated by him. The thread bare scrutiny of the testimony of the complainant, who is also key prosecution witnesses, creates

a dent in the truthfulness of the prosecution story, as the complainant has tried to exaggerate the facts and in that process he narrated highly improbable story.

11. PW-4, Asraf Mohammad (injured), in his examination-in-chief, tried to support the prosecution story. He also deposed about the occurrence, but his testimony also suffers from contradictions and discrepancies. This witness also tried to exaggerate the facts qua the occurrence. He tried to implicate the lady accused by making improvements in his statement given to the police. He specifically deposed that he was given axe blow on his leg, whereas, PW-1, Dr. Devender Sharma, did not notice any incised wound on his leg. He could not explain the injuries sustained by the accused persons. Therefore, the version of this witness also is of no help to the prosecution case, as his testimony is marred by major contradictions and discrepancies.

12. Likewise, PW-5, Rozina, in her examination-in-chief, tried to support the prosecution story and the occurrence. She deposed that Shamshad Begum came to her house and informed that a quarrel has taken place, so she went to the shop, but she was stopped by the lady accused. As per this witness, her husband and father were raising hue and cry. This witness further deposed that when she went on the spot, Sadiq Mohammad, Gulshad and Mansab Ali were attacking the complainant party with sword and stick. Accused Sadiq Mohammad inflicted sword blow on Shabana and accused Gulshad inflicted stick blow on her back. This witness, in her cross-examination, tried to portray that she, Shabana and Parvej were given blows with sharp edged weapon, but the medical evidence is totally in contrast to what has been deposed by this witness. PW-1, Dr. Devender Sharma, only noticed lacerated wound on the persons of Shabana and Parvej Mohammad. This witness did not state in her statement given to the police that lady accused prevented her from going towards the spot, but she made improvement while deposing in the Court. She deposed that lady accused blocked her passage while she was going towards the scene of occurrence.

13. PW-6, Shabana, is also one of the key prosecution witnesses. This witness tried to support the prosecution case in her examination-in-chief. She has deposed that Shamshad told her that accused persons are giving beatings to her father-in-law and brother-in-law, so she Rozina and Shamshad were going to the spot, but they were prevented from proceeding further by the ladies. As per the version of this witness, she heard hue and cry, so she rushed to the spot and accused Sadiq attacked her with sword, but she caught the handle of the sword. She has further deposed that PW-7 (Shamshad) received a blow of sword on her hand and accused Mansab Ali inflicted injuries on the head of Shamshad. Again, if the version of PW-6 is tallied viz-a-viz the medical evidence, there is clear variance. The medical evidence does not establish that PW-7 sustained incised wound on her person. As per the medical evidence PW-7 only sustained lacerated wounds. Thus, it is safe to hold that PW-6 also tried to exaggerate the things by making improvements in her statement.

14. PW-7, Shamshad Begum (injured) stated in her examination-in-chief that she saw accused persons uprooting the boundary marks. She has further deposed that she saw the accused persons inflicting injuries on her father and brother. As per the version of this witness, accused Sarvar Hussain attacked his father and brother with sword. Accused Sarvar Hussain inflicted sword blow on the head of Ashraf. She went to the house of her father and narrated the incident, so her brother, Parvej, Sabana and Rozina went towards the place of occurrence, but their path was blocked by lady accused. When they reached the spot, they saw Ashraf Mohammad and Anwar Hussain lying injured and Shabana was also given beatings. Again, the version of this witness is belittled by the medical evidence. As per the medical evidence, injured Ashraf only sustained incised wound, so if the version of

PW-7 is to be believed then injured Ashraf must have sustained incised wound, as PW-7 clearly stated that he was given a blow of sword on his head by accused Sarvar Hussain. This witness also fails to give any plausible and acceptable explanation, how the accused persons sustained injuries on their person. Again, this witness also made improvements in her statement, which renders the prosecution case doubtful.

15. PW-8, HC Nand Lal, is a formal witness, as he only received the statement (Ex. PW-3/A) of Anwar Hussain (complainant) on 01.11.2004, whereupon FIR, Ex. PW-8/A, was registered. He has further deposed that on 05.11.2004 SI/SHO Utam Chand deposited the case property with him.

16. PW-10, Mohammad Pravej, also deposed akin to that of other alleged witnesses of the occurrence. As per this witness his sister, Shamshad Begum, came to him and told about the incident, so he went towards the shop, but he was intercepted by Hasan Bibi and other accused persons. He has further deposed that accused persons were armed with sticks. Thereafter he went towards the shop and saw accused Nazir Husain giving blows to his father. Accused Sarvar Hussain gave a blow of axe on the leg of his father. He has deposed that accused Nazir Hussain gave a sword blow on the head of his father and when he tried to rescue him, accused Gulshad gave a blow with stick. This witness, in his cross-examination, specifically deposed that he alone went to the spot. The statement of this witness is contradicted by other prosecution witnesses, as other witnesses have stated that when Shamshad told about the incident, Rozina, Shamshad and Parvej (PW-10) went to the spot, but as per this witness he alone went to the spot. His version is further contradicted by the medical evidence. PW-10 deposed that accused Sarvar Hussain inflicted axe blow on the leg of his father, but as per the medical evidence injured Ashraf Mohammad had contusion and abrasion over left leg on the dorsal with underlying fracture of tibia on its upper 1/3rd. Thus, it is not safe to rely upon the statement of this witness, as his version lack corroborative support from medical evidence.

17. After exhaustively discussing the material, which has come on record, the testimonies of all the non-official prosecution witnesses seem to be exaggerated. All the non-official prosecution witnesses tried to depict a narrative which is not so recorded in the FIR. Certainly, FIR is primary and first portrayal of crime and if the same lacks corroboration from its maker or other prosecution witnesses, then the case of the prosecution cannot be believed. In the instant case, what has been purportedly stated in the FIR does not find corroborative support from the prosecution witnesses in the Court. The prosecution witnesses seem to have overwhelmed while deposing in the Court and in an attempt to narrate altogether highly exaggerated portrayal of the incident, they improved materially. The version of the non-official prosecution witnesses are marred with contradictions and discrepancies, which go to the root of the case and makes it feeble and full of doubts. After comprehensive scrutiny of the available material, the case of the prosecution has developed two possible limbs of probabilities and none of these conclusively establish that the accused persons committed the crime. In fact both these limbs create a doubt in the mind of this Court and compel this Court to disbelieve the versions of the key prosecution witnesses. It is settled law that veracity and credibility of a witness has to be tested on the touchstone of its own weaknesses and strengths. If the prosecution witnesses try to deviate from the prosecution story by deposing an exaggerated and improved version, may be one or all of them, then there occurs a incorrigible doubt in the mind of the Court. The instant case is one of those cases where the non-official prosecution witnesses exaggerated the occurrence, but their attempt proves fatal to the prosecution case. Therefore, it is more than safe to hold that the key prosecution witnesses have tried to implicate the accused persons.

18. The Hon'ble Supreme Court in ***Dhanna vs. State of M.P., (1996) 10 SCC 79,*** has held that in an appeal against acquittal, the appellate court has to proceed more cautiously and unless there is absolute assurance of the guilt of the accused on the basis of the evidence on record, the order of acquittal is not liable to be interfered with. The apposite para of the judgment (supra) is extracted hereunder for ready reference:

> ***"11.. Though the Code does not make any distinction between an appeal from acquittal and an appeal from conviction so far as powers of the appellate Court are concerned, certain unwritten rules of adjudication have consistently been followed by Judges while dealing with appeals against acquittal. No doubt, the High Court has full power to review the evidence and to arrive at its own independent conclusion whether the appeal is against conviction or acquittal. But while dealing with an appeal against acquittal the appellate Court has to bear in mind : first, that there is a general presumption in favour of the innocence of the person accused in criminal cases and that presumption is only strengthened by the acquittal. The second is, every accused is entitled to the benefit of reasonable doubt regarding his guilt and when the trial Court acquitted him, he would retain that benefit in the appellate Court also. Thus, appellate Court in appeals against acquittals has to proceed more cautiously and only if there is absolute assurance of the guilt of the accused, upon the evidence on record, that the order of acquittal is liable to be interfered with or disturbed."***

The judgment (supra) is fully applicable to the facts of the present case. Indeed, in cases of acquittal the appellate court has to examine the material cautiously and the reversal findings are to be recorded only if the material on record unerringly and conclusively proves the guilt of the accused. However, in the case in hand, the learned Trial Court acquitted the accused persons after examining the material on record and we, after re-appreciating the evidence, find that the prosecution case is full of contradictions and discrepancies. Thus, after exhaustively scrutinizing the evidence and applying the law it is more than safe to hold that the learned Trial Court has rightly acquitted the accused persons.

19. After exhaustively discussing the testimonies of key prosecution witnesses, it is safe to hold that prosecution witnesses have not given true version about the occurrence and, in fact, they tried to exaggerate the things and in their attempt to do so, they portrayed a highly improbable story. The Hon'ble Supreme Court in ***Arun vs. State, (2008) 15 SCC 501,*** has held that if there are two reasonable views, then the view favouring the accused be adhered to. In the present case also there are two views and the available material on record compels us to tilt towards the view favouring the accused.

20. 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.

21. In ***Chandrappa vs. State of Karnataka, (2007) 4 SCC 415,*** the Hon'ble Supreme Court has culled out the following principles qua powers of the appellate Courts while dealing with an appeal against an order of acquittal:

> ***"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:***

1. ***An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.***
2. ***The Code of Criminal Procedure, 1873 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.***
3. ***Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.***
4. ***An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.***
5. ***If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial Court."***

22. In view of the settled legal position, as aforesaid, and on the basis of material, which has come on record, it is more than safe to hold that the prosecution has failed to prove the guilt of the accused persons beyond reasonable doubts and the findings of acquittal, as recorded by the learned Trial Court, need no interference, as the same are the result of appreciating the facts and law correctly and to their true perspective. Accordingly, the appeals, which lack merits, deserve dismissal and are dismissed.

23. In view of the above, the appeal, so also pending application(s), if any, stand(s) disposed of.

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

Mrs. Bahar Murtaza Fazal Ali & others ...Plaintiffs/Applicants

Versus

Rohini Wahi alias Roohani ....Defendant/Respondent

OMP Nos. 316 of 2016 and 139 of 2017 in
Civil Suit No. 4084 of 2013
Order reserved on 8th March, 2019

Date of Decision 2nd May, 2019

Code of Civil Procedure 1908– Order VI Rule 17– Amendment of pleadings- Permissibility- Plaintiffs filing suit and seeking declaration of their being the only legal representatives of "FM"- Filing application for amendment of plaint and assailing will of "FM"- Also seeking impleadement of beneficiaries under said will- However plaintiffs found having filed and withdrawn another suit at Delhi challenging said will- No leave to file fresh suit challenging taken from Court at Delhi- Amendment if allowed would change nature of suit to one to declare forgery of will- Application dismissed. (Paras 19 to 23 & 29)

Cases referred:

Ajenderaprasadji N. Pandey vs. Swami Keshavprakeshdasji N. and others, (2006)12 SCC 1
B.K.Narayna Pillai vs. Parameshwaran Pillai and another, (2000)1SCC 712
Bakhtawar Singh and another vs. Sada Kaur and another, (1996)11 SCC 167)
Baldev Singh and others vs. Manohar Singh and another, (2006)6SCC 498
Deena (dead) through LRs. vs. Bharat Singh (dead) through LRs and others, (2002)6 SCC 336
Kandapazha Nadar and others vs. Chitraganiammal and others, (2007)7 SCC 65
Nitin Gulwant Shah vs. Indian Bank and others, (2012)8 SCC 305
Peethani Suryanarayana vs. Repaka Venktata Ramana Kishore and others, (2009)11 SCC 308
Raghu Raj Singh Rousha vs. Shivam Sundaram Promoters Private Ltd. & anr, (2009)2 SCC 363
Rajkumar Gurawara (dead) through Lrs vs. S.K.Sarwagi & Company Private Limited and another, (2008)14 SCC 364
Ranen Roy vs. Prakash Mitra, (1998)9 SCC 689
State of H.P. vs. Achhru Ram (dead) through LRs, AIR 2011 HP 19
Vishwambhar and others vs. Laxminarayan (dead) through LRs, (2001)6 SCC 163

For the Plaintiffs/Applicants:	Ms. Anu Tuli, Advocate.
For the Defendant/Non-applicant	Mr. Rajnish Maniktala,Sr. Advocate with Mr. Naresh Verma, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

After hearing the counsel for parties and going through the record, undisputed facts emerging from pleadings of plaintiffs are that subject matter of the main suit is property situated in Zen Tea Estate, Gopalpur, Tehsil Palampur, District Kangra H.P. described in plaint, which was owned and possessed by late Shri Faiz Murtaza Ali, who has expired on 20.6.2013, plaintiffs being mother, wife and daughter, are asserting their rights on the said property as only legal heirs of late Faiz Murtaza Ali, whereas defendant is asserting her right on the property claiming herself also second wife of late Faiz Murtaza Ali having been given the property in dispute to her as deferred Mehar/Dower payable immediately after the death of Faiz Murtaza Ali and also devolved upon her by virtue of Will dated 14.4.2013 allegedly executed by Faiz Murtaza Ali during his life time.

2. As stated in plaint, Will dated 14.4.2013 came into the knowledge of plaintiffs on 25.7.2013, after 35 days of death of Faiz Murtaza Ali and on 2nd August, 2013

defendant had entered into 'Bahar Villa' (part of disputed property) in absence of plaintiffs, leading them to file an on-line complaint to the police as well as the Chief Minister of State and also filing a complaint with SSP and Deputy Commissioner, Dharamshala on 7th August, 2013 whereupon the Deputy Commissioner had directed the SDM Palampur to use the police force to evict the trespassers and to hand over the possession to the plaintiffs, but before the implementation of the said order, defendant obtained an interim injunction on 8th August, 2013 by filing civil suit No. 420 of 2013 in the Civil Court at Palampur, on the basis of Will dated 14.4.2013, claiming herself to be second wife of late Shri Faiz Murtaza Ali and thereafter defendant also applied for registration of Will dated 14.4.2013 in the office of Registrar/Tehsildar, Palampur. On 27th August, 2013, plaintiffs also received another Will dated 19th June, 2013 claimed to be executed by Faiz Murtaza Ali and thereafter, as the property situated at Delhi was also subject matter of these Wills, in September 2013, plaintiffs filed a suit being CS(OS) No. 1815 of 2013 in the Delhi High Court for declaring Wills dated 14.4.2013 and 19.6.2013 null and void being forged, fabricated, manufactured and concocted wherein order to maintain status quo with respect to the properties under the Wills was passed.

3. In the present suit, issues were framed on 14.7.2016 wherein on the basis of defence taken by the defendant in the written statement, issue related to Will dated 14.4.2013 was also framed as issue No. 10 as under:-

"10. Whether deceased Shri Faiz Murtaza Ali had executed the valid Will dated 14.4.2013? ...OPD"

4. Whereafter on 8.8.2016 plaintiffs have moved present application under Order 6 Rule 17 Civil Procedure Code (in short 'CPC') bearing OMP No. 316 of 2016 seeking amendment of plaint for incorporating one more prayer in the suit for declaring Will dated 14.4.2013 null and void and also for amending the pleadings in plaint with further averments regarding the said Will and also for amendment of memo of parties by adding two new defendants being beneficiaries of Will dated 14.4.2013.

5. The application has been opposed by defendant on the ground that addition of new defendants is not governed by Order 6 Rule 17 CPC but by provisions of Order 1 Rule 10 CPC and that the plaintiffs, at the time of filing of suit in December 2013, have already made averments with respect to Will dated 14.4.2013 in paragraphs 7, 13 and 20 and in the written statement filed on 12.3.2014, defendant has claimed her right on the basis of said Will specifically in paragraph 6 of the preliminary submissions of written statement, which was replied in detail in replication filed on 28.5.2014, in its paragraph 6 of the reply to preliminary submissions by plaintiffs and thus from the aforesaid pleadings, respective stand of the parties is clear since 2013-14 and from very beginning plaintiffs are neither accepting execution of Will dated 14.4.2013 much less its validity nor that defendant was legally wedded wife of Faiz Murtaza Ali and that suit property was given in 'Dower' whereas defence/case of defendant, since beginning is that suit property has devolved upon her being Mehar/Dower and she has inherited it on account of Will dated 14.4.2013 which has already been challenged by plaintiffs in the civil suit filed in the Court at Delhi and therefore, it is not permissible for plaintiffs to invoke the jurisdiction of two Courts for trial of the issue with regard to validity of Will dated 14.4.2013.

6. Thereafter, an application OMP No. 114 of 2017 was filed by plaintiffs for placing on record the order dated 22.12.2016 passed by learned Additional District Judge, 02, South Saket-New Delhi in Civil Suit (OS) No. 1815 of 2013, whereby the said suit, filed by plaintiffs in the Court at Delhi challenging the validity of Will dated 14.4.2013, has been

disposed of as withdrawn after recording the statement of learned counsel for the plaintiffs and plaintiff No. 2 Smt. Sehnaj Ali.

7. On 18.4.2017 plaintiffs have filed a separate application under Order 1 Rule 10 CPC bearing OMP No 139 of 2017 for addition of defendants No. 2 and 3 (wrongly mentioned in cause title of this application as defendants No. 2 to 6) detailed in application stating them to be beneficiaries/persons interested in and responsible for forging the Will dated 14.4.2013.

8. In reply to this application, defendant has opposed this application also on the ground that after unconditional withdrawal of the civil suit filed in Delhi Court without any liberty to file it on the same cause of action, wherein validity of Will dated 14.4.2013 and another Will dated 19.6.2013 was questioned, the plaintiffs are precluded from instituting any fresh suit in respect of said subject matter in view of provisions of Order 23 Rule 1(4) CPC and further that onus of issue pertaining to proof of Will is upon the defendant being propounder of the Will.

9. Learned counsel for the plaintiffs has placed reliance upon pronouncements of the Apex Court in **B.K.Narayna Pillai vs. Parameshwaran Pillai and another** reported in **(2000)1SCC 712, Baldev Singh and others vs. Manohar Singh and another** reported in **(2006)6SCC 498 and Peethani Suryanarayana vs Repaka Venktata Ramana Kishore and others** reported in **(2009)11 SCC 308** for canvassing to allow the applications, wherein it is observed that in general where the other party can be compensated, a liberal approach for allowing the amendment should be adopted, and for rejecting of amendment sought, mere delay in filing the application is not a valid ground as technicalities of law should not be permitted to hamper the adjudication of justice, however with rider that the application must be bonafide, not causing injustice to other party and not affecting the right already accrued to the defendant. In these decisions, it is also mandated by the Apex Court that the Court has been conferred with wide power and unfettered discretion to allow the amendment at any stage for the ends of justice, where the amendment is necessary to decide the real dispute between the parties with further rider that party seeking the amendment, after commencement of trial, should be able to satisfy the Court regarding the due diligence.

10. Learned counsel for the defendant has placed reliance upon **Ajenderaprasadji N. Pandey vs. Swami Keshavprakeshdasji N. and others** reported in **(2006)12 SCC 1, Rajkumar Gurawara (dead) through Lrs vs. S.K.Sarwagi & Company Private Limited and another** reported in **(2008)14 SCC 364,** and **Raghu Raj Singh Rousha vs. Shivam Sundaram Promoters Private Ltd. and another** reported in **(2009)2 SCC 363** wherein it is held by the Apex Court that proviso to Order 6 Rule 17 CPC has been couched in the mandatory form where the applicant is not able to establish that despite exercise of due diligence, the matter could not be raised, the amendment should not be allowed as the exercise of due diligence is a condition precedent for amendment after commencement of trial. Putting further reliance on ***Vishwambhar and others vs. Laxminarayan (dead) through LRs*** reported in ***(2001)6 SCC 163*** it is contended that allowing the amendment in prayer as sought in the present case would amount to allow the filing of suit by plaintiffs seeking declaration about validity of Will dated 14.4.2013 which would be a time barred suit as the limitation for assailing the validity of Will has expired on 25.7.2016, more particularly, when allowing the amendment sought for, would change the nature of suit in its entirety.

11. In support of the plea of defendant that in view of provisions of Order 23 Rule 1(4) CPC amendment sought is liable to be rejected, reliance has been placed on **Ranen Roy vs. Prakash Mitra** reported in **(1998)9 SCC 689, Nitin Gulwant Shah vs. Indian**

Bank and others reported in **(2012)8 SCC 305** and **State of H.P. vs. Achhru Ram (dead) through LRs** reported in **AIR 2011 HP 19,** wherein it is held that if the plaintiff either abandons any suit or part of claim or withdraw from the suit or part of claim without seeking permission/liberty to institute fresh suit in the same subject matter, he would be precluded from instituting any fresh suit.

12. Undoubtedly, for allowing the amendment at any stage of suit, if the amendment sought is necessary for adjudication of real dispute between the parties, a liberal approach should be adopted for ends of justice ignoring the technicalities of law, however, but subject to certain limitations as enumerated verdicts of the Apex Court referred supra including that in case after allowing the amendment nature of suit is going to be changed in such a manner that it would amount to allow the filing of a civil suit barred under law.

13. In the present case, for the reasons assigned hereinafter, I am of the considered view that the amendment sought by the plaintiffs is not permissible.

14. Plaintiff is seeking amendment to allow the addition of a prayer for declaring the Will dated 14.4.2013 as null and void. Will has been alleged to be executed on 14.4.2013 by Faiz Murtaza Ali who expired on 20.6.2013 and it is an admitted case of plaintiffs that this Will came in their knowledge after 35 days of death of Faiz Murtza Ali i.e. on 25.7.2013.

15. Proposed amendment has been sought for assailing the validity of Will in question on the ground that this document has been forged and fabricated by the defendant. The Will, undoubtedly, is an instrument. Article 59 in Part IV of the First Division of Schedule to the Limitation Act provides three years' limitation for filing a suit to cancel or set aside the instrument from the date when the facts entitling the plaintiff to have the instrument cancelled or set aside, first become known to him.

16. Article 56, in Part III, of the First Division of Schedule to the Limitation Act, 1963 provides the limitation period of three years to declare the forgery of an instrument issued or registered from the date of knowledge of issue or registration of the said instrument.

17. Article 58 in Part III provides three years' limitation to obtain any other declaration for filing suits relating to the declaration from the date when the right to sue first accrues.

18. In the present case, undoubtedly, the Will in question is an unregistered document and therefore, there is no question of cancelling or setting aside the said instrument and thus Article 59 may not be applicable. Similarly, the unregistered Will cannot be said to be an instrument issued or registered as it is not a document issued or registered for its nature. Therefore, Article 56 of the Limitation Act is also not applicable. In my opinion, determination of limitation period in the present case will be governed by Article 58 wherein limitation shall start to run from the date when the right to sue first accrues meaning thereby that the limitation period has to be counted from 25.7.2013 the date when claim of execution of Will came in the knowledge of plaintiffs for the first time and three years from the said date shall be over on 24.7.2016. Therefore, limitation available to the plaintiffs for seeking declaration about validity of Will in question was upto 24.7.2016.

19. Section 3 of Limitation Act, mandates an embargo on the Court to entertain a suit which is barred by limitation irrespective of the fact that ground for limitation has been set up as a defence or not. Where only on the basis of pleading and material filed by plaintiff, but without considering material and pleading of defendant, it can be ascertained

in definite terms that suit is time barred, Court has not to wait for conclusion of trial after framing issue in this regard, but suit can be rejected at threshold as barred by limitation. In the present case, the original suit has been filed for permanent and mandatory injunction and for declaration that plaintiffs only are legal heirs of deceased Faiz Murtaza Ali. By way of amendment sought, plaintiffs are intending to assail the Will dated 14.4.2013. In case amendment is allowed, it will change the nature of suit to a suit to declare the forgery of Will, and for the purpose of determination the question of limitation for filing such suit, date of filing the suit would be the date of allowing the amendment. Application for amendment has been filed on 8.8.2016, and amendment has not been allowed yet, whereas the limitation period for assailing the Will dated 14.4.2013 had expired on 25.7.2016. When Will was brought in the notice of plaintiff by Advocate and even if, limitation is to be considered from date of assertion of right by defendant on the basis of Will, then also defendant asserted her right on the property on 2.8.2013 and obtained interim injunction from Civil Court on 8.8.2013 and in that eventuality also, limitation period has expired on 1.8.2013 or at the post on 7.8.2013. Date of filing of application for amendment i.e. 8.8.2016 is also beyond limitation period and therefore, allowing the amendment would amount to permitting a time barred suit. For this reason also, the amendment sought is not permissible.

20. No doubt, plaintiffs had filed the suit CS(OS) No. 1815 of 2013 assailing the said will at Delhi within limitation period, but the said suit has been withdrawn by plaintiffs on 22.12.2016. It is also undisputed fact that Will dated 14.4.2013 deals with three properties situated in jurisdiction of three different High Courts i.e. High Court of Himachal Pradesh, Delhi High Court and Patna High Court and in view of provisions of Section 17 of CPC the plaintiffs were at liberty to file the suit to obtain relief respecting to the property involved in the Will in any of three High Courts and plaintiffs had chosen to file the suit in the jurisdiction of Delhi High Court which was permissible under law. Therefore, it cannot be said that plaintiffs were pursuing fresh cause in a Court having no jurisdiction to adjudicate the same or the Court where suit was filed was unable to entertain the suit for any other cause of same nature and therefore, the plaintiffs are not entitled for exclusion of time spent in adjudicating the matter at Delhi. Therefore, benefit of Section 14 of the Indian Evidence Act is also not available to the plaintiffs for calculating the limitation period for assailing the validity of Will in the present suit. I draw support from the pronouncements of the Apex Court in cases ***Bakhtawar Singh and another vs. Sada Kaur and another*** reported in ***(1996)11 SCC 167)*** and ***Deena (dead) through LRs. vs. Bharat Singh (dead) through LRs and others*** reported in ***(2002)6 SCC 336.***

21. Even if it is considered that prayer for declaration that plaintiffs are only legal heirs of deceased Faiz Murtaza Ali also means that plaintiffs are entitled for assailing the Will dated 14.4.3013 being necessary for adjudicating the dispute between the parties and that it is not amounting to be changing the nature of original suit but can be considered to be inclusive in the prayer already made in suit and for the purpose of counting limitation date of filing original suit will be relevant, then also for the provisions of Order 23 Rule 1(4) CPC, amendment is not permissible as civil suit bearing No, CS(OS) No. 1815 of 2013 filed by plaintiffs on the same subject matter was withdrawn by plaintiffs without permission of the Court to withdraw the suit with liberty, to institute a fresh suit in respect of the subject matter of the said suit and therefore, plaintiffs are precluded from instituting any fresh suit in respect of same subject matter i.e. assailing the Will dated 14.4.2013.

22. The suit can be instituted after expiry of prescribed period of limitation with exemption from the limitation law under Order 7 Rule 6 CPC, which provides that on showing the ground in the plaint for exemption from law of limitation, the suit can be

instituted after the expiration of the period prescribed in law of limitation, further provides that the Court may permit the plaintiff to claim exemption from the law of limitation on any ground not set out in the plaint if such ground is not inconsistent with the ground set out in plaint. In the application for amendment neither such ground has been taken nor any such exemption has been sought. In replication also, no exemption from the law of limitation has been sought. It is stated in replication that there cannot be two trials of a document i.e. Will dated 14.4.2013 and therefore, plaintiffs have withdrawn civil suit i.e. CS No. 1815 of 2013 (re-numbered as CS No. 5872 of 2016 before the District Court, Saket, Delhi) and pursuing the present suit only for trial of said Will. Even if it is considered to be an explanation for seeking the amendment in the present case beyond the period prescribed for asserting the Will, the plaintiffs cannot be granted exemption from limitation law for the reasons; (a) that there is no such prayer and pleading on behalf of the plaintiffs as required under Order 7 Rule 6 CPC; (b) for the legal bar under the provisions of Order 23 Rule 1(4) CPC, the plaintiffs are precluded from filing the fresh suit as discussed herein above.

23. The Apex Court in ***Kandapazha Nadar and others vs. Chitraganiammal and others*** reported in ***(2007)7 SCC 65*** after considering its earlier pronouncements has held that when the Court allows the suit to be withdrawn without liberty to file the fresh suit, without any adjudication, such order allowing withdrawal cannot constitute a decree and it cannot debar the plaintiffs from taking the same defence in the second round of litigation which was taken in the plaint of first suit as the order of Court allowing such withdrawal does not constitute a decree under Section 2(2) of CPC and therefore, withdrawal of suit without liberty to file fresh suit will preclude the plaintiffs from filing fresh suit on the same subject matter, but not from raising the plea in defence to the case set up by the defendant.

24. In view of above settled position of law, though allowing the amendment amounting to institution of second suit on the same subject matter is barred under Order 23 Rule 1(4) CPC is not permissible under law, however, at the same time, withdrawal of civil suit CS(OS) No. 1815 of 2013, without liberty to file fresh suit, would not amount to be resjudicata against the plaintiffs for the reason that issue involved in suit filed at Delhi, which is directly and substantially an issue in the present case, has not been tried and finally decided by the Court at Delhi or any other competent Court and therefore, plaintiffs are not dis-entitled or barred from contesting the validity of Will dated 14.4.2013 regarding which specific issue No.10, as referred supra, has been framed in the present suit by putting the onus to prove the validity of Will on the defendant. The plaintiffs have every right to lead evidence in rebuttal in accordance with law to the evidence led by the defendant on this issue.

25. It is well settled that onus to prove the Will is on its propounder. One of the grounds taken by defendant for asserting her right on the property is execution of Will dated 14.4.2013 by late Faiz Murtaza Ali. Therefore, the issue No. 10 has been rightly framed by putting the onus on the defendant to prove the validity of Will and plaintiffs are legally entitled to prove contrary in the rebuttal to the claim of defendant.

26. It is not a case where the plaintiffs were not having the knowledge of execution of Will in question. There are detailed averments in the plaint with respect to knowledge of the said Will and also disputing its genuineness and validity. But the plaintiffs have chosen to assail the said Will in the civil suit filed at Delhi but not in the present suit. Now, for withdrawing the suit at Delhi without liberty to file fresh, there is a legal bar on the plaintiffs to assail the validity of said Will by way of proposed amendment as it would amount to permit filing of a suit which is barred under law. However the plaintiffs have every right to dispute the genuineness and validity of the Will in question during the

adjudication of issue No. 10 framed in the present suit and for that purpose, the plaintiffs will also have the opportunity to lead evidence in support of their claim already set up in the plaint with regard to validity and genuineness of Will and also pleaded in the replication in response to claim set up by defendant on the basis of the said Will.

27. The defendant has contended that there is no averment in application that plaintiffs were not able to incorporate the pleadings in plaint sought to be incorporated now by way of present application despite due diligence on their part which is condemn precedent for seeking amendment after commencement of trial as provided in proviso of Order 6 Rule 17 CPC with further submission that as trial has commenced on framing of issues on 14.7.2016, the application is liable to be dismissed on this count only. As amendment has not been found to be permissible being barred by limitation and also under Order 23 Rule 1(4) CPC, there is no necessity to return the findings on this plea.

28. Impleadment of proposed defendants No. 2 and 3 has been sought on the basis of fact that they are beneficiaries of Will dated 14.4.2013 and as the prayer proposed to be added is for assailing the validity of the said Will and therefore, they are necessary party being beneficiaries of the said Will. As prayer for amendment has been declined, prayer for impleading them as defendants is also liable to be dismissed more particularly there is nothing on record to establish their any kind of right, title or interest in the suit property involved in the present suit and there is no relief sought against them.

29. There are sufficient averments already in the original plaint disputing validity of Will dated 14.4.2013 and claim of the defendant. Nothing has been pointed in proposed amendments in plaint except proposed prayer clause, which can be said as value addition in pleadings rather it is reassertion of earlier pleading either in changed or the same phraseology and this addition thereof in plaint is useless. So far addition of prayer with regard to validity of Will dated 14.4.3013 is concerned, issue No. 10 referred supra has already been framed and it would hardly make any difference that evidence at first instance is led by defendant or the plaintiff. Therefore, I also find that material issues in dispute between the parties can be adjudicated completely and finally without incorporation of proposed amendment in the plaint and without impleading proposed defendants No. 2 and 3.

30. In view of above discussion, these applications, filed by plaintiffs, are dismissed.

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

Shri Pradhan Tejta, through his LR Smt. Rita Tejta ....Petitioner

Versus

Suresh Vishindas Wadhwa and others. ....Respondents.

CMPMO No.158 of 2019
Decided on : 2.5.2019

Code of Civil Procedure, 1908 - Order VI Rule 17– Amendment of pleadings- Stage- Rent petition at final stage of arguments- Issues arising from pleadings stood framed by Rent Controller- Sufficient opportunities granted to tenant to cross-examine witnesses of landlord- Belated application seeking amendments of written statement held to be an abuse

of process of Court- Petition challenging order of Rent Controller dismissing such application, dismissed- Order upheld. (Para 3)

For the Petitioner:	Mr. Naresh Sharma, Advocate.
For the Respondents:	Mr. Ajay Kumar, Sr. Advocate with ms. Rohini Karol, Advocate, for respondent No.1/caveator.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

Caveat No. 112 of 2019

Disposed of.

CMPMO No. 158 of 2019

The instant petition is directed against the dis-affirmative findings recorded by the learned Rent Controller, Shimla, upon, an application cast under the provisions of Order 6 Rule 17 readwith Section 151 of Code of Civil Procedure, wherethrough leave to add hence the preliminary objection No.5, was strived, to be, therefrom obtained by the petitioner herein.

2. The petitioner herein is, respondent No.1(a) in Rent Petition No. 89-2 of 2011, and, her eviction from the demised premises is strived, on, anvil of her subletting the afore premises to respondent No.1, one Shri Ajit Singh (a) without an explicit written consent of the landlord, and (b) on anvil, of, non-payment of arrears of rent.

3. The learned counsel for respondent No.1, states at bar that, upon, the afore initial strived ground of eviction, of petitioner, from the demised premises, an apposite issue has been struck , (i) and, he further submits that both the contesting litigants have adduced their respective evidence thereon, (ii) besides, he also submits that the counsel for the petitioner herein has availed the fullest opportunities, to cross-examine the land-lord's evidence, vis-a-vis, the petitioner herein without the express consent of the landlord, rather inducting one Ajit Singh, as, a sub-tenant in the demised premises. Since, he further submits that the afore Rent petition, has extantly arrived up to, the stage of arguments, and, arguments upon the afore Rent Petition stand already addressed in August, 2015, and, (ii) thereafter miscellaneous applications were preferred before the learned Rent Controller, and, one of the adversarial order(s) made thereon, was assailed before this Court, whereon, a decision also adverse to the petitioner was recorded, (iv) thereupon it appears that the belated endeavor of the petitioner herein, to beget, the afore amendment, is, a gross abuse of process of the Court. The predominant reason for forming the afore conclusion is based, upon the factum qua with the entire evidence, on the relevant issue being adduced, and, when the petitioner herein, has availed the fullest opportunities to cross-examine, the landlords evidence, upon, the afore issue, (v) thereupon it is now only for the Rent Controller to evaluate the afore evidence, dehors, the afore strived amendment, given the afore endevour, being naturally an attempt to scuttle the afore completed exercise. The learned Rent Controller is directed to decide the afore rent petition within a period of three months.

In view of the above, the present petition stands dismissed alongwith all pending applications.

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

Cr. Appeal No. 151 of 2012 alongwith
Criminal Appeal 313 of 2012
Reserved on: 28.02.2019
Decided on: 2.5.2019

1. Cr. Appeal No. 151 of 2012:

Sadiq Mohammad & another .....Appellants.

Versus

Parvej Mohammad .....Respondents.

2. Cr. Appeal No. 313 of 2012:

State of Himachal Pradesh .....Appellants.

Versus

Parvej Mohammad & another. .....Respondents.

Indian Penal Code, 1860 - Sections 147, 302, 307. 325, 506 read with 149 – **Arms Act, 1959** – Section 25- Rioting, murder, attempt to murder, criminal intimidation etc.- Proof- Trial Court acquitting all accused of offences they were charged with- Appeal by de-facto complainant- Held, prosecution case portrayed as if complainant tried to remove poles erected by accused party after demarcation was cancelled by Kanungo- And as if accused were allegedly agressors- Evidence of Patwari however showing that demarcation was never cancelled by Kanungo- And both parties had admitted its correctness- Accused also received injuries on their bodies- No explanation on record as how accused had received those injuries- Evidence also full of contradictions and discrepancies- Prosecution case doubtful- Appeal dismissed- Acquittal upheld. (Paras 13 to19, 22 & 26)

Cases referred:

Arun vs. State, (2008) 15 SCC 501
Chandrappa vs. State of Karnataka, (2007) 4 SCC 415
Dhanna vs. State of M.P., (1996) 10 SCC 79
State of Karnataka vs. Shrisail Sateeppa Karkalamethi and another, AIR 1994 SC 1244
T. Subramanian vs. State of Tamil Nadu, (2006) 1 SCC 401

Cr. Appeal No. 151 of 2012:

For the appellant: Mr. Sanjeev Kuthiala, Sr. Advocate, with Ms. Kamlesh Kumari, Advocate.

For respondents No. 1 to 10: Mr. N.K. Thakur, Sr. Advocate, with Mr. Divya Raj Singh, Advocate.

For respondent No. 11/State: Mr. Vikas Rathore, Mr. Narinder Guleria, Additional Advocates General, with Mr. J.S. Guleria and Mr. Kunal Thakur, Deputy Advocates General and Mr. Sunny Dhatwalia, Assistant Advocate General.

Cr. Appeal No. 313 of 2012:

For the appellant/State: Mr. Vikas Rathore, Mr. Narinder Guleria, Additional Advocates General, with Mr. J.S. Guleria and Mr. Kunal Thakur, Deputy Advocates General and Mr. Sunny Dhatwalia, Assistant Advocate General.

For the respondents: Mr. N.K. Thakur, Sr. Advocate, with Mr. Divya Raj Singh, Advocate, for the respondents.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeals, that is, Criminal Appeal No. 151 of 2012 maintained by Shri Sadiq Mohammad and others and Criminal Appeal No. 313 of 2012 maintained by the State of Himachal Pradesh, are preferred against impugned judgment dated 31.12.2011, passed by learned Additional Sessions Judge, Mandi, District Mandi, H.P., in Sessions Trial No. 6 of 2005, whereby the respondents/accused persons (hereinafter referred to as "the accused persons") were acquitted for the commission of the offence punishable under Section 302, 307, 147, 148, 149, 325, 324, 323 and 506 of Indian Penal Code, 1860 (hereinafter referred to as "IPC") and Section 25 of Indian Arms Act.

2. The facts giving rise to the present case, as per the prosecution story, can tersely be capsulated as under:

On 01.11.2004, at about 07:30 a.m., Sadiq Mohammad (complainant and appellant in Criminal Appeal No. 151 of 2012) was in his home and Sarwar Hussain, Talib Hussain and deceased Nazir Ali were busy cultivating the fields. Sadiq Mohammad heard some noise, so he went ahead of the courtyard and saw Ashraf Mohammad, Anwar Hussain, Parvej Mohammad, Guddi, wife of Parvej Mohammad and Anwar Hussain armed with axe, sword, stick, *gandasa* etc. and they were beating Sarwar Hussain, Talib Hussain (appellants in Criminal Appeal No. 151 of 2012) and Nazir Hussain (the deceased). Accused Parvej Mohammad inflicted injuries on the person of the deceased with an axe and Sadiq Mohammad also suffered injury on his head. As per the prosecution story, many people gathered on the spot and the accused persons also threatened to kill the complainant party. Subsequently, injured persons were shifted to hospital and intimation qua the occurrence was given to the police. Police recorded the statement of Sadiq Mohammad, which was sent to police station, whereupon FIR was registered against the accused persons. During the medical treatment, the deceased succumbed to his injuries, so inquest on the corpse was conducted. The corpse was also photographed. Dr. Jiva Nand conducted postmortem of the deceased and found that the injuries sustained by him could be caused by sharp edged weapon. Injured Sarvar Hussain and Talib Hussain were medically examined in Zonal Hospital, Mandi. Injuries sustained by injured Sarvar Hussain and Talib Hussain were found dangerous to life. Medical examination of injured Sadiq Mohammad was also conducted. Police went on the spot, prepared the spot map and recovered two bamboo sticks, a stick of *marinu*, blood stained earth lying on the spot and grass stained with blood. A sheath of sword, which was stained with blood and earth, was also taken into possession from the spot. Blood, which was lying in the *veranda* at different places, was preserved. The spot maps of the recovery of the above articles were prepared. Sadiq Mohammad produced a sword, which was without sheath, and an axe. Police conducted the sealing of the recovered articles and sample seals were taken on a separate piece of cloth. Sketches of sword and axe were prepared and photographs of the spot were clicked. Sarvar Hussain produced a vest, shirt and pants, which were sealed and taken into possession. One Mohammad Gulshad also produced a shirt, which was also sealed and taken into possession. Injured Talib Hussain produced a shirt, a *payjama* and a vest, which were taken into possession by the police. The spot was got demarcated and demarcation report was obtained. Shri Balkrishan, Patwari, visited the spot and issued *tatima* and *jamabandi*.

The scientific samples were sent to forensic analysis and report in this regard was obtained. After completion of investigation, *challan* was presented in the Court.

3. The prosecution, in order to prove its case, examined as many as fifteen witnesses. Statements of the accused persons were recorded under Section 313 Cr.P.C., wherein they pleaded not guilty. In defence, the accused persons examined one witness, i.e., Dr. Devender Sharma.

4. The learned Trial Court, vide impugned judgment dated 31.12.2011, acquitted the accused persons for the commission of the offence punishable under Section 302, 307, 147, 148, 149, 325, 324, 323 and 506 IPC.

5. The learned Additional Advocate General has argued that the learned Trial Court has wrongly appreciated the facts and law and the impugned judgment is based on surmises and conjectures, thus the same is liable to be set aside. He has further argued that there is ample material on record which clearly shows that the accused persons were aggressors and committed the crime. He has argued that the learned Trial Court did not appreciate the evidence in its right and true perspective and the accused persons were wrongly acquitted. The evidence, which has come on record, is sufficient to convict the accused persons. He has argued that the accused persons be convicted by setting aside the judgment of the learned Trial Court. Conversely, the learned Senior Counsel for the accused persons has argued that nothing has come on record, which could establish the guilt of the accused persons beyond the shadow of reasonable doubt. He has further argued that the learned Trial Court has correctly appreciated the material, which has come on record, and the judgment of acquittal, rendered by the learned Trail Court, is the result of appreciating the facts and law to their right and true perspective. He has argued that the judgment of acquittal needs no interference, so the appeal be dismissed.

6. On the other hand, the learned counsel for the appellants (in criminal appeal No. 151 of 2012) has argued that the learned Trial Court did not appreciate the material, which has come on record, properly and the judgment of acquittal is the result of wrong appreciation of evidence. He has further argued that the learned Trial Court erroneously dealt with the available material and based the impugned judgment on surmises and conjectures. He has argued that after re-appreciating the entire material, the judgment of acquittal, rendered by the learned Trial Court, be set aside, the appeal be allowed and the accused persons be convicted for the offences they are charged with.

7. In rebuttal, the learned Additional Advocate General controverted the contentions raised by the learned Senior Counsel. He has reiterated his arguments and prayed that after re-appreciating the material, the impugned judgment be set aside and the accused persons be convicted.

8. In order to appreciate the rival contentions of the parties, we have gone through the record carefully.

9. The first and important limb of the prosecution case mainly hinges upon the testimonies of PWs 1 to 5 and on the medical evidence. The role of official prosecution witnesses is not of much significance, as they investigated the matter after the alleged occurrence. The investigation is second limb of the prosecution case and in order to prove the occurrence and involvement of the accused persons in the occurrence, the first limb is to be examined and only if the first limb is proved then there is relevance to examine the second limb of evidence, which is in the shape of official prosecution witnesses. Therefore, firstly, only the testimonies of key prosecution witnesses are being examined.

10. In the instant case medical evidence is very important, as, as per the prosecution story the accused persons inflicted injuries with sword and axe. Dr. Jiva Nand, the then Medical Officer Zonal Hospital, Mandi, was examined as PW-9. As per this witness, he conducted postmortem examined of the deceased. He found the following injuries on the person of the deceased:

> ***"Injuries on body***
>
> ***1. Roughly triangular incised looking lacerated wound on forehead in middle near hair margin of size 4x1 cm in length 1 cm wide at centre and both deep with tapering ends both side with lot of dry blood over and around the wound.***
>
> ***2. Choped lacerated wound on palm of right hand between thumb and index finger towards wrist of size 8 cm in length and 2 cm wide cutting underlying muscles and bonds into pieces with lot of dry blood over and around the wound.***
>
> ***3. Incised lacerated wound on dorsum of right hand cutting over clothes present on medial and with contusion of length 5 cm in a lateral aspect with dry blood over and around the wound.***
>
> ***4. Multiple superficial in lacerations on dorsum of both hands and fingers with dry blood over them which were also present on the right shin and left elbow posterior aspect.***
>
> ***5. There was penetrating stab wound with clear cut margin with some superficial laceration nearly triangular lying obliquently on the right side of the chest over 7th and 8th rib along anterior auxiliary line 21 cm below anterior auxiliary fold and 17 cm from medistinal and at the level of xiphisternum of size 3 cm in length 1 cm wide at the centre with clear cut margin with dry blood over and around the wound causing cutting of 8th rib upper ¾ near costochondral junction, then entering plural cavity right causing superficial laceration of anterior surface of lower lobe of right lung, then piercing the diaphragm causing penetrating laceration of right lobe of liver from anterior lateral surface to inferior-medial surface of right lobe upto near the gall bladder with lot of fluid blood in right plural cavity and whole pariteneal cavity.***
>
> ***Cranium and Spiral Cord***
>
> ***Scalp hair were soiled with blood and dust. There was triangular lacerated wound as already described. Skull bone was normal. Brain tissue and membrane were normal but pale whilte. One superficial laceration on medial and of left upper eye lib near eye brow 1x1 cm inside with fresh bleeding.***
>
> ***Thorax***
>
> ***There was cutting of 8th rib on upper ¾ area near costochondral junction on right side. Otherwise normal wall.***
>
> ***Right pleurae torned and contained about 800 to 100 cm of blood. Left pleurae normal pale while, empty. Mucosa of both larynx and trashes were pale white.***
>
> ***Right lung showed superficial laceration on anterior and superior surface on right lobe of the lung with big contusion.***

Left lung was normal. Pale white. Pericardium was pale white. All the chambers of heart wee empty. Wall pale white. Coronaries were empty.

Abdomen

Walls pale white. Peritoneum of full of fluid blood about two litres of blood.

Stomach wall pale white normal, stomach contained some undigested food rice and dal without any peculiar smell.

Liver perforating injury in right lobe of liber from anterior superior surface to inferior medial side of right lobe causing laceration of liver tissue.

Spleen and kidneys were pale white and normal.

Bladder empty."

This witness has further opined that the deceased died due to combined effect of stab injury, hemorrhage, shock and other injuries to the body parts.

11. PW-10, Dr. Devinder Sharma, the then Medical Officer, CHC Ratti, medically examined Nazir Hussain (the deceased), Sarvar Hussain, Talib Hussain and Sadiq Mohammad. As per this witness, Nazir Hussain was unconscious, gasping, pupils B/C dilated, cold claming extremities. As per this witness the deceased was pulse-less and B.P. was unrecoverable and whole body was soiled with fresh blood. This witness also noticed injuries on the person of the deceased. He opined some of the injuries dangerous to life. He has further deposed that weapon used was sharp in nature. This witness also medically examined Talib Hussain and noticed injuries on his person. As per this witness, the injuries sustained by Talib Hussain were caused by sharp edged weapon. He referred the patient to Zonal Hospital, Mandi, for further treatment. He issued Medico Legal Certificate, Ex. PW-10/B, qua patient Talib Hussain. This witness also examined Sarvar Hussain and noticed injuries on her person. He referred the patient to Zonal Hospital, Mandi, for further treatment. He issued Medical Legal Certificate, Ex. PW-10/F, qua Sarvar Hussain.

12. PW-12, Dr. Rakesh Ranjan, the then Senior Resident Neuro Surgery, P.G.I., Chandigarh, deposed that under his supervision CT scan (computed tomography scan) was conducted. As per this witness there was a compound depressed fracture with pnaucephalous. He has further deposed that the injury was grievous in nature. He issued report, Ex. PW-12/C.

13. In the instant case, the statement of PW-1, Sadiq Mohammad is very important. This witness, in his examination-in-chief, tried to support the prosecution story, but he, in his cross-examination, has deposed that he could not tell as to which accused was holding which type of weapon. He has deposed that there were more than one sword and axe. He feigned ignorance that on 29.10.2004 Kanungo came on the spot and demarcated the disputed land. He also feigned ignorance that pillars were fixed by Kanungo and statements of Ashraf Mohammad, Talib Mohammad and other villagers were recorded. He was not aware qua pendency of the civil litigation *inter se* the parties. Contrastingly, the deposition of PW-2, Stpal Kaur, is different from that of PW-1. PW-2 specifically deposed that on her complaint Kanungo conducted the demarcation. This witness, in her cross-examination, has deposed that three sons of Nazir Hussain (deceased), including the complainant were present on the spot. This witness was not declared hostile, so there is no reason to disbelieve her version. Now, if the testimonies of PW-1 and PW-2 are analyzed in juxtaposition, the deposition of PW-1 can be said to be tainted with discrepancies and

condictions, as he tried to conceal the material facts and made a false statement before the Court. Thus, the statement of PW-1 is not believable.

14. PW-3, Mansab Ali, deposed that on 23.10.2004 police registered a case against Ashraf and others for obstructing the road. As per this witness, on 29.10.2004 the spot was demarcated and stones were affixed. This witness, in his cross-examination, has deposed that poles were affixed on 29.10.2004 by them on their land, but he was not aware by whom, they were affixed. He has further deposed that they uprooted the poles as Kanungo told them that the poles could not be affixed as there is status quo order of the Court. As per this witness, Kanungo told that demarcation was cancelled owing to status quo order.

15. The testimonies of PW-4, Talib Hussain, and PW-5, Sarvar Hussain (injured persons) are very important. As per PW-4, poles were affixed on 29.10.2004, but when they came to know about the status quo order, they alongwith a copy of the order went to Kanungo, who, advised them to remove the pillars. He has further deposed that on 31.10.2004 pillars were removed. He has deposed, in his cross-examination, that on 30.10.2004 he showed the copy of order to Kanungo, who told them that demarcation is cancelled. PW-5, Sarvar Hussain, also corroborated the version of PW-4 qua status quo order and uprooting the pillars. This witness, in his cross-examination, has deposed that Talib Hussain told him that demarcation was cancelled by Kanungo and thereafter he went to uproot the poles.

16. In the wake of what has been deposed by key prosecution witnesses it is discernible that they tried to portray that the incident took place when the complainant tried to remove the poles. It can be said that the edifice of the prosecution case stands on weak pillars, which are in the shape of testimonies of PW-1, Sadiq Mohammad, whose testimony has been contradicted by PW-2, Satpal Kaur, and PWs 4 and 5. The combined reading of the testimonies of PWs-4 and 5 show that the poles were uprooted as the demarcation was cancelled, but their versions have been eclipsed by the statement of PW-11, Balkrishan, Patwari. PW-11 has specifically deposed, in his cross-examination, that on 02.09.2006 he conducted the demarcation and Kanungo did not cancel it. He has further deposed that both the parties admitted the demarcation to be correct.

17. In the wake of what has emerged after discussing the testimonies of key prosecution witnesses, it would be apt to adumbrate the stand taken by the accused persons in their statements recorded under Section 313 Cr.P.C., which has also been taken note of by the learned Trial Court and the same is as under:

> ***"Accused Shabana stated that she was on maternity leave. Accused Rozina admitted that demarcation was conducted on 29.10.2004 after which poles were affixed. Accused Sabina stated that she was an athlete. She used to go to attend practice at 6:30 am and used to return at 8:30 am. She came to know about the incident when she returned. Her parents were arrested after 18 days and she was implicated after two years. Accused Shabnam Bibi and Dil Khursheed stated that they were at home and were not aware of the incident. Accused Shamshed Begum stated that her father had given two rooms to her. Talib Hussain, Nazir Husain, Sarwar Hussain-three sons of Nazir Hussain came and they stated uprooting pole on 1-11-2004 at 7 am. Her father objected. Accused picked up a quarrel. She went to her old house and told the incident to Parvej, Shabana and Rojina. When she reached at spot, scuffle was taking place. Both parties had***

suffered injuries. Sword and axes were with the complainant party. They took them away. Accused Rehmat Ali stated that he was on duty w.e.f. 1-11-2004 till 18-11-2004. Accused Ashraf Mohammad stated that complainant party started uprooting boundary mark and when he stopped them, complainant party attacked him and Anwar Hussain with sword and axe. Accused suffered injuries. Shamshed Begum went to home and called Parvej and Shabana. When they reached at the spot, incident was over."

18. It is also gainful to discuss the testimony of DW-1, Dr. Devinder Sharma, who has been examined in defence by the accused persons. This witness conducted the medical examination of Ashraf Mohammad, Anwar Hussain, Mohammad Parvej, Rozina Bibi, Shamshad Begum and Shabana Hansi. As per this witness Shabana, Rozina, Parvej Mohammad and Anwar Hussain and Shamshad Begum had suffered injuries. He has further deposed that the injuries sustained by Ashraf Mohammad were grievous in nature and could be caused by sharp edged weapon, like sword. He, in his cross-examination, has admitted that such injuries could have been caused in a melee of groups.

19. Now, in view of the statement of DW-1, it can be more than safe to hold that accused persons also sustained injuries and nothing has come on record that how the accused persons sustained injuries. The cumulative reading of the testimonies of key prosecution witnesses as also the stand taken by the accused persons in their statements recorded under Section 313 Cr.P.C. coupled with the fact that accused persons also sustained injuries and the prosecution has failed to bring on record the material, which could prove how the accused persons sustained injuries, are some of the strong circumstances which cannot be overlooked.

20. In view of what has emerged after exhaustively discussing the material on record, following judicial pronouncements are apposite and need to be applied to the facts of the present case:

1. ***State of Karnataka vs. Shrisail Sateeppa Karkalamethi and another, AIR 1994 Supreme Court 1244; &***
2. ***Dhanna vs. State of M.P., (1996) 10 SCC 79.***

21. The Hon'ble Supreme Court in **State of Karnataka vs. Shrisail Sateeppa Karkalamethi and another, AIR 1994 Supreme Court 1244,** took into consideration the fact that so many accused happened to receive so many injuries and the prosecution failed to provide any plausible and acceptable explanation how the accused persons received those injuries. The relevant para of the judgment is as under:

"3. The prosecution relief on four eye-witnesses. It may be mentioned here that A-4 also gave a report in which a prosecution witness figured as accused. Four of the accused injured during the same incident. The doctor who examined A-4 found five injuries on him including incised wound and injury No. 3 was grievous. On A-2 and incised wound and another injury was found. On A-7 there was a lacerated wound on right mandibular region and two other injuries on other parts of the body. A separate case was registered on the complaint given by A-4. However, for the purpose of the present case, it may be mentioned, that no plausible explanation has been put forward by the prosecution. Taking all that into consideration it could

emerge that the place and time and presence of some of the witnesses and accused are not in dispute but regarding the origin of the occurrence the prosecution case is totally cryptic and there is no explanation as to how so many accused happened to receive so many injuries. Taking this aspect into consideration the High Court found it difficult to rely on the witnesses. There is any amount of doubt as to how the quarrel started and who started the attack. Because of this vagueness the evidence of the prosecution witnesses became unreliable. The reasons given by the High Court are quite sound. We see no ground to interfere. The criminal appeal is dismissed."

The judgment (supra) is fully applicable to the facts of the present case. In the case in hand, what to talk of plausible and acceptable explanation qua the accused persons' sustaining injuries, there is not even an iota of evidence which could even remotely prove and establish how the accused persons sustained injuries. Thus, not explaining how the accused persons sustained injuries proves fatal to the prosecution case.

22. In another case titled ***Dhanna vs. State of M.P., (1996) 10 SCC 79,*** the Hon'ble Supreme Court has held that in an appeal against acquittal, the appellate court has to proceed more cautiously and unless there is absolute assurance of the guilt of the accused on the basis of the evidence on record, the order of acquittal is not liable to be interfered with. The apposite para of the judgment (supra) is extracted hereunder for ready reference:

"11.. Though the Code does not make any distinction between an appeal from acquittal and an appeal from conviction so far as powers of the appellate Court are concerned, certain unwritten rules of adjudication have consistently been followed by Judges while dealing with appeals against acquittal. No doubt, the High Court has full power to review the evidence and to arrive at its own independent conclusion whether the appeal is against conviction or acquittal. But while dealing with an appeal against acquittal the appellate Court has to bear in mind : first, that there is a general presumption in favour of the innocence of the person accused in criminal cases and that presumption is only strengthened by the acquittal. The second is, every accused is entitled to the benefit of reasonable doubt regarding his guilt and when the trial Court acquitted him, he would retain that benefit in the appellate Court also. Thus, appellate Court in appeals against acquittals has to proceed more cautiously and only if there is absolute assurance of the guilt of the accused, upon the evidence on record, that the order of acquittal is liable to be interfered with or disturbed."

The judgment (supra) is fully applicable to the facts of the present case. Indeed, in cases of acquittal the appellate court has to examine the material cautiously and the reversal findings are to be recorded only if the material on record unerringly and conclusively proves the guilt of the accused. However, in the case in hand, the learned Trial Court acquitted the accused persons after examining the material on record and we, after re-appreciating the evidence, find that the prosecution case is full of contradictions and discrepancies. Thus, after exhaustively scrutinizing the evidence and applying the law it is more than safe to hold that the learned Trial Court has rightly acquitted the accused persons.

23. After exhaustively discussing the testimonies of key prosecution witnesses, it is not unsafe to hold that prosecution witnesses have not given true version about the occurrence and, in fact, the testimonies of PWs-1 to 5 are not in consonance with each other. The testimonies of PWs-1 to 5 suffer from discrepancies and contradictions and they create a doubt about the veracity of the prosecution case. The Hon'ble Supreme Court in ***Arun vs. State, (2008) 15 SCC 501,*** has held that if there are two reasonable views, then the view favouring the accused be adhered to. In the present case also there are two views and the available material on record compels us to tilt towards the view favouring the accused.

24. 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.

25. In ***Chandrappa vs. State of Karnataka, (2007) 4 SCC 415,*** the Hon'ble Supreme Court has culled out the following principles qua powers of the appellate Courts while dealing with an appeal against an order of acquittal:

> ***"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:***
>
> 1. ***An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.***
> 2. ***The Code of Criminal Procedure, 1873 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.***
> 3. ***Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.***
> 5. ***An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.***
> 5. ***If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial Court."***

26. In view of the settled legal position, as aforesaid, and on the basis of material, which has come on record, it is more than safe to hold that the prosecution has

failed to prove the guilt of the accused persons beyond reasonable doubts and the findings of acquittal, as recorded by the learned Trial Court, need no interference, as the same are the result of appreciating the facts and law correctly and to their true perspective. Accordingly, the appeals, which lack merits, deserve dismissal and are dismissed.

27. In view of the above, the appeals, so also pending application(s), if any, stand(s) disposed of.

****

BEFORE HON'BLE MR. JUSTICE SURYA KANT, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

State of HP and Anr. .....Appellants.

Versus

M/s Ajay Kumar Sood .....Respondent.

Arb. Appeal No. 1 of 2019
Date of Decision: 2.5.2019

Arbitration and Conciliation Act 1996 (Act)- Sections 34 and 37– Award– Objections thereto– Dismissed by Hon'ble Single Bench– Appeal against- Objector contending that award being non-speaking and unreasoned should have been set aside- Held, while considering objections under Section 34 of Act, scope of Court interference is very limited- It cannot sit in appeal over findings of Arbitrator- Court will interfere in case of fraud, bias or violation of principles of nature justice- Interference on ground of patent illegality is permissible only when award is so unfair and unreasonable as shocks conscience of Court- Award found well reasoned and speaking one- Appeal dismissed. (Paras 10 to 12)

Cases referred:

Hindustan Tea Company vs. M/s K. Sashikant & Company and Anr., AIR 1987 SC 81
M/s Sudarsan Trading Company vs. The Government of Kerala and Anr, AIR 1989 SC 890
Markfed Vanaspati & Allied Industries vs. Union of India (2007) 7 SCC 679
McDermott International Inc. vs. Burn Standard Company Limited and Ors., (2006) 11 SCC 181
P.R. Shah, Shares and Stock Broker (P) Ltd. vs. M/s. B.H.H. Securities (P) Ltd. and others, (2012) 1 SCC 594
Sutlej Construction vs. Union Territory of Chandigarh, (2018) 1 SCC 718
Swan Gold Mining Ltd. vs. Hindustan Copper Ltd., Civil Appeal No. 9048 of 2014, decided on 22.9.2014

For the Appellants: Mr. Ashwani Sharma, Mr. Ranjan Sharma, Mr. Adarsh Sharma, Ms. Ritta Goswami and Mr. Nand Lal Thakur, Additional Advocate Generals.

For the Respondent: Mr. J.S. Bhogal, Senior Advocate, with Mr. Parmod Negi, Advocate, for

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(oral)*

Being aggrieved and dissatisfied with judgment dated 1.5.2017, passed by the learned Single Judge in Arbitration Case No. 62 of 2015, whereby objections under Section 34 of the Arbitration and Conciliation Act (in short "*the Act*") having been filed by the appellants–objectors (hereinafter referred to as the Objectors), laying therein challenge to award dated 29.4.2015, passed by the learned Arbitrator, came to be dismissed, objectors have approached this Court in the instant proceedings filed under Section 37 of the Act, praying therein to set-aside the aforesaid impugned judgment.

2. Precisely, the facts as emerge from the record are that objectors vide Executive Engineer, Jubbal Division, HPPWD, Jubbal letter No. 3245-51 dated 17.6.2002 awarded the work of C/o balance work on K.P.A. road km o/o to 17/0 (SH-C/O M/T work at RD 0/0 to 10/00, for Rs. 98,00,498/- with completion of time of one year. As per the statement of claims filed by the respondent-claimant (hereinafter referred to as "the claimant"), the work was completed by him on 30.6.2006 and during this period, extentsion was also granted to him till the date of completion without any compensation. Under clause 2.1 of the agreement, claimant submitted a bill for work done of Rs. 7,32,290/- dated 11.8.2008 and in addition thereto, the claim for price escalation under clause 10CC of the contract was also submitted vide letter dated 26.11.2007 for Rs. 9,08,310/- and for Rs. 1,04,871/- vide letter dated 27.11.2008. As per the claimant, bills, as referred herein above, were required to be paid within six months, but no payment was made, as a consequence of which, security deposited by it also continued to be withheld by the respondents.

3. Aggregate for the execution of work in question was though proposed to be procured locally, but subsequently, same was procured from Panchkula and as such, claimant had to incur extra carriage of Rs. 25,00,000/- payable by the objectors. Executive Engineer, Jubbal Division, HPPWD Jubbal District Shimla, H.P., recommended the case of the claimant vide letter dated 21.5.2004. However, fact remains that no such amount ever came to be paid to the claimant. As per the claimant, work in question was completed by it well within time granted by the objectors and time was extended without any levy of compensation since delay was on account of reasons not attributable to it. As per the claimant, it had to keep and maintain the machinery, tool, plant and equipment during the extended period without any additional work and as such, incurred damage to the extent of Rs. 50,00,000/-, for machinery, which was rendered idle on site. Aforesaid fact was brought to the knowledge of the objectors vide letter dated 26.8.2003, but amount to the tune of Rs. 4,16,913/- was deducted from running account bills, which continued to be withheld unauthorisedly by the objectors in spite of request of the claimant.

4. Since dispute arose *inter-se* parties qua the aforesaid aspect of the matter, same came to be adjudicated subsequently by an arbitrator, who, vide impugned award dated 29.4.2015, allowed the claim Nos. 1 to 5 and 7 out of total 7 claims in favour of the claimant.

5. Feeling aggrieved with the passing of aforesaid award passed by the learned Arbitrator, objectors preferred objections under Section 34 of the Act before the learned Single Judge, who vide judgment dated 1.5.2017, dismissed the same and as such, in this backdrop, objectors have approached this Court in the instant proceedings.

6. Having heard learned counsel for the parties and perused material available on record vis-à-vis reasoning assigned by the learned Single Judge while upholding the award passed by the learned Arbitrator, this Court is not persuaded to agree with the contention raised by Mr. Adarsh Sharma, learned Additional Advocate General that learned

Single Judge before passing impugned judgment failed to properly examine the material adduced on record by the respective parties, rather this Court finds that learned Single Judge while passing impugned judgment upholding the award passed by the Tribunal has carefully examined each and every aspect of the matter and as such, judgment under challenge does not call for any interference.

7. Since details with regard to claim set up by claimant have been already taken note of in earlier part of the judgment, it is not necessary to reproduce the same at this stage. Record reveals that objector No.2, Executive Engineer while refuting the claim set up by the claimant stated that work in question was awarded to the Contractor on 17.6.2002, whereas ban on mining by this Court was imposed on 21.2.2004 and as such, it ought to have completed the work as per date stipulated in the agreement i.e. 30.6.2003. While placing reliance upon communication dated 21.5.2004, objectors claimed before the learned Arbitrator that claimant was clearly apprised about the position that this delay in completion of work is not attributed to the department and as such, claims put forth by it are not maintainable/sustainable, rather he is liable to pay the department as per counter claims set-up by it.

8. Apart from the above, learned Additional Advocate General while referring to the record made a serious attempt to persuade this Court to agree with his contention that no reason came to be assigned by the Arbitrator while allowing claims set up by the respondent (claimant) and as such, impugned award deserves to be set-aside. To the contrary, Mr. J.S. Bhogal learned Senior Counsel, vehemently argued that award in question came to be passed by the learned Arbitrator on the basis of consent and admission made by the objectors themselves and as such, aforesaid argument having been made by the learned Additional Advocate General deserves outright rejection. While making this Court to peruse award passed by the learned Arbitrator as well as impugned judgment passed by the learned Single Judge, Mr. Bhogal, strenuously argued that sufficient reasons have been assigned by the Arbitrator while allowing claims and thereafter by learned single Judge while upholding the findings returned by the learned Arbitrator.

9. Having closely examined impugned award as well as judgment passed by the learned single Judge, this Court has no hesitation to conclude that contentions raised by the learned Additional Advocate General deserve outright rejection being fallacious because cogent and sufficient reasons have been assigned by the learned Arbitrator while passing the impugned award, more particularly, while allowing claim No. 2, i.e. price escalation of Rs. 10,13,181/- and claim No. 5 i.e. extra carriage of aggregate from Panchkula i.e. Rs. 25 lac, and as such, by no stretch of imagination, it can be said that award passed by the Arbitrator is either not a reasoned one or same has been passed without application of mind.

10. Apart from above, this Court finds that learned Single Judge while answering the aforesaid arguments raised on behalf of the department with regard to non-assigning of reasons and non-application of mind by the Arbitrator while passing award in qeustion, has not only taken note of reasons assigned by the Arbitrator, rather after having perused record vis-à-vis reasoning assigned by the learned Arbitrator has also given his own findings qua correctness of reasoning assigned by the learned Arbitrator and as such, impugned judgment, which is based upon proper appreciation of material available on record, cannot be interfered with.

11. By now it is well settled that the scope of interference by Court is very limited while considering the objections filed under Section 34 of the Act. The award passed by the learned Arbitrator can be interfered with in case of fraud or bias or violation of principles of natural justice. Interference, if any, on the ground of patent illegality is only permissible, if

same goes to the root of the case. Violation should be so unfair and unreasonable so as to shock the conscious of the court. Reliance is placed on ***Hindustan Tea Company*** *v.* ***M/s K. Sashikant & Company and Anr. AIR 1987 SC 81***, ***M/s Sudarsan Trading Company*** *v.* ***The Government of Kerala and Anr, AIR 1989 SC 890, McDermott International Inc.*** *v.* ***Burn Standard Company Limited and Ors., (2006) 11 SCC 181, P.R. Shah, Shares and Stock Broker (P) Ltd.,*** *v.* ***M/s. B.H.H. Securities (P) Ltd., and others, (2012) 1 SCC 594, Swan Gold Mining Ltd. v. Hindustan Copper Ltd.*** *in Civil Appeal No. 9048 of 2014, decided on 22.9.2014****, Sutlej Construction*** *v.* ***Union Territory of Chandigarh, (2018) 1 SCC 718.***

12. Moreover, there cannot be any dispute as has been repeatedly held by the Hon'ble Supreme Court as well as this Court that court while deciding objection, if any, filed by the aggrieved party under Section 34 of the Act against the award passed by an Arbitrator, does not sit in appeal over the findings returned by the learned Arbitrator and there cannot be any reappraisal of evidence on the basis of which, learned Arbitrator has passed the award. Otherwise also, in terms of Section 34 of the Act, objections, if any, raised by the aggrieved party can be considered by the court if the award is in any manner against the public policy, which certainly has to be liberally interpreted in view of the facts of the case.

13. Contention raised by the learned Additional Advocate General representing the objectors that impugned award is non-speaking and unreasoned is wholly mis-placed and deserves to be rejected because it is quite apparent from the perusal of award that Arbitrator has dealt with each and every aspect of the matter meticulously while passing impugned award. Hon'ble Apex Court in ***Markfed Vanaspati & Allied Industries v. Union of India (2007) 7 SCC 679*** has ruled that arbitration is a mechanism or method of resolution of dispute that unlike courts takes place in private, pursuant to agreement between the parties. In the aforesaid judgment, Hon'ble Supreme Court having taken note of its earlier judgment rendered in *M/s Sudarsan Trading Co. v. Government of Kerala & Anr. (1989) 2 SCC 38 in para 29,* has observed that the court in a nonspeaking award cannot probe into the reasoning of the award. The Court further observed that only in a speaking award the court may look into the reasoning of the award, and it is not open to the court to probe the mental process of the arbitrator and speculate, where no reasons are given by the arbitrator as to what impelled him to arrive at his conclusion. The reasonableness of the arbitrator's reasons cannot be challenged. The arbitrator's appraisement of the evidence is never a matter for the court to entertain.

14. In the case at hand, record also reveals that both the parties had agreed during 6th hearing held on 10.3.2014 that the amount under claim No.2, which was due and payable to claimant was Rs. 9,74,612/- and the same had been sent to Superintending Engineer, Rohru, for approval and compensation levied under clause 2 of the award had already been waived off by the Superintending Engineer and as such, learned Single Judge rightly concluded that once the objectors themselves admitted the claim of the claimant (respondent) under the aforesaid head to be Rs. 9,74,612/-, then they cannot be permitted to resile from the said admission.

15. Consequently, in view of the detailed discussion made herein above, we find no reason to interfere with the well reasoned judgment passed by the learned Single Judge and as such, appeal is dismissed accordingly being devoid of any merits.

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

Vandana Kumari .....Petitioner.

Versus

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

CWP No. 132 of 2018
Decided on: 02.05.2019

Himachal Pradesh Land Record Manual- Para 28.11- Income certificate- Cancellation thereof- Competent Authority, who is ? Held, under Himachal Pradesh Land Record Manual, Tehsildar is competent authority to issue income certificate of person- Authenticity and genuineness of such certificate, when questioned is to be decided by same authority (Tehsildar) which has issued it. (Paras 2 to 4)

Cases referred:
Raksha Devi vs. State of H.P. and others and its connected matters, CWP No. 1096 of 2010 decided on 17th May, 2010

For the petitioner: Mr. Amit Singh Chandel, Advocate.
For the respondents: Mr. Vikas Rathore, Addl. A.G with Mr. J.S. Guleria, Dy.A.G. for respondents No. 1 to 6.
Mr. H.S. Rangra, Advocate for respondent No.7.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

In this writ petition order dated 7.6.2017 passed by learned Deputy Commissioner (Appellate Authority under the scheme for appointment of Anganwari worker/Anganwari helper), is under challenge. The petitioner herein was appellant before learned Appellate Authority below. She is aggrieved by the appointment of respondent No.7 as Anganwari worker in Anganwari centre, Kashmela, Tehsil Baldwara, District Mandi, H.P.

2. The challenge to the impugned order is on the grounds *inter-alia* that the income of respondent No.7 was beyond the income prescribed under the scheme and that she was meritorious as compared to the private respondent. Without commenting upon the authenticity and genuineness of income certificate issued in favour of the private respondent, we find that as per provisions contained in '***The Himachal Pradesh Land Records Manual,*** the competent authority to issue the income certificate is Tehsildar. The procedure for cancellation of the income certificate has been provided under para 28.11 of the manual which reads as follows:-

> "***28.11*** *If it is found during inquiry or otherwise, that any information given by the applicant is wrong, the certificate issuing authority shall cancel the certificate after passing a speaking order in this behalf and initiate proceedings against the delinquent under the law. In such a situation, the certificate earlier issued will be replaced by a copy of the cancelled certificate in the electronic record.*"

3. Therefore, when the income certificate Annexure R-7/C to the reply filed on behalf of respondent No.7 has been issued by the Executive Magistrate (Tehsildar) Baldwara, District Mandi, therefore, it is the said authority alone competent to look into the question of genuineness and authenticity thereof. Learned Appellate Authority, therefore, should have sought the report from the Executive Magistrate, Baldwara. So far as the correctness of the income certificate issued in favour of respondent No.7, it is even held so by a Division Bench of this Court in ***CWP No. 1096 of 2010*** titled ***Raksha Devi*** v. ***State of H.P. and others and its connected matters***, decided on 17th May, 2010, that where a dispute qua the genuineness and authenticity of the income certificate is involved in an appeal, the same should be got duly processed by the authority competent to cancel the same. Not only this, but the party aggrieved by the cancellation of the certificate has also the remedy to assail the same before the Appellate Authority which in the given facts and circumstances of this case would be Sub Divisional Officer (Civil), Sarkaghat, District Mandi, H.P. For the sake of convenience para 28.1 of the Land Records Manual is reproduced here as under:-

> "***28.1*** *The Tehsildar/Naib Tehsildar Mohal, Sub-Divisional Officer (c), Additional District Magistrate/Additional Deputy Commissioner and Deputy Commissioner concerned shall be the competent authorities to issue all kinds of certificates within their respective jurisdictions. The next higher officer in the official hierarchy shall be the appellate authority for adjudication upon refusal of an officer competent to issue the certificate for issuing a certificate or in case any person is aggrieved about issuance of a certificate to another person.*"

4. The Appellate Authority under the scheme under these circumstances has committed illegality while passing the impugned order. Therefore, though, there is no merit in the writ petition and the same is accordingly disposed of, leaving it open to the petitioner to approach the Executive Magistrate (Tehsildar), Baldwara, District Mandi, H.P., in case she is aggrieved by the issuance of income certificate Annexure R-7/C in favour of respondent No.7 for its cancellation. In the event of income certificate is cancelled by the competent authority and also the Appellate Authority, not only the petitioner but the private respondent shall also have the right to resort to the legal remedy available to them in accordance with law. Pending application(s), if any, shall also stand disposed of.

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

Nain Singh Sharma …Petitioner

Versus

Champa Devi and others …Respondents

CR No.180 of 2018
Decided on : 3.5.2019

Himachal Pradesh Urban Rent Control Act, 1987 - Section 24 (3) – Appellate jurisdiction- Exercise of- Whether matter can be remanded to Rent Controller by Appellate Authority?- Held, Section 24(3) of Act empowers Appellate Authority to make enquiry itself or through Rent Controller on behalf of said Appellate Authority- No power to remand matter to Rent Controller vests with Appellate Authority- Therefore, it cannot remand rent suit to Rent Controller after setting aside his order for disposal of petition afresh- Order of Appellate

Authority remanding matter to Rent Controller is in excess of jurisdiction- Order set aside- Appellate Authority directed to hold further enquiry in the matter. (Paras 2 to 4)

Case referred:
Surinder Kaur vs. Mohinder Pal Singh, ILR (1976) 5

For the petitioners : Mr. K.D. Sood, Senior Advocate with Mr. Shubham Sood, Ms. Shradha Karol and Mr. Sukrit Sood, Advocates.
For the respondents : Mr. Ashwani Kaundal, Advocate, for respondent No. 1.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant civil revision petition is directed against the orders recorded by the learned appellate authority, upon, Rent Appeal No. 2-S/14 of 2018, as stood preferred therebefore, by the aggrieved tenants, against the order of eviction, from the demised premises, as rendered by the learned Rent Controller,

2. Without going into the merits of the case, or upon the findings returned upon relevant res-controversia, by the learned Rent Controller, rather, an adjudication, is enjoined to be meted only upon, the legality of the order made by the learned appellate Authority, wherethrough, it after setting aside, the verdict recorded by the learned Rent Controller, it, remanded the lis to the learned Rent Controller, for, enabling the latter to determine, the, controversy, appertaining to the title of the respondents herein, to receive rent, vis-à-vis, the demised premises.

3. Even though, the tenant is statutorily estopped to deny the title of the land lord, yet when the appellate authority, had, proceeded to make the afore order, of, remand, to the learned Rent Controller, importantly, after setting aside, the apposite verdict assailed before it, and, conspicuously also, when the afore res-controversia, is, rather estopped to be reared, by the respondent/tenant, (i) thereupon within the ambit, of, the verdict, reported in ILR (1976) 5, rendered in case titled as, "**Smt. Surinder Kaur versus Mohinder Pal Singh**", hence renders the afore allowing of the apposite appeal, by the learned Appellate Authroity, and, thereafter the remanding, of, the lis, to, the Rent Controller, for the latter making an enquiry, vis-à-vis, the afore facet, rather to, beget an apparent transgression thereof. In the afore judgment, relevant paragraph-3 whereof is extracted hereinafter:

> *"It is apparent that in those cases where the Appellate Authority is of opinion that in order to decide the appeal a further enquiry is necessary it has been empowered to make that enquiry itself or to make it through the Controller. The expression "through the Controller" clearly contemplates that when the Controller makes the enquiry he does so on behalf of the Appellate Authority. In other words, the Controller makes the enquiry and forwards the findings reached by him to the Appellate Authority. He does so not for the purpose of disposing of a petition pending before him but for the purpose of enabling the Appellate Authority to dispose of the appeal pending before the latter. It is clear from the terms of Section 21(3) of the Act that the enquiry envisaged by that provision is intended in order to enable the Appellate Authority to decide the appeal. It is manifest that the provision does not contemplate that the appeal should be allowed and the case remanded to the Controller for making an enquiry and disposing of the*

petition afresh. No such power to remand the case has been conferred by Section 21(3) on the Appellate Authority. I am fortified in the view taken by me by the decisions of the Punjab High Court in Shri Krishan Lal Seth vs. Shrimati Pritam Kumar and Rajinder Kumar vs. Basheshar Nath. I am of opinion that the order of the Appellate Authority is in excess of his jurisdiction and is vitiated accordingly".

(i) it is expostulated, that, the requisite enquiry encapsulated, within the ambit of Section 21(3), of the H.P. Urban Rent Control Act, holding, a contemplation, qua the Rent Controller upon being directed or enjoined to hold an enquiry, his rather holding, the afore, for and on behalf, of the appellate authority, and, (ii) also the latter, in alternate thereto being statutorily empowered, to, suo-moto hold an enquiry, vis-à-vis, the afore relevant res-controversia. Further more, it is also expostulated therein, that, the afore mandate, borne in Section 21(3) of the H.P. Urban Rent Control Act, rather bars the appellate authority, to, for progressing the afore purpose, hence, after setting aside the impugned verdict, to, further there onwards, remand the entire lis, for, facilitating hence an enquiry being made by the learned Rent Controller. Since the learned appellate Authority, has, in visible infraction of the afore contemplation(s), rather proceeded to allow the appeal, and, has thereafter proceeded to set aside, the impugned verdict, (iii) thereupon it has committed breach of the afore expostulation of law, (iv) whereupon this Court is constrained to allow the instant revision petition, and, to set aside the impugned verdict.

4. In nut-shell, the learned appellate Authority is directed to, suo-moto, conclude the enquiry into the afore res-controversia, and, thereafter is directed to proceed to make a fresh decision, within four weeks, upon Rent Appeal No. 2-S/14 of 2018,. The parties are directed to appear before the learned Appellate Authority, on 22.5.2019. All pending application(s), if any, are also disposed of.

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

Rohit .....Petitioner.
Versus
Rashik .....Respondent.

Cr. Revision No. 7 of 2015
Date of Decision: 3.5.2019.

Code of Criminal Procedure, 1973 (Code)- Section 362– Review of judgment/ order– What is?- Distinction between review and recall- Revision petition of accused dismissed by Court for non-prosecution on his failure to take steps for service of complainant- Filing petition thereafter for recalling said order and restoration of revision petition- Held, there is distinction between 'review' and 'recall'- In review, merits of order/judgment passed earlier are considered whereas in recall, merits of petition are not looked into and order/judgment is simply recalled- There is no bar under Section 362 of Code to recall order. (Paras 7 to 9)

Cases referred:

Asit Kumar Kar vs. State of West Bengal and Ors, (2009) 2 SCC 703
Damodar S. Prabhu vs. Sayed Babalal H., (2010) 5 SCC 663
Vishnu Agarwal vs. State of Uttar Pradesh and Anr., (2011) 14 SCC 813

For the petitioner: Mr.Maan Singh, Advocate.
For the respondent: Mr. Ashwani Kaundal, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Cr.MP No. 631 of 2019

By way of instant application filed under Section 482 Cr.PC., prayer has been made on behalf of the applicant/petitioner for recalling the judgment dated 15.7.2016, passed by this Court in Criminal Revision No. 7 of 2015, whereby Criminal revision referred herein above, came to be dismissed for non-prosecution.

2. Averments contained in the application, which has been processed through Superintendent, Modern Central Jail, Nahan, suggest that due to mis-communication, applicant/petitioner was unable to impart proper instructions to Mr. G.R. Palsra, Advocate, who was earlier representing him in Criminal Revision No. 7 of 2015, as a consequence of which, criminal revision petition referred herein above, came to be dismissed for non-prosecution.

3. On 15.7.2016, learned counsel for the applicant/petitioner informed this Court that despite several communications, applicant/petitioner is not coming forward to pursue the matter and as such, Court having taken note of the fact that despite repeated opportunities, applicant/petitioner failed to take steps for the service of the respondent, dismissed the criminal revision petition having been filed by him for non-prosecution. It has been further averred in the application that applicant/petitioner after entering into compromise with the respondent, whereby he paid entire amount in terms of judgment passed by the learned trial Court, remained under the bona-fide belief that no further action, if any, is required to be taken by him. However, fact remains that subsequently, on 22.4.2019, he was taken into custody, whereafter he moved instant application for recalling of judgment dated 15.7.2016, and restoration of revision petition filed by him so that factum with regard to his entering into compromise with respondent is brought on record and judgment of learned trial court holding him guilty of having committed offence under Section 138 of the Negotiable Instruments Act (in short "the Act") is set aside

4. Having carefully perused explanation rendered on record by the applicant/petitioner, this Court is convinced and satisfied that due to unavoidable circumstances, applicant/petitioner was unable to take steps for the service of the respondent, as a consequence of which, criminal revision petition came to be dismissed, but question, which arises for consideration by this Court at this stage is that whether it can proceed to recall its judgment dated 15.7.2016, especially, in view of the bar contained in Section 362 of Cr.PC. As per Section 362 Cr.PC, no court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error.

5. At this stage, Mr. Maan Singh, learned counsel for the applicant/petitioner while referring to the judgment rendered by the Hon'ble Apex Court in **Asit Kumar Kar v. State of West Bengal and Ors (2009) 2 SCC 703**, contended that there is a distinction between review petition and recall petition. He contended that since revision petition filed by the applicant/petitioner never came to be decided on merits, there is no embargo/impediment for this Court to recall its earlier judgment dated 15.7.2016 because

that order was passed simply on account of non-prosecution. It would be profitable to reproduce the relevant paras of the aforesaid judgment as under:

> 6. There is a distinction between a petition under Article 32, a review petition and a recall petition. While in a review petition the Court considers on merits where there is an error apparent on the face of the record, in a recall petition the Court does not go into the merits but simply recalls an order which was passed without giving an opportunity of hearing to an affected party.
>
> 7.We are treating this petition under Article 32 as a recall petition because the order passed in the decision in All Bengal Licensees Association v. Raghabendra Singh & Ors. [2007 (11) SCC 374] cancelling certain licences was passed without giving opportunity of hearing to the persons who had been granted licences. In these circumstances, we recall the directions in paragraph 40 of the aforesaid judgment. However, if anybody has a grievance against the grant of licences or in the policy of the State Government, he will be at liberty to challenge it in appropriate proceedings before the appropriate Court. The writ petitions are disposed of with these directions.

6. In this regard, reliance is also placed on judgment passed by the Hon'ble Supreme Court in case titled ***Vishnu Agarwal v. State of Uttar Pradesh and Anr. (2011) 14 SCC 813***.

7. In the judgment (supra), Hon'ble Apex Court has held that there is a distinction between review petition and recall petition. While in review petition, court considers on merit where there is an error apparent on the face of the record, in a recall petition the court does not go into the merits but simply recalls an order, which was passed without giving an opportunity of hearing to the affected party.

8. It is not in dispute that in the case at hand, criminal revision petition having been filed by the petitioner came to be dismissed for non-prosecution on the statement having been made by the learned counsel representing him that petitioner is not coming forward to impart instructions and no finding, if any, ever came to be returned by this Court on merits while passing judgment dated 15.7.2016.

9. Consequently, in view of the facts narrated herein above as well as law taken note herein above, this Court finds no impediment in accepting the prayer made in the instant application and as such, same is allowed, as a consequence of which, judgment dated 15.7.2016, passed by this Court is recalled and petition is restored to its original number. Application stands disposed of.

Cr. Revision No. 7 of 2015

By way of instant criminal revision petition filed under Section 397 read with Section 401 of Cr.PC, challenge has been laid to judgment dated 18.11.2014, passed by the learned Additional Sessions Judge, Kullu, District Kullu, H.P., in Criminal Appeal No. 107 of 2014, affirming judgment of conviction and sentence dated 12.8.2014, recorded by the learned Special Judicial Magistrate, Kullu, in complaint No. 276-1/2011/77-1/2013, whereby the learned trial Court while holding the petitioner-accused guilty of having committed offence punishable under Section 138 of the Act convicted and sentenced him to undergo simple imprisonment for a period of three months and to pay compensation to the tune of Rs.85,000/- (70,000/- cheque amount and Rs. 15,000/- as damages) to the complainant.

10. Precisely the facts, as emerge from the record are that respondent-complainant instituted a complaint under Section 138 of the Act, in the court of learned Special Judicial Magistrate, Kullu, H.P., against the petitioner-accused, alleging therein that on 30.1.2011 and 12.2.2011, the accused had borrowed a sum of Rs. 30,000/ and Rs.40,000/-, respectively, from him and with a view to discharge his liability, he issued two cheques bearing No. 490639 dated 17.3.2011 for Rs. 30,000 and another Cheque bearing No. 563373 dated 17.3.2011 for Rs. 40,000/- drawn at UCO Bank Raison Kullu, in favour of the complainant, however, fact remains that the aforesaid cheque were dishonoured on its presentation on account of closed account. Since petitioner-accused failed to make the payment good within the stipulated period despite issuance of legal notice, respondent/complainant was compelled to initiate proceedings before the competent Court of law under Section 138 of the Act.

11. Learned trial Court on the basis of material adduced on record by the respective parties held the petitioner-accused guilty of having committed offence under Section 138 of the Act and accordingly, sentenced him as per the description given herein above.

12. Being aggrieved and dis-satisfied with the aforesaid judgment of conviction recorded by the court below, accused preferred an appeal in the court of learned Additional Sessions Judge, Kullu, H.P., which also came to be dismissed vide judgment dated 18.11.2014, as a consequence of which, judgment of conviction recorded by the learned trial Court came to be upheld. In the aforesaid background, present petitioner-accused has approached this Court by way of instant proceedings, seeking therein his acquittal after setting aside the judgments of conviction recorded by the courts below.

13. Today during the pendency of the case, Mr. Maan Singh, learned counsel for the petitioner while referring to the compromise (Annexure A-1 annexed with Cr.MP No. 631 of 2019), whereby the petitioner has paid full and final payment to the respondent-complainant, contended that in view of the subsequent developments, this Court while exercising power under Section 147 of the Act as well as in terms of guidelines issued by the Hon'ble Apex Court in ***Damodar S. Prabhu V. Sayed Babalal H. (2010) 5 SCC 663,*** can proceed to compound the offence.

14. Mr. Ashwani Kaundal, learned counsel for the respondent complainant on the instructions of the respondent, who is present in Court while fairly acknowledging the factum with regard to compromise arrived at inter-se parties contended that since entire payment in terms of the judgment passed by the learned trial court stands duly paid to the respondent complainant, this Court can accede to the aforesaid prayer made by the learned counsel for the petitioner for compounding of offence. This Court also recorded statement of the complainant-respondent namely Mr. Rashik, who on oath stated that he with his own volition and without there being any external pressure, has entered into compromise with the petitioner-accused, whereby he has received the entire sum of Rs. 85,000/- from the petitioner-accused. He further stated that he has no objection in case judgment of conviction recorded by the learned courts below is quashed and set-aside in view of the compromise arrived at *inter-se* us. His statement is taken on record.

15. Having taken note of the fact that complete amount in terms of judgment passed by the learned trial Court, stands paid to the respondent-complainant, this Court sees no impediment in accepting the prayer made having been made by the petitioner for compounding of offence while exercising power under Section 147 of the Act. Hon'ble Apex Court in ***Damodar S. Prabhu*** case *(supra)*, has categorically held that court, while

exercising power under Section 147 of the Act, can proceed to compound the offence even after recording of conviction by the courts below.

16. Consequently, in view of the above, present matter is ordered to be compounded and impugned judgments passed by the courts below are quashed and set-aside and the petitioner-accused is acquitted of the charges framed against him under Section 138 of the Act. Release warrants be prepared and sent through email/fax to the quarter concerned forthwith. Accordingly, the petition is disposed of, so also pending applications, if any.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Arpna Sharma .... Petitioner
Versus
State of H.P. & others .... Respondents

CWPs No. 627 & 635 of 2019 a/w
CWP No. 633 of 2019
Decided on: 04.05.2019

Constitution of India, 1950– Articles 14 & 15 – Post-Graduate Medical Education (Amendment) Regulations, 2018- NEET- PG Policy 2017 & Notification dated 20/03/2017- Subsequent Government Notification dated 27.2.2019- Whether subsequent notification will have retrospective operation?- Petitioner qualified NEET on 31.1.2019 and at relevant time, entitled for incentives as per notification dated 20.03.2017- Subsequently another notification issued on 27.2.2019 whereby providing 10% incentive to in-service candidates having rendered service in rural areas of State for requisite period- Petitioner claiming benefit of subsequent Notification dated 27.2.2019- Held, petitioner was well aware at time of applying for NEET about Notification of 2017 which was applicable to her- Now she cannot turn around and insist to claim benefits under subsequent notification- Notification dated 27.2.2019 cannot be made operative retrospectively. (Paras 6 to 8 & 12 to14)

Cases referred:
Dr. Arti Dhatwalia vs. State of H.P, (2017) 3 ILR (HP) 27
State of U.P. and others vs. Dinesh Singh Chauhan, (2016) 9 SCC 749

For the petitioner(s): Mr. Vivek Singh Attri and Mr.Abhinav Purohit, Advocates, for the petitioner(s) in CWPs No. 627 & 635 of 2019.
Mr. Amit Singh Chandel, Advocate, for the petitioner in CWP No. 633 of 2019.

For the respondent(s): Mr. Ajay Vaidya, Senior Additional Advocate General, for the respondents-State.
Mr. Lokender Pal Thakur, Central Government Standing Counsel, for the respondents-Union of India.
Mr. B.C. Negi, Senior Advocate with Mr. Nitin Thakur, Advocate, for respondent-MCI.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (oral)

The petitioners have filed these writ petitions wherein prayer clauses in two of the writ petitions being CWPs No. 627/2019 and 635/2019 are identical and read as under:

> "*(i) Issue a writ in the nature of certiorari/mandamus or any other appropriate writ of similar nature to direct the respondents to give 10% incentive marks to the petitioner for the service rendered in rural area upto maximum of 30% as per MCI Regulations, or, in the alternative,*
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> *(ii) to quash the prospectus of NEET-PG, 2019 and NEET-PG Policy of 2017, dated 20.03.2017 and PG & Super Speciality Policy dated 27.02.2019 being contrary and violative of clause 9 (IV) of Postgraduate Medical education (amendment) Regulation 2018, dated 05.04.2018 for not granting 10% incentive marks to the petitioner serving in rural areas in Himachal Pradesh, or in the alternative,*
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> *(iii) and to further reschedule NEET-PG (MD/MS) Counseling 2019 to be conducted on dated 04.04.2019, 26.04.2019, 07.05.2019 & 08.05.2019 as provided in the prospectus.*
>
> *(iv) Issue a writ in the nature of mandamus or any other appropriate writ of similar nature thereby directing the respondents to quash the incentive marks issued on the basis of NEET-PG Policies 2017 and 2019 based on extraneous considerations and prepare fresh merit list after granting incentive marks of service to the petitioner posted in rural areas in terms of clause 9(IV) of Postgraduate Medical education (amendment) Regulation, 2018, dated 05.04.2018 and law laid down by the Apex Court of the Country or in the alternative,*
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> *(v) Issue a writ or order in the nature of mandamus or any appropriate writ of similar nature to prepare fresh NEET-PG policy based on the data collected by the Directorate of Health Services and to grant the incentive marks or in the alternative,*
>
> *(vi) this Hon'ble Court may set up a committee directing to reframe the NEET-PG Policy as per data with the DHS to give benefit of service in rural area to the petitioner in terms of clause 9(IV) of Postgraduate Medical education (amendment) Regulation 2018, dated 05.04.2018."*

Whereas prayer clauses in CWP No. 633 of 2019 reads as under:

> *"(i) Issue a writ in the nature of certiorari or any other appropriate writ of similar nature to quash the prospectus of NEET-PG (MD/MS) 2019-22 Counseling as annexure P-7/A and PG Policy 2017 at appendix 7 of annexure P-7/A and PG Policy 2019 dated 27.02.2019 as annexure P-7 and to quash and set aside and reschedule NEET-PG(MD/MS) Counseling-2019-22 to be conducted on dated 04.04.2019, 26.04.2019, 07.05.2019 & 08.05.2019 pursuant to Prospectus as annexure P-7/A being violative of clause 9(IV) of Postgraduate Medical education (amendment) Regulation 2018, dated 05.04.2018 annexure P-11 for not granting 10% incentive marks to the petitioner serving in rural area in Himachal Pradesh or in alternative respondent State may be directed to allow 10% incentive marks per year subject to maximum of 30% to the petitioner for the services rendered in the*

rural area as per regulation 9(IV) of MCI regulation dated 05.04.2018 as annexure P-11 in the ends of law and justice.

(ii) Issue a writ or order in the nature of mandamus or any other appropriate writ of similar nature thereby directing the respondents to quash the incentive marks issued on the basis of NEET-PG Policies 2017 and 2019 based on extraneous considerations and prepare fresh merit list after granting incentive marks of service to the petitioner posted in rural area in terms of Clause 9(IV) of Postgraduate Medical education (amendment) Regulation, 2018, dated 05.04.2018 and law laid down by the Apex Court of the country.

(iii) Issue a writ or order in the nature of mandamus or any appropriate writ of similar nature to prepare fresh NEET-PG Policy based on the data collected by the respondent State vide annexure P-9 dated 12.10.2019 and to grant the incentive marks as per data with respondent No. 4 for service rendered in rural area to the petitioner in terms of Clause 9(IV) of Postgraduate Medical education (amendment) Regulation 2018, dated 05.04.2018."

2 The specific case of the petitioners falls under Clause 3.9 (ii) of the prospectus, which reads as under:

"(ii) For the purpose of incentive, this Policy shall be applicable henceforth; meaning thereby the GDOs who have served in field postings in the past will be awarded incentive as per previous Notification dated 20.03.2017 (and amended from time to time) and any GDO who is serving/will serve in any field posting will be entitled for incentive as prescribed in this Policy from now onwards."

3 The petitioners after qualifying their MBBS examination have been appointed as Medical Officers and are serving in different rural areas of the State. In the National Elegibility-cum-Enterence Test (NEET) for post graduation that was conducted in the year 2017, the General Duty officers were held entitled for incentives of 10% and maximum 30% of the marks obtained for each completed year of service in any of the areas declared as difficult/remote/ tribal/backwards by the State. However, the Medical Council issued a notification No. MCI-18(1)/2018-Med/100818, dated 05.04.2018, whereby the Postgraduate Medical Education Regulations, 2000, were further amended and were termed as Postgraduate Medical Education (Amendment) Regulations, 2018, whereby the rural areas were also included for giving incentives in marks.

4 The petitioners appeared and qualified the NEET for 2019 on 31.01.2019. The Government of Himachal Pradesh notified the Policy for regulating admissions to various Post Graduation and Super Specialty Courses in Medical Education applicable in the State of Himachal Pradesh, wherein for the first time incentives were provided to the General Duty Officers who had also served in the rural areas. However, for the purpose of incentive, this Policy was made applicable prospectively. Meaning thereby, that the incentive to the General Duty Officers is available only under the previous notification dated 20.03.2017, whereunder incentive was admissible only for remote and difficult areas.

5 Short reply has been filed on behalf of the respondents No. 1 to 3, wherein it is stated that the Medical Council of India has amended the "Postgraduate Medical Education Regulations, 2000" vide notification, dated

05.04.2018, wherein the procedure for selection of candidate for Post-graduation courses has been prescribed as under:

> *" 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 candidates shall be prepared on the basis of the marks obtained in National Eligibility-cum-Entrance Test and candidates shall be admitted to Postgraduate 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 on incentive upto 10% of the marks obtained for each year of service in remote and/or difficult areas or Rural Areas upto maximum of 30% of the marks obtained in National Eligibility-cum-Entrance Test. The remote and/or difficult areas or Rural Areas shall be as notified by State Government/Competent Authority from time to time."*

6 Relying upon the aforesaid notification, more particularly, the portion that is underlined by us, it is averred that it is the Government of Himachal Pradesh that alone is competent to decide for giving incentive in remote/difficult/rural areas, as such, the aforesaid regulations are not binding in nature upon the State Government and it is upto the State Government to decide which area(s) is to be included based on reasoning and the same view has been upheld by this Court in ***CWP No. 581 of 2017, titled Dr. Arti Dhatwalia vs. State of H.P, (2017) 3 ILR (HP) 27.***

7 It is further averred that in the new Post Graduate Policy, dated 27.02.2019, the department in its wisdom has tried to differentiate difficult/remote/rural areas to a reasonable classification on the basis of difficult, topographical and geographical location of a particular institution.

8. As regards the retrospective application of the incentive, as contained in the new Post Graduate Policy, dated 27.02.2019, it is averred that in case it is made applicable with retrospective date, prejudice would be caused to several candidates, who are serving in the areas with 10% incentive as per the previous Policy, but the corresponding incentive to those areas has been reduced vide current Policy.

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

10. The principle of incentivisation flows from Regulation 9(IV) of the Post Graduation Medical Education Regulation, as has been extracted below. This regulation was subject matter of decision in ***Dr. Arti Dhatwalia's case*** (supra) and this Court after placing reliance upon the judgment of State of ***U.P. and others vs. Dinesh Singh Chauhan, (2016) 9 SCC, 749***, while granting incentive marks observed as under:

> *"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 veryrecent 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/competentauthority 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.

11. Thus, it would be noticed that the issues raised in the instant writ petitions are no longer *res integra* in view of the judgment of the Hon'ble Supreme Court in ***Dinesh Singh Chauhan's*** case and followed by this Court in ***Dr. Arti Dhatwalia's*** case.

12. Additionally, it would be noticed that the petitioners have qualified the NEET on 31.01.2019 and at that relevant time, they were entitled for incentive as per notification, dated 20.03.2017, as the present Policy has been notified much later, i.e. on 27.02.2019.

13. As observed earlier, in so far as present writ petitions are concerned, the issues involved therein are no longer *res integra* in view of the judgment passed by the Hon'ble Supreme Court in ***State of U.P. and others vs. Dinesh Singh Chauhan, (2016) 9 SCC 749*** and the judgment rendered by this Court in batch of petitions lead being ***CWP No. 581 of 2017 titled Dr. Aarti Dhatwalia vs. State of H.P.*** and, thus, are squarely covered by the ratio laid down therein.

14. Therefore, the petitioners cannot claim notification dated 27.02.2019 be applied to their cases retrospectively. The petitioners having qualified the examination knowing fully well that the incentive would be granted as per notification dated 20.03.2017, cannot now turn around and insist that incentive be granted as per the subsequent Policy notified on 27.02.2019.

15. However, learned counsel for the petitioner(s) would argue that the State is not adopting the uniform standards and is granting incentive contrary to the aforesaid judgment(s).

16. If that be so, it is always open to the petitioner(s) to assail such action of the State by filing separate writ petition(s).

17. Accordingly, the writ petitions are dismissed, leaving the parties to bear their own costs. Pending application(s), if any, also stands dismissed.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Bovel Lal .....Petitioner.
Versus
State of Himachal Pradesh and another .....Respondents.

CWP No. 181 of 2019.
Date of decision: 04.05.2019.

Constitution of India, 1950 - Article 19– Freedom of speech and expression- Reasonable restriction- Right to dharna at specific place only- Whether can be claimed?- Petitioner challenging notification of District Magistrate, Shimla, denotifying venue near Police Station, Chhota Shimla, for holding rallies, demonstration etc.- Petitioner praying for permit for conducting strike at place denotified by District Magistrate- Held, there is no fundamental or statutory right to go on strike- Right to hold dharna is subject to reasonable restrictions- Reasons given for de-notification being obstruction of traffic and inconvenience to public are reasonable- Reasons given for denotification also admitted by petitioner- Alternative site for same enlisted- Petition dismissed. (Paras 5 to 7)

Case referred:
T.K. Rangarajan vs. Government of T.N. and others, (2003) 6 SCC 581

For the Petitioner : Mr. Kush Sharma,Advocate.
For the Respondents: Mr. Ashok Sharma, Advocate General with Mr. Ajay Vaidya, Senior Additional Advocate General and Mr. J.K. Verma, Mr. Adarsh Sharma and Mr. Nand Lal Thakur, Additional Advocate Generals and Ms. Divya Sood, Deputy Advocate General.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral)

The petitioner is a representative of the Himachal Pradesh Parent Teachers Associations and aggrieved by the notification dated 14.01.2019 issued by the District Magistrate, Shimla, whereby the venue at Chhota Shimla near Police Station has been denotified for holding demonstration, rallies etc. has filed the instant writ petition for grant of the following reliefs:-

"i) Issue a writ of certiorari to quash impugned order dated 14-01-2019 i.e. Annexure P-3.

ii) Issue a writ of mandamus directing the Respondent authorities not to implement the impugned order dated 14-01-2019 i.e. Annexure P-3 in the case where already permission has been accorded.

Iii) That the Respondent may further be directed to declare proper place as suitable venue for holding demonstrations, rallies etc. which does not obstruct traffic and inconvenience to the general public."

2. We really wonder how the instant writ petition is maintainable. The petitioner is admittedly working as Contract Teacher with the Education Department of the State of Himachal Pradesh and, therefore, is not an industrial worker covered by the provisions of the Industrial Disputes Act, 1947, Industrial Employees Standing Orders, 1946, Trade Unions Act, 1926 and hosts of other legislation and, as such, has neither any fundamental nor statutory or a moral right to go on strike. The law on this subject is well settled and reference in this regard can conveniently be made to the judgment of the Hon'ble Supreme Court in ***T.K. Rangarajan*** *versus* ***Government of T.N. and others, (2003) 6 SCC 581*** wherein in paragraphs 12, 17 to 19, it was held as under:-

*"**(A) There is no fundamental right to go on strike**:-*

12. Law on this subject is well settled and it has been repeatedly held by this Court that the employees have no fundamental right to resort to strike. In Kameshwar Prasad and others v. State of Bihar and another [(1962) Suppl. 3 SCR 369] this Court (C.B.) held that the rule in so far as it prohibited strikes was valid since there is no fundamental right to resort to strike.

***(B) There is no legal/statutory right to go on strike**.*

17.There is no statutory provision empowering the employees to go on strike.

18. Further, there is prohibition to go on strike under the Tamil Nadu Government Servants Conduct Rules, 1973 (hereinafter referred to as "the Conduct Rules"). Rule 22 provides that "no Government servant shall engage himself in strike or in incitements thereto or in similar activities." Explanation to the said provision explains the term 'similar activities'. It states that "for the purpose of this rule the expression 'similar activities' shall be deemed to include the absence from work or neglect of duties without permission and with the object of compelling something to be done by his superior officers or the Government or any demonstrative fast usually called "hunger strike" for similar purposes. Rule 22-A provides that

> *"no Government servant shall conduct any procession or hold or address any meeting in any part of any open ground adjoining any Government Office or inside any Office premises — (a) during office hours on any working day; and (b) outside office hours or on holidays, save with the prior permission of the head of the Department or head of office, as the case may be."*

(C) There is no moral or equitable justification to go on strike.

19.Apart from statutory rights, Government employees cannot claim that they can take the society at ransom by going on strike. Even if there is injustice to some extent, as presumed by such employees, in a democratic welfare State, they have to resort to the machinery provided under different statutory provisions for redressal of their grievances. Strike as a weapon is mostly misused which results in chaos and total maladministration. Strike affects the society as a whole and particularly when two lakh employees go on strike enmasse, the entire administration comes to a grinding halt. In the case of

strike by a teacher, entire educational system suffers; many students are prevented from appearing in their exams which ultimately affect their whole career. In case of strike by Doctors, innocent patients suffer; in case of strike by employees of transport services, entire movement of the society comes to a stand still; business is adversely affected and number of persons find it difficult to attend to their work, to move from one place to another or one city to another. On occasions, public properties are destroyed or damaged and finally this creates bitterness among public against those who are on strike."

3. Similar, issue came up before the learned Division Bench of this Court in ***CWP No.404/2007***, titled ***Devinder Negi*** *versus* ***State of H.P. and others***, decided on 15.10.2009. wherein while dealing with a question as to whether members of the Resident Doctors Association (RDA) working in the Indira Gandhi Medical College (IGMC) had a right to go on strike when their services were in dire need to the patients, the learned Division Bench of this Court held as under:-

"*12. The law on this subject is very well settled and it has been repeatedly held by the Apex court that the government employees have neither fundamental nor statutory or moral right to resort to strike. The impact of such strikes by the students and medical community who are directly connected with the hospitals is totally different from the strike in a factory or trading establishment, as ailing patients cannot be left waiting or unattended. Hospital activity is not the same as the lifeless functioning of machines in a factory or movement of trading material or other forms of commerce. Almost all the activities in relation to hospital are such as require constant and incessant attending and care, unlike financial losses; the loss of life or limb cannot be recouped. The Junior Doctors and student community undergoing medical courses are to realize and understand the realities and their duties towards the ailing patients in particular and the society at large before resorting to any such activity. In Pt. Parmanand Katara v. Union of India: AIR 1989 SC 2039 the Apex court observed:*

> *"Every doctor whether a Government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life. No law or State action can intervene to avoid/delay the discharge of the paramount obligation cast upon members of the medical profession. The obligation being total, absolute and paramount, laws of procedure whether in status or otherwise which would interfere with the discharge of this obligation cannot be sustained and must, therefore, give way. Every doctor should be reminded of his total obligation and be assured of the position that he does not contravene the law of the land by proceeding to treat the injured victim on his appearance before him either by himself or being carried by others."*

13. Thus for all above reasons, we are constrained to hold that the strike by the Doctors is illegal and unethical as it infringes the fundamental right of the patients enshrined in Article 21 of the Constitution of India. The patients have also a fundamental 'Right to Life' and therefore, at the same time the medical treatment, which is an integral and essential part of the fundamental right, cannot be ignored.

14. Even in a case of strike by lawyers, in Ex-Capt. Harish Uppal v. Union of India(2003) 2 SCC 45, the Constitution Bench of the Supreme Court observed

that the Lawyers have no right to go on strike or give a call for boycott and even they cannot go on token strike. The court specifically observed that for just or unjust cause, strike cannot be justified in the present day situation. Take strike in any field, it can be easily realized that the weapon does more harm than good. The sufferer is the society ---public at Large.

15. Thus there is neither any legal or statutory right of the employee to go on strike nor moral or equitable justification of the RDA to resort to strike in any manner. The public cannot be held at ransom by resorting to strike, even if there is injustice to some extent, as presumed by such employees, in a democratic welfare state.

16. In T.K Ranga Rajan v. Govt. of Tamil Nadu, AIR 2003 SC 3032, the Supreme Court also observed that Strike is a weapon mostly misused which results in chaos and total maladministration. En masse Strike affects the society as a whole; the entire administration comes to a grinding halt. In case of strike by the teachers the entire education system suffers. Many students are prevented from appearing in their exams which ultimately affects their whole career. In case of strike by doctors, innocent patients suffer. On occasions, public properties are destroyed or damaged and finally this creates bitterness among public against those who go on strike. In a society where there is a large scale unemployment and number of qualified persons are eagerly waiting for employment in Government Departments or in public sector undertakings strikes cannot be justified on any equitable ground. The misconduct of the employees, by the government is required to be dealt with in accordance with law. However, considering the gravity of the situation and the fact on occasion, even if the employees are not prepared to agree with what is contended by some leaders who encourage the strike, they are forced to go on strikes for the reason beyond their control. Therefore, even if the provisions of the act and the rules are not enforced, they are to be enforced after taking into consideration the situation and the capacity of the employees to resist. On occasion there is tendency or compulsion to blindly follow the others. The Apex court in the above case further observed that, whatever the reasons may be, it will not be proper for the government servants to resort to strike, even though they have a genuine and bonafide grievance. That has to be redressed only by resorting to the machinery provided under the statutory powers governing the Government servants, but not resorting to strike."

4. Apart from above, it would be noticed that the reasons given for denotifying the venue at Chhota Shimla near Police Station for holding demonstration, rallies etc. are that it obstructs the traffic and causes inconvenience to the general public.

5. The right to carry out demonstration/dharna is otherwise subject to reasonable restrictions and can only be carried out so as to ensure that minimum inconvenience is caused to the public at large. The employees going on 'dharnas' or protests etc. cannot obstruct the free flow of traffic or cause inconvenience to the general public merely because the protesters have been able to muster-up a sizeable number will not give them the right to hold the general public to ransom, bringing the entire administration to a grinding halt and because of strike by teachers, as observed in ***T.K. Rangarajan's case*** (supra), the entire education system suffers.

6. Even the learned counsel for the petitioner was not in a position to controvert the correctness of the reasons given for denotifying the venue at Chhota Shimla

near Police Station, but would contend that there is no alternate site notified by the Government for holding such kind of demonstration rallies etc.

7. However, we find that even this submission is without any merit as the respondents have annexed with their reply notification dated 21.02.2015 (Annexure R-1) wherein following venues have been notified for holding demonstration, rallies etc. with prior permission of the competent authority i.e. Sub Divisional Magistrate/ Additional District Magistrate/ District Magistrate:-

1. CTO Chowk for 200 persons.
2. Starting of Lower Bazar below Rani Janshi Park for 50 persons.
3. Chhota Shimla near police station for 25-50 persons.
4. Subzi Mandi Ground for 1000 persons.
5. Ambedkar Chowk for 500 persons.
6. Summer Hill Chowk for 250 persons.

8. In view of the aforesaid discussion, we find no merit in this writ petition and the same is accordingly dismissed. Pending application, if any, also stands disposed of.

9. Now that the respondents have themselves acknowledged the fact that the demonstrations/rallies held near Police Station, Chhota Shimla, obstruct the traffic and cause inconvenience to the general public by issuing notification dated 14.01.2019, we therefore direct that henceforth no person(s), association, society, authority etc. shall carry out demonstrations/rallies etc. near Police Station, Chhota Shimla.

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

Cr. Appeal No.: 790 of 2008 a/w
Cr. Appeal No. 791 of 2008
Date of Decision: 04.05.2019

Cr. Appeal No. 790 of 2008

Rana Arun Sen ....Appellant.

Vs.

L. R. Kashyap .....Respondent.

Cr. Appeal No. 791 of 2008

Rana Arun Sen ....Appellant.

Vs.

L. R. Kashyap .....Respondent.

Negotiable Instruments Act, 1881 (Act)– Section 138 – Dishonour of chqeue- Complaint- During pendency of complaint, compromise effected between parties and complaint withdrawn- Fresh cheques issued in view of compromise also dishonoured- Fresh complaint qua dishonor of fresh cheques- Trial Court dismissing complaint on ground that offence under Section 138 of Act is not constituted if cheques in question were issued in complainant's favour pursuant to compromise- Appeal against- Held, there was no adjudication qua cheques inter-se parties in earlier proceedings- Subsequent proceedings were not barred on ground that cheques were issued under compromise- Appeal allowed-

Judgment set aside- Trial Court directed to revive complaints and proceed further in accordance with law. (Paras 3, 5 to 7)

For the appellant(s):	Mr. Bimal Gupta, Senior Advocate, with Ms. Rubeena Bhatt, Advocate.
For the respondent(s):	Mr. Sanjeev Kuthiala, Senior Advocate, with Ms. Kamlesh Kumari, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

As common issue of law is involved in these appeals, they are being disposed of by way of a common judgment, as agreed upon. The reliefs prayed for in the said appeals are as under:

> *"**Cr. Appeal No. 790 of 2008***
>
> *It is, therefore, respectfully prayed that record of the case may kindly be called for, this appeal may kindly be accepted, judgment dated 31.10.2008 passed by the learned Chief Judicial Magistrate, Solan, HP, in Case No. 5/3 of 2005, may kindly be set aside and the complaint of the Appellant under Section 138 of the Negotiable Instruments Act, 1881 may kindly be allowed as prayed for.*
>
> *Any other order or direction, which this Hon'ble Court deems just and proper may also be passed in favour of the petitioner and against the respondent."*
>
> *"**Cr. Appeal No. 791 of 2008***
>
> *It is, therefore, respectfully prayed that record of the case may kindly be called for, this appeal may kindly be accepted, judgment dated 31.10.2008 passed by the learned Chief Judicial Magistrate, Solan, HP, in Case No. 84/10 of 2005, may kindly be set aside and the complaint of the Appellant under Section 138 of the Negotiable Instruments Act, 1881 may kindly be allowed as prayed for.*
>
> *Any other order or direction, which this Hon'ble Court deems just and proper may also be passed in favour of the petitioner and against the respondent."*

2. Appellant before this Court, feeling aggrieved, by the factum of bouncing of cheques issued by the respondent in his favour filed Complaints under Section 138 of the Negotiable Instrument Act. During the pendency of those proceedings, a compromise was entered into between the parties and in lieu of the compromise so arrived at between the parties, petitions filed under Section 138 of the Negotiable Instrument Act were withdrawn and fresh cheques were issued by the respondent to the appellant.

3. Incidentally, the said cheques issued in favour of the appellant also bounced. Feeling aggrieved, the appellant again approached the Court by filing Complaints under Section 138 of the Negotiable Instrument Act. The complaints so filed, stand dismissed by way of impugned judgments by the learned Court below on the ground that the provisions of Section 138 of the Negotiable Instrument Act are not invokable in the case of bouncing of a cheque, if a cheque has been issued by one party to other party on the basis

of a compromise. While returning said findings, learned Court below has relied upon the judgment of the Hon'ble Supreme Court in Lalit Kumar Sharma and another Vs. State of Uttar Pradesh and another, (2008) 5 Supreme Court Cases 638.

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

5. The impugned judgments *per se* are not sustainable in law. While dismissing the Complaints filed by the appellant, learned Court below has mis-red the judgment passed by the Hon'ble Supreme Court in Lalit Kumar Sharma's case (*supra*). The factual matrix of the case before the Hon'ble Supreme Court was that therein a party had invoked the provisions of section 138 of the Negotiable Instrument Act and thereafter the matter stood compromised by the said party with the party which had issued the cheque in issue as well as others. Post compromise, the other party had issued certain cheques to the first party and as said cheques bounced, proceedings under Section 138 of the Negotiable Instrument Act were initiated. The subsequent proceedings so initiated were held to be not maintainable on the ground that the original proceedings, which stood initiated as a result of the original cheque having been bounced, stood taken to their logical conclusion by the learned Trial Court. Relevant para of the judgment of Hon'ble Supreme Court is quoted hereinbelow:

> *"17. Thus, a second cheque was issued by Manish Arora for the purpose of arriving at a settlement. The said cheque was not issued in discharge of the debt or liability of the Company of which the appellants were said to be the Directors. There was only one transaction between Shri Ashish Narula, Shri Manish Arora, Directors of the Company and the complainant. They have already been punished. Thus, the question of entertaining the second complaint did not arise. It was, in our opinion, wholly misconceived. The appeal, therefore, in our opinion, must be allowed. It is directed accordingly. The respondent shall bear the costs of the appellants. Counsel's fee assessed at Rs.25,000/-."*

6. This important aspect of the matter has not been taken into consideration in the present case by the learned Trial Court, resulting perversity in the judgments which stand impugned before this Court. Learned Trial Court has erred in not appreciating that it is not as if the Hon'ble Supreme Court has held that in every case where cheque resulted out of compromise if bounced, provisions of Section 138 are not to be invoked. In fact, Hon'ble Supreme Court held that in case a party has already invoked the provisions of Section 138 of the Negotiable Instrument Act and proceedings either stood decided or were pending, then another cheque is issued in view of compromise, subsequent proceedings are not maintainable. Admittedly, in the present case, after filing of Complaints under Section 138 of the Negotiable Instrument Act, compromise was arrived at between the complainant and the accused and in lieu of the same, the Complaints were withdrawn. The cheques which were issued in lieu of the compromise when bounced, forced the complainant to again initiate proceedings under Section 138 of the Negotiable Instrument Act. As there was no adjudication in the previous proceedings, the subsequent proceedings were not barred simply on the ground that the cheques were issued in lieu of a compromise

7. Thus, in view of the findings returned hereinabove, the appeals are allowed. Impugned judgments dated 31.10.2008, passed by the Court of learned Chief Judicial Magistrate, Solan, H.P. in Case No. 5/3 of 2005 and Case No. 84/10 of 2005 are set aside. The Complaints are ordered to be revived and restored to their original numbers. Learned Trial Court is directed to adjudicate upon the same in accordance with law. It is made clear that this Court has not made any observation on the merit of the case and the Complaints

shall be adjudicated upon by the learned Trial Court on their own merit. Parties are directed to appear before the learned Trial Court on ***27th May, 2019.*** Registry is directed to forthwith return back the record of the case to the learned Trial Court.

Cr. MP No. 1413 of 2018 in Cr. Appeal No. 790 of 2008

Cr. MP No. 1412 of 2018 in Cr. Appeal No. 791 of 2008

8. As agreed, these applications are disposed of, with liberty to the applicants to move similar applications before the learned Trial Court.

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

Moti Kapila ....Petitioner.
Versus
Sh. Sanjay Kumar and another ...Respondents.

CMPMO No.: 533 of 2018.
Decided on: 06.05.2019.

Code of Civil Procedure, 1908- Order VIII Rule 1-A(3) – Additional documents- Leave of Court- Grant of- Trial Court dismissing defendant's application seeking leave to place additional documents on record- Petition against- Suit at stage of arguments- Six opportunities availed by defendant in leading evidence- Earlier also, his another application for placing additional documents on record was allowed by Trial Court but these documents not mentioned in that application- Suit pending for last eight years- Held, defendant failed in giving any cogent and satisfactory explanation for non-production of documents earlier- Order of Trial Court dismissing defendant's application upheld- Petition dismissed. (Paras 6, 9 & 10)

For the petitioner : Mr. Hamender Singh Chandel, Advocate.
For the respondents : Mr. Divya Raj Singh, Advocate

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition filed under Article 227 of the Constitution of India, following reliefs have been prayed for:-

> *"It is, therefore, prayed that impugned order dated 2.11.2018, Annexure P-4, passed by the Ld. Senior Civil Judge, Court No. 1, Una, in CMA under Order 8 Rule 1-A (3), titled Sanjay Kumar and another vs. Moti Kapila, whereby the application for placing on record the documents has been dismissed may be quashed and set aside and the petitioner may be held entitled to place on record the relevant documents, in the interest of justice.*
>
> *Any other relief, deeded proper in the facts and circumstances of the case may also be allowed."*

2. Brief facts necessary for adjudication of the present petition are that respondents herein have filed a suit for mandatory injunction against the present petitioner directing him to hand over the suit land as also for recovery of licence fee of `2,30,000/-. Said suit was filed somewhere in the month of November/December, 2011. Written statement by the present petitioner was filed to the suit in the year 2012.

3. In the year 2018, when the suit was at the arguments stage, an application stood filed by the present petitioner/defendant under Order 8, Rule 1-A(3) of the Code of Civil Procedure (hereinafter referred to as the 'Code') for permission to produce and prove on record certified copies of police complaint dated 15.09.2010 and police diary No. 28, dated 15.09.2010. A copy of the said application is appended on record as Annexure P-8. It stood mentioned in the said application that at the time of filing of the written statement, certified copies of the said documents were not in the hands of defendant nor were traceable in the record of Police Department and the same could only be traced and collected by the defendant by applying under Right to Information Act from the Una Police on 29.03.2018 and that too with great efforts. It further stood mentioned in the application that the application was filed in good faith and in a bonafide manner and without any unreasonable delay.

4. The application stood opposed on the ground that after the filing of the written statement on 07.06.2012, more than 6 opportunities were availed by the defendant to lead evidence and though the said documents were well within the knowledge of the defendant since the very inception of the suit, the same were not filed *inter alia* for the reason that the said documents have no relevance with the facts of the suit. It further stood mentioned in the reply that earlier also an application under Order 8, Rule 1-A(3) of the Code stood filed by the defendant on 17.09.2017 and the same was allowed as plaintiff had pleaded no objection qua the same. The stand of the plaintiff thus in the reply was that the application was filed just with the intent to delay the adjudication of the suit with malafide intention.

5. Said application stands rejected by the learned trial Court vide impugned order dated 02.11.2018. Learned trial Court while dismissing the application has held that the parties being alive of the matter in controversy had gone to trial and led their evidence and despite the fact that the documents were already in existence when defendant lead produced his evidence, he did not exercise due diligence at the appropriate stage of the case. It further held that earlier also similar application stood filed by the defendant and at that stage, documents which are now intended to be produced on record, could have been produced which the defendant failed to do. Learned trial Court further held that documents were not necessary to advance the case of the defendant and taking the same on record would further delay the case unnecessarily. It thus dismissed the application.

6. The order so passed by learned trial court has been assailed by the petitioner by way of this petition *inter alia* on the ground that learned Court below has erred in coming to the conclusion that the documents were not necessary for adjudication of the case as said documents were most important and relevant documents to substantiate the case of the defendant. Learned Counsel for the petitioner further argued that the documents pertained to the facts which already stood pleaded in the written statement and not allowing the same to be placed on record has resulted in grave miscarriage of justice as no prejudice could have been caused to the plaintiff in case said application would have been allowed.

7. On the other hand, learned Counsel for the respondent has argued that there is no perversity with the order passed by the learned Court below as the said Court has rightly rejected the application of the petitioner because the application in fact stood

filed by the defendant just to delay the matter and there was no cogent explanation given as to why on earlier instances, said documents could not be placed on record.

8. I have heard learned Counsel for the parties and also gone through the impugned order as also the record of the case.

9. It is not in dispute that the suit was filed in the year 2011 and the written statement stood filed in the year 2012. It has also not been disputed that in 6 opportunities which were taken by the defendant to lead his evidence, no effort was made to place on record these documents. It is also a matter of record that in an earlier application filed under Order 8, Rule 1-A(3) of the Code by the present petitioner, which stood allowed by the learned Court below while placing on record some other documents, there was no whisper or request or mention of these particular documents. It was only at the stage of arguments that this application was filed on the pretext that earlier these documents could not be placed on record by the petitioner as the same were not traceable in the Police Department and same were traced only by applying under the Right to Information, Act.

10. Order 8, Rule 1-A(3) of the Civil Procedure Code provides that a document which ought to be produced in the Court by the defendant, but is not produced, shall not, without leave of the Court, be received in evidence on his behalf at the hearing of the suit. In fact, Rule 1-(A) of Order 8 of the Code deals with duty of the defendant upon which relief is claimed or relied upon by him. It lays the procedure as to how the documents upon which the defendant intends to rely to prove its case, have to be produced before the Court. The documents, permission to produce and prove on record qua whom was sought under application filed under Order 8, Rule 1A(3) of the Code, as per own case of the petitioner were obtained by him under the Right to Information Act. Though, there is a mention in the application that said documents were not traceable in the Police Department but there is no material on record to substantiate this fact. It is petitioner's own case that he obtained said documents from the Police Department under Right to Information Act. If said documents were made available to the petitioner by the Police Department under Right to Information Act in March, 2018, it is not understood as to why the petitioner could not earlier obtain said documents under the provisions of the said Act since 2012, because it is not the case of the petitioner that earlier also, he had applied for said documents under the Right to Information Act but the same were not supplied to him by the department concerned. This demonstrates gross negligence on the part of the petitioner. The contention of learned Counsel for the petitioner that the order passed by the learned Court below suffers from perversity as learned Court should not have commented upon the relevance of the documents concerned, in my considered view, is immaterial because otherwise also, such an application could not have been allowed after the lapse of 8 years when delay in filing the application to bring on record the said documents has not at all been satisfactorily explained. It is apparent from the record that the petitioner has been grossly negligent in not taking appropriate steps to bring said documents on record and now at this stage, no indulgence in fact, can be shown to him by permitting him to produce on record the documents in issue, especially when the lis is pending adjudication since the year 2011 and the application was filed in the year 2018 at the stage of arguments of the suit.

Accordingly, in view of above discussion, this petition is dismissed being devoid of merit. Pending miscellaneous application(s), if any, also stand disposed of. No orders as to costs.

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

Dharmender Mathur .....Petitioner

Versus

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

Cr. MMO No. 177 of 2019
Reserved on: 06.05.2019
Decided on: 08.05.2019

Code of Criminal Procedure, 1973 (Code)– Section 482 –Inherent powers- Exercise of- Quashing of FIR- Limitation, if any- Held, High Court may quash any FIR or complaint in exercise of its inherent jurisdiction- Inherent powers so conferred are not affected or limited by Section 320 of Code- On facts, FIR registered by wife against husband quashed pursuant to compromise between parties. (Paras 6 to 11)

Cases referred:

B.S. Joshi and others vs. State of Haryana and another, (2003) 4 SCC 675

Jitendra Raghuvanshi and others vs. Babita Raghuvanshi and another, (2013) 4 SCC 58

Parbatbhai Aahir alias Parbatbhai Bhimsinhbhai Karmur and others vs. State of Gujarat and another, (2017) 9 SCC 641

Preeti Gupta and another vs. State of Jharkhand and another, (2010) 7 SCC 667

For the petitioner: Mr. R.L. Verma, Advocate.

For the respondents: Mr. S.C. Sharma, Mr. Shiv Pal Manhans and Mr. P.K. Bhatti, Additional Advocates General with Mr. Raju Ram Rahi, Deputy Advocate General, for the respondents-State.
Mr. Dinesh Bhatia, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present petition, under Section 482 of the Code of Criminal Procedure (hereinafter to be called as "the Code"), is maintained by the petitioner for quashing of F.I.R No. 123/14, dated 22.07.2014, under Sections 498A & 506 of the Indian Penal Code, registered at Police Station Shimla West (Boileauganj) H.P., alongwith all consequent proceedings arising out of the said F.I.R., pending before the learned trial Court.

2. Briefly stating the facts, giving rise to the present petition are that marriage between the petitioner and respondent No. 4 was solemnized on 20.06.2009 at Jaipur as per Hindu rites and ceremonies and they lived together till 2014. However, thereafter due to some differences in opinion with the petitioner, respondent No. 4 left the matrimonial house and started living at her parental house at Shimla and on 22.07.2014, she got registered FIR No. 123/14, dated 22.07.2014, against the petitioner. However, now the parties have entered into a compromise **(Annexure P-4)** and in order to maintain their cordial relations, they do not want to pursue the case against each other. Hence the present petition.

3. Learned counsel for the petitioner has argued that as the parties have compromised the matter, vide Compromise Deed **(Annexure P-4)**, no purpose will be served

by keeping the proceedings alive, hence the FIR, alongwith consequent proceedings, arising out of the same, pending before the learned trial Court may be quashed and set aside.

4. Learned counsel appearing on behalf of respondent No. 4 has argued that the present petition may be allowed, in view of the compromise arrived at between the parties.

5. To appreciate the arguments of learned counsel appearing on behalf of the parties, I have gone through the entire records in detail.

6. Their Lordships of the Hon'ble Supreme Court **B.S. Joshi and others**vs. **State of Haryana and another**, (2003) 4 SCC 675, have held that if for the purpose of securing the ends of justice, quashing of FIR becomes necessary, section 320 would not be a bar to the exercise of power of quashing. It is well settled that the powers under section 482 have no limits. Of course, where there is more power, it becomes necessary to exercise utmost care and caution while invoking such powers. Their Lordships have held as under:

> **[6] In Pepsi Food Ltd. and another v. Special Judicial Magistrate and others ((1998) 5 SCC 749), this Court with reference to Bhajan Lal's case observed that the guidelines laid therein as to where the Court will exercise jurisdiction under Section 482 of the Code could not be inflexible or laying rigid formulae to be followed by the Courts. Exercise of such power would depend upon the facts and circumstances of each case but with the sole purpose to prevent abuse of the process of any Court or otherwise to secure the ends of justice. It is well settled that these powers have no limits. Of course, where there is more power, it becomes necessary to exercise utmost care and caution while invoking such powers.**
>
> **[8] It is, thus, clear that Madhu Limaye's case does not lay down any general proposition limiting power of quashing the criminal proceedings or FIR or complaint as vested in Section 482 of the Code or extraordinary power under Article 226 of the Constitution of India. We are, therefore, of the view that if for the purpose of securing the ends of justice, quashing of FIR becomes necessary, Section 320 would not be a bar to the exercise of power of quashing. It is, however, a different matter depending upon the facts and circumstances of each case whether to exercise or not such a power.**
>
> **[15] In view of the above discussion, we hold that the High Court in exercise of its inherent powers can quash criminal proceedings or FIR or complaint and Section 320 of the Code does not limit or affect the powers under Section 482 of the Code.**

7. 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.

8. Their Lordships of the Hon'ble Supreme Court in **Jitendra Raghuvanshi and others**vs. **Babita Raghuvanshi and another,**(2013) 4 SCC 58, have held that criminal proceedings or FIR or complaint can be quashed under section 482 Cr.P.C. in appropriate cases in order to meet ends of justice. Even in non-compoundable offences pertaining to matrimonial disputes, if court is satisfied that parties have settled the disputes amicably and without any pressure, then for purpose of securing ends of justice, FIR or complaint or subsequent criminal proceedings in respect of offences can be quashed. Their Lordships have held as under:

[13] As stated earlier, it is not in dispute that after filing of a complaint in respect of the offences punishable under Sections 498A and 406 of IPC, the parties, in the instant case, arrived at a mutual settlement and the complainant also has sworn an affidavit supporting the stand of the appellants. That was the position before the trial Court as well as before the High Court in a petition filed under Section 482 of the Code. A perusal of the impugned order of the High Court shows that because the mutual settlement arrived at between the parties relate to non-compoundable offence, the court proceeded on a wrong premise that it cannot be compounded and dismissed the petition filed under Section 482. A perusal of the petition before the High Court shows that the application filed by the appellants was not for compounding of non-compoundable offences but for the purpose of quashing the criminal proceedings.

[14] The inherent powers of the High Court under Section 482 of the Code are wide and unfettered. In B.S. Joshi , this Court has upheld the powers of the High Court under Section 482 to quash criminal proceedings where dispute is of a private nature and a compromise is entered into between the parties who are willing to settle their differences amicably. We are satisfied that the said decision is directly applicable to the case on hand and the High Court ought to have quashed the criminal proceedings by accepting the settlement arrived at.

[15] In our view, it is the duty of the courts to encourage genuine settlements of matrimonial disputes, particularly, when the same are on considerable increase. Even if the offences are non-compoundable, if they relate to matrimonial disputes and the court is satisfied that the parties have settled the same amicably and without any pressure, we hold that for the purpose of securing ends of justice, Section 320 of the Code would not be a bar to the exercise of power of quashing of FIR, complaint or the subsequent criminal proceedings.

[16] There has been an outburst of matrimonial disputes in recent times. The institution of marriage occupies an important place and it has an important role to play in the society. Therefore, every effort should be made in the interest of the individuals in order to enable them to settle down in life and live peacefully. If the parties ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in a court of law, in order to

do complete justice in the matrimonial matters, the courts should be less hesitant in exercising its extraordinary jurisdiction. It is trite to state that the power under Section 482 should be exercised sparingly and with circumspection only when the court is convinced, on the basis of material on record, that allowing the proceedings to continue would be an abuse of the process of the court or that the ends of justice require that the proceedings ought to be quashed. We also make it clear that exercise of such power would depend upon the facts and circumstances of each case and it has to be exercised in appropriate cases in order to do real and substantial justice for the administration of which alone the courts exist. It is the duty of the courts to encourage genuine settlements of matrimonial disputes and Section 482 of the Code enables the High Court and Article 142 of the Constitution enables this Court to pass such orders.

[17] In the light of the above discussion, we hold that the High Court in exercise of its inherent powers can quash the criminal proceedings or FIR or complaint in appropriate cases in order to meet the ends of justice and Section 320 of the Code does not limit or affect the powers of the High Court under Section 482 of the Code. Under these circumstances, we set aside the impugned judgment of the High Court dated 04.07.2012 passed in M.C.R.C. No. 2877 of 2012 and quash the proceedings in Criminal Case No. 4166 of 2011 pending on the file of Judicial Magistrate Class-I, Indore."

9. Similarly, Hon'ble Supreme Court in **Parbatbhai Aahir alias Parbatbhai Bhimsinhbhai Karmur and others** *vs.* **State of Gujarat and another, (2017) 9 Supreme Court Cases 641,** wherein it has been held as under :

"16.The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions:

16.1. Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court;

16.2. The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

16.3. In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

16.4 While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

16.5 The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

16.6. In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

16.7. As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

16.8. Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

16.9 In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

16.10. There is yet an exception to the principle set out in propositions 16.8 and 16.9 above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance.

Even if, the trial is allowed to be continued, as the parties have compromised the matter, there are bleak chances of conviction to secure the ends of justice.

10. Thus, taking into consideration the law as discussed hereinabove, I find that the interest of justice would be met, in case, the proceedings are quashed, as the parties have already compromised the matter, as per Compromise **(Annexure P-4)**, placed on record.

11. Accordingly, looking into all attending facts and circumstances, this Court finds that present is a fit case to exercise jurisdiction vested in this Court, under Section 482 of the Code and, therefore, the present petition is allowed and F.I.R No. 123/14, dated 22.07.2014, under Sections 498A & 506 of the Indian Penal Code, registered at Police Station Shimla West (Boileauganj) H.P., is ordered to be quashed. Since F.I.R No. 123/14, dated 22.07.2014, under the aforesaid Sections has been quashed, consequent proceedings,

arising out of the said F.I.R., pending before the learned trial Court are thereby rendered infructuous.

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

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

Jai Shankar ...Appellant

Versus

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

LPA No. 210 of 2012
Date of decision: 9.5.2019

Constitution of India, 1950- Articles 14 & 16- Appointment as Lecturer on taking over of private college by Government- Claim of- Entitlement- Petitioner was serving as Lecturer in private college, when he got selected as Lecturer in School cadre on regular basis- Applying to college Management for his 'relieving' and extraordinary leave in order to join school cadre- Meanwhile private college taken over along with eligible staff by Government, when he was on so called extra-ordinary leave- Petitioner claiming that he was occupying post of Lecturer in said college on date of issuance of Notification and entitled for taking over his service by State- Petition dismissed by Hon'ble Single Bench- LPA- Held, petitioner never sought permission of Management of college to apply for another job- No extraordinary leave was ever sanctioned in his favour by principal of college- He was relieved by principal pursuant to his written request- He was not on rolls after his relieving from said college- Petitioner not eligible for taking over of his service by Government- LPA dismissed. (Paras 9 to15)

For the Appellant: Mr.Sanjeev Bhushan, Senior Advocate, with Ms. Abhilasha Kaundal, Advocate.

For the Respondents: Mr.J.S. Guleria, Deputy Advocate General.
Dr. Naresh Verma, Assistant Professor, Physics present with records.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge.

Appellant herein had filed a petition (Original Application No. 2763 of 2001), in the H.P. State Administrative, Tribunal which was transferred to this High Court on abolition of the said Tribunal in 2008 and was registered as CWP(T) No. 8032 of 2008. Learned Single Judge has dismissed the said petition vide judgment dated 9.4.2012, which has been assailed in present appeal.

2. We have heard Mr.Sanjeev Bhushan, Senior Advocate representing appellant and Mr.J.S. Guleria, Learned Deputy Advocate General for State and have also gone through the record.

3. Petitioner/appellant's case is that he was appointed as Lecturer (Political Science) in a private College, namely, R.V.M.S.D. College Sujanpur Tihra on 9.8.1997 and had joined as such in the said College on 19.8.1997. Later on, on 28.2.2000 R.V.M.S.D. College Sujanpur Tihra was merged with DAV College (Women) Sujanpur and was named as DAV College Sujanpur Tihra and the appellant continued to be Lecturer (Political Science) in the said College. It is also case of the petitioner/applicant that during his service in DAV College Sujanpur Tihra, he, with prior approval of the Managing Committee of the College, had applied for regular post of Lecturer (Political Science) School Cadre in the Education Department of Himachal Pradesh, advertised through Public Service Commission and further that after his selection to the said post of Lecturer (Political Science) School Cadre, he had submitted an application on 17.5.2000 with two prayers i.e. one for granting extra ordinary leave of 16 months, under para 53 (Appendix 'A') Chapter XXXVIII, paragraph 38.5 B (d) of Himachal Pradesh University Ordinances, in order to get benefit of taking over of College as per announcement made by the Hon'ble Chief Minister and second for relieving him to join new posting, whereupon on the same date, Principal of DAV College had relieved him to join the new assignment. Grievance of appellant is that at the time of taking over of College, his service has not been taken over along with other staff.

4. Respondent-State had issued a notification dated 7th March, 2001, vide which order for taking over aforesaid Private College, was notified with immediate effect, with rider that terms and conditions would be notified later on, which were notified vide notification dated 28.8.2001 and services of teaching and non-teaching staff, in consonance with instructions already notified vide notification dated 26.8.1994, were notified with certain changes incorporated in this notification dated 28.8.2001.

5. Claim of the petitioner is that being on leave for 16 months w.e.f. 17.5.2000, he was on roll of the College till 16.9.2001 and therefore, at the time of issuance of notification dated 7th March, 2001 and 28.8.2001, he was occupying the post of Lecturer (Political Science) in the College taken over by respondent-State and being eligible person as per notified terms and conditions and also R&P Rules, he was entitled for taking over of his service by respondent/State as a Lecturer (Political Science) in the College Cadre.

6. Claim of the appellant has been opposed by respondent-State on the ground that he was not in continuous service preceding one year at the time of taking over the College i.e. 7.3.2001 and his services with DAV College were ended on his relieving on 17.5.2000 and no extra ordinary leave, as claimed by him, was ever sanctioned to him and therefore, his name was not found in the list of employees, serving at the time of taking over of the College and therefore, he is not entitled for relief claimed.

7. Learned Single Judge, after hearing the parties and taking in to consideration the pleadings, has rejected the claim of the petitioner/appellant on various grounds. At the time of rejecting the claim of petitioner, learned Single Judge, after believing that petitioner had submitted an application seeking his relieving and extra ordinary leave vide Annexure A-2 with the petition, has observed that there is no tangible material on record to show that extra ordinary leave, applied by the petitioner under H.P. University Ordinances, was sanctioned and on the date of taking over of the College, petitioner was not on rolls of DAV College Sujanpur Tihra and he was not in continuous service for a period of one preceding year before taking over the College for want of sanction of any kind of leave. In addition it has also been observed by Learned Single Judge that there is no contemporaneous record to show that petitioner has sought employment in the State Government with prior permission of the Management and thus it cannot be said that petitioner's case was covered under para 53 of Appendix 'A' of H.P. University Ordinances.

8. Now, with present appeal, appellant/petitioner has filed a photocopy of no objection certificate dated 5.2.2000 issued by President of Managing Committee of R.V.M.S. D. College, Sujanpur Tihra, whereby no objection to join other job was granted in favour of appellant/petitioner and banking upon this No Objection Certificate, learned counsel for the appellant/petitioner has contended that learned Single Judge has committed a mistake for rejecting the claim of the appellant/petitioner by returning findings that there was no contemporaneous record to show that petitioner had sought employment in the State Government with prior permission of the Management.

9. Though, as evident from the perusal of record of original petition filed by the appellant/petitioner, no such No Objection Certificate was placed on record before learned Single Judge and it has been disclosed for first time in this appeal, that too, without filing any application for leading any additional evidence, however, in the interest of justice, we have considered the same and had called for record from the respondents related to the appellant/petitioner. Respondent-State has produced the requisite record. We find that this No Objection Certificate was issued in favour of appellant/petitioner on filing an application by him on 4.2.2000, whereby he had sought permission to appear in the interview of School Cadre Lecturer conducted by Himachal Pradesh Public Service Commission with request to issue him experience and No Objection Certificate. It is evident from this application that the petitioner had not applied for post of Lecturer (School Cadre) with prior permission of the Management, but had sought No Objection Certificate at the time of appearing in interview for the said post. Even if, this No Objection Certificate, issued at the time of interview, is considered to be permission of the Management for seeking employment with the State Government, it is of no help to the appellant/petitioner for the reasons stated hereinafter.

10. Applying for employment with the State Government with prior permission of the Management, does not entitle the appellant/petitioner for automatic grant of extra ordinary leave, as claimed by petitioner. Permission to apply and join job elsewhere is quite different from the grant of extra ordinary leave. As per record produced, extra ordinary leave, as claimed by petitioner was neither ever applied by the petitioner nor was granted in his favour at any point of time.

11. Perusal of record produced by respondent-State reveals that there is no such application dated 17.5.2000, as claimed by appellant/petitioner to be submitted for seeking extra ordinary leave of 16 months. Copy of the said application filed with the petition as Annexure A-2, is not only unsigned, but also does not have any indication of its receipt by the Principal or any other official of the College. Plea of learned counsel for the petitioner/appellant that the record is not maintained by respondents properly is not tenable, as on one hand he is relying upon this record for grant of no objection to the appellant/petitioner to join services with respondent-State and on the other hand he is doubting the maintenance of the same record in proper manner. He cannot be permitted to blow hot and cold at the same time. Therefore, this application Annexure A-2 appears to have been fabricated later on in order to substantiate the claim of petitioner for the post of Lecturer in College Cadre after undertaking of the College.

12. Even if, it is considered that the appellant/petitioner had filed application Annexure A-2, then also it does not create any right in favour of appellant/petitioner to consider him on extra ordinary leave of 16 months, as claimed. It is settled law that leave cannot be claimed as a matter of right. Leave applied, but not sanctioned amounts to rejection of the prayer for leave, more particularly when petitioner was relieved without any rider. Relieving dated 17.5.2000 (Annexure A-3) is only a relieving simplicitor of the appellant/petitioner on 17.5.2000 to join his new assignment. It does not speak anything

about grant of any kind of leave in favour of appellant/petitioner for joining as a Lecturer (School Cadre) with respondent-State. Therefore, this relieving at any stretch of imagination cannot be said to be grant of extra ordinary leave, as claimed. This relieving order also reflects that no such application dated 17.5.2000 as purported to have been filed as Annexure A-2, was ever submitted by the appellant/petitioner. This fact is further substantiated from perusal of Character Certificate issued on the same day i.e. 17.5.2000 in favour of appellant/petitioner by the same Principal of DAV College, which is available on the record produced by respondent-State, which was duly received by appellant/petitioner putting his signatures dated 17.5.2000 thereon. In this certificate, it has been unambiguously certified that appellant/petitioner had served DAV College as a Lecturer (Political Science) from 19.8.1997 to 17.5.2000. It clearly indicates that services of appellant/petitioner were ended with concerned DAV College on 17.5.2000. Neither this Character Certificate nor Relieving Certificate, in any manner, indicates that the appellant/petitioner was granted leave and permitted to continue after 17.5.2000, rather these documents establish contrary thereto.

13. Further had leave as claimed by appellant/petitioner, would have been sanctioned in his favour, he must have been on the roll of the College, but there is nothing on record to establish that after 17.5.2000, the appellant/petitioner was on the roll of DAV College, rather as discussed above, the record indicates contrary that his service was put to an end on 17.5.2000.

14. Learned Single Judge has rightly observed that though in the petition filed by the appellant/petitioner, he has claimed to have making a representation (Annexure A-5) to respondent No. 1, stating all the facts therein, which was not replied, but copy of the said representation has not been placed on record with the petition and we also, on perusal of record of Original Application filed by the petitioner, do not find any such document on record. It is also noticeable that in the Index of Original Application also, there is no mention of any Annexure A-5, to have been filed with the Original Application/petition, but there is reference of Annexure A-5 in body of the Original Application.

15. Learned counsel for the appellant/petitioner, to substantiate the claim of the petitioner/appellant, has also referred to an application dated 22.4.2001 available on record produced by respondents-State, submitted by appellant/petitioner for considering him for the appointment in the newly undertaken College. In para 1 of this application, appellant/petitioner had stated that on 17.5.2000, he had to go on extra ordinary leave for 16 months, because he had to appear in the competitive examination for the post of Lecturer School Cadre, which is contrary to the admitted facts and also the contents of application Annexure A-2, wherein he had sought relieving w.e.f. 17.5.2000, on account of his selection as a Lecturer School Cadre in the Department of Education and also for extra ordinary leave. In application dated 22.4.2001, petitioner/appellant had stated that he had qualified the examination and was appointed as Lecturer on 22.5.2000, whereas in application Annexure A-2, dated 17.5.2000, it is stated that he had been selected as a Lecturer School Cadre in Department of Education. The contents of both these applications cannot co-exist together, which again indicates that the application Annexure A-2 is result of afterthought to extend the claim to the post of Lecturer College Cadre.

16. In view of above discussion, we find that there is no illegality, irregularity or perversity in the judgment passed by learned Single Judge. As no ground for interference is made out, accordingly appeal is dismissed. No costs.

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

Rama Nand ....Petitioner.
Versus
Sh. Kuldeep Bansal and others ....Respondents.

Civil Revision No. 199 of 2018
Decided on: 10.05.2019.

Code of Civil Procedure, **1908** - Order IX Rules 8 & 9 –Restoration of suit dismissed in default- Delay- Explanation for- Held, pleadings are dictated on legal solicitation- Therefore, each and every word contained in application per se cannot be substantiated by way of evidence- Delay of seven months in application for restotration of suit cannot be said to be inordinate, when plaintiff contending that he was ailing at relevant time and could not apprise his Counsel about it. (Paras 7 to 9)

For the petitioners : M/s Vivek Singh Attri and Abhinav Purohit, Advocates.
For the respondents : Mr. Ajay Sharma, Sr. Advocate with Ms. Anandita Sharma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

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

"1.Allow the present application and set aside the order dated 18-7-2018 passed by Ld. Civil Judge Senior, Nahan, in CMA No. 91/6 of 2014.

2. To pass any order or further order as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case."

2. Brief facts necessary for adjudication of the present petition are that a Civil Suit filed by the present petitioner for specific performance of contract, which was filed somewhere in the year 2010, stood dismissed in default for non-prosecution on 25.02.2014 by the Court of learned Civil Judge (Senior Division), Sirmaur District at Nahan. Order dated 25.02.2014 is quoted herein-below:-

"Rebuttal evidence not present. Case called several times, but neither the plaintiff, nor any counsel appeard on his behalf. It is already 2.50 PM. Accordingly, the suit of the plaintiff is dismissed in default, for non-prosecution. The file after completion be consigned to record room."

3. Aggrieved by the same, petitioner filed an application under Order 9, Rule 9 read with Section 151 of the Code of Civil Procedure, praying for recalling of the said order. The application alongwith application filed under Section 5 of the Limitation Act for condonation of delay in filing the application for recalling order, stand rejected vide impugned order.

4. Learned Counsel for the petitioner has argued that the impugned order is not sustainable in the eyes of law as the same is harsh and the findings returned therein are not borne out from the record of the case. On the other hand, learned Counsel for the

respondents has argued that there is no merit in the present petition as learned trial Court has rightly dismissed the applications which were filed after an inordinate delay and that too without any cogent explanation.

5. I have heard learned Counsel for the parties and also gone through the impugned order as well as the record of the case.

6. As I have already observed above, the suit was dismissed on 25.02.2014. The application for recalling said order was filed in September, 2014. The reason mentioned in the application as to why no one appeared for prosecuting the case on 25.02.2014 was that the applicant/petitioner was suffering from ailment and as he could not apprise his Counsel of the said fact, the same led to non-appearance of Counsel in the Court, which ultimately resulted in dismissal of the suit for non-prosecution.

7. Learned trial Court while dismissing the said plea of the petitioner held that the application was filed for setting aside the order of dismissal of the suit in default after about seven months and no cogent explanation was given as to why the application could not be filed within reasonable period. The explanation which was given by the applicant before the learned trial Court was disbelieved by the learned Court below and it held that if a party is found to be negligent or there is want of *bonafide*, then delay cannot be condoned and application cannot be allowed.

8. In my considered view, order passed by learned Court below is harsh. Though, the application for setting aside the order vide which the suit was dismissed in default was filed after about seven months but such a delay cannot be said to be inordinate delay.

9. Besides this, the Court has to understand that whenever applications are filed by the parties for the purpose of explanation of delay, the Court cannot accept that each and every word contained in the application *per se* would be substantiated by the applicant, because it is common knowledge that majority of contents of such like applications are dictated on legal solicitation so given to the party concerned. In these circumstances, the Court has to be slightly sensitive and in case the delay is not that inordinate and the other party can be monetarily compensated, then the Court rather than following a hyper technical approach has to follow a approach which is more humane and justice oriented.

10. In view of above discussion, petition is allowed. Order dated 18.07.2018, passed in CMA No. 91/6 of 2014, as also order dated 25.02.2014, passed by learned Civil Judge (Sr. Division), Sirmaur District at Nahan, are quashed and set aside and the Civil Suit is ordered to be restored to its original number, with the direction to the learned Court below to adjudicate the same on merit, subject however to payment of cost of Rs. 20,000/- by the petitioner to the respondents. Parties through their learned Counsel are directed to appear before the learned trial Court on 10.07.2019. It is clarified that in case cost is not paid by the petitioner to the respondent by way of Bank Draft on the date so fixed, then the order passed by learned trial Court dated 25.02.2014, shall automatically become operative. In other words, even a single day shall not be granted by the learned trial Court to the petitioner for payment of amount of cost in addition to time granted by this Court.

The petition stands disposed of in above terms, so also pending miscellaneous application(s), if any.

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

State of H.P. ...Appellant
Versus
Jaggu Ram and others ...Respondents

Cr. Appeal No. 311 of 2009
Decided on: May 10, 2019

Indian Penal Code, 1860- Section 325 read with 34– Grievous hurt in furtherance of common intention- Proof of- Trial Court acquitting accused of having caused grievous injuries to 'BP' in furtherance of common intention of each other- Appeal against by State on ground of wrong appreciation of evidence by Trial Court- On facts, held, victim and accused had animosity on account of extraction of sand from river- Mining cases pending against complainant- Both sides not paying any royalty to Government- Land of accused situated close to river bed- Eye witness denying assault on victim on relevant date- No explanation for delay caused in filing FIR though victim crossed from place of incident through Police Post- Vital contradictions in statements of prosecution witnesses- Trial Court rightly appreciated evidence on record while acquitting accused- Appeal dismissed- Acquittal upheld. (Paras 11 to 18)

Case referred:
C. Magesh and others vs. State of Karnataka, (2010) 5 SCC 645

For the appellant: Mr. Ashwani Sharma, Additional Advocate General.
For the respondents: Mr. Deepak Kaushal, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (oral)

Instant appeal having been filed by the appellant-State (hereinafter, 'State') is directed against judgment of acquittal dated 29.11.2008, passed by the learned Chief Judicial Magistrate, Sirmaur District at Nahan, Himachal Pradesh in Cr. Case No. 87/2 of 2007, whereby the respondents-accused (hereinafter, 'accused') came to be acquitted of the charges framed against them under Section 325 read with Section 34 IPC.

2. Briefly stated the facts as emerge from the record are that on 4.7.2007, at about 5.30 pm, accused, in furtherance of their common intention, caused grievous injuries to the complainant Bhanu Partap (PW-1), at Trilokpur River by means of fist and kick blows. Allegedly the matter was reported to the Police Post Kala Amb. One Head Constable Hari Singh alongwith Constable Viveka Nand visited the Regional Hospital, Nahan and recorded the statement under Section 154 CrPC of the complainant, Bhanu Partap, on the basis of which, formal FIR, Ext. PW-7/A came to be registered against the accused at Police Station, Nahan.

3. After completion of investigation, Police presented *Challan* in the competent Court of law, who being satisfied that a prima facie case exists against the accused, charged them with offences punishable under Section 325 IPC read with Section 34 IPC, to which all the accused pleaded not guilty and claimed trial. Prosecution, with a view to prove its case against the accused, examined in all eight witnesses, whereas, accused in their statements

recorded under Section 313 CrPC, denied the case of the prosecution *in toto* and claimed that they have been falsely implicated. However, the fact remains that they did not lead any evidence in their favour, despite opportunity having been afforded to them.

4. Learned Chief Judicial Magistrate, Sirmaur District at Nahan, Himachal Pradesh, vide judgment dated 29.11.2008, acquitted all the accused of the charges framed against them. In the aforesaid background, State has approached this Court by way of instant proceedings, praying therein for conviction of accused after setting aside impugned judgment of acquittal recorded by the learned Court below.

5. Having heard learned counsel for the parties and perused the evidence led on record, be it oral or documentary vis-à-vis judgment of acquittal recorded by the learned Court below, this court is not at all convinced with the arguments advanced by Mr. Ashwani Sharma, learned Additional Advocate General, that the learned Court below has misappreciated the evidence and has failed to appreciate the dame in its right perspective, rather, this Court, on careful perusal of the evidence led on record by the prosecution has no hesitation to conclude that the prosecution miserably failed to prove its case against the accused, beyond all reasonable doubt and further there are material contradictions and inconsistencies in the statements of prosecution witnesses including the complainant, PW-1 Bhanu Partap, as such, learned Court below rightly did not place reliance upon the same, while determining the guilt, if any, of the accused.

6. PW-1 Bhanu Partap, while deposing before the learned Court below, claimed that on 4.7.2007, at about 5.30 pm, he had gone on his Tractor to bring sand from Trilokpur River, where Tractor of Rinku was also parked and 2-3 labourers were also standing there. As per this witness, accused Ramesh, Manager alias Major Singh, Sanju and Jaggu came on the spot of alleged occurrence and started giving beatings to Rinku by means of Danda blows and when complainant tried to rescue Rinku, he was also given beatings by the accused, as a consequence of which, he sustained injuries on his nose and ear. He also deposed that he was admitted in Nahan Hospital on 5.7.2007 and thereafter all the four accused kept on approaching him for compromise. He told them to get him treated but since they did not do so, his father informed the Police Post Kala Amb and he made statement under Section 154 CrPC Ext. PW-1/A in the hospital. As per this witness, he alongwith persons namely Vinod Kumar, Ravinder and Yudhvir remained associated with the Police during investigation. He deposed that on 9.8.2007, Police prepared the Site Plan on his *Nishandehi*. He further deposed that the accused have their own tractor and they also load sand from Trilokpur River and due to this, they are having animosity with him. He deposed that, on account of beatings given to him by the accused, membrane of his ear had been torn. In his cross-examination, he feigned ignorance with regard to ownership of the River in question, from where he and the accused allegedly load sand. He categorically admitted that they did not pay any royalty for loading sand and *Bajri* etc. from the river and land of accused is adjacent to the river. Most importantly, in his cross-examination, this witness admitted that, while coming from Trilokpur to Kala Amb, there are Poonam Nursing Home and Sneh Hospital and other Clinics. He also admitted that the Police Post, Kala Amb falls on the way from Trilokpur to Nahan. As per this witness, he had informed the Police Post, Kala Amb on 4.7.2007 at about 5.30 pm, whereafter, Head Constable Hari Singh had visited his house at Budlion on 5.7.2007 at 10 am and his statement was recorded by Head Constable Hari Singh on 5.7.2007 at about 3.30 pm. He stated that on 9.7.2007, he accompanied Head Constable Hari Singh and one Constable alongwith Vinod, Rinku and Billu. He also admitted that he is having business terms with other witnesses namely Vinod, Rinku and Billu and they frequently meet each other. He admitted in his examination-in-chief that his statement was recorded on 9.7.2007 at Trilokpur River and he alongwith

others loads sand from the river without any permission. He also admitted that the Mining Officer had *challaned* him under the Mining Act.

7. PW-2 Ravinder Singh and PW-4 Vinod Kumar, in their statements recorded before the learned Court below, also gave almost similar narration of facts as has been taken note above in the statement of PW-1 Bhanu Partap. However, careful perusal of the cross-examination conducted upon these witnesses, if is read juxtaposing the statement of PW-1 Bhanu Partap, it completely demolishes the case of the prosecution.

8. PW-2 Ravinder Singh, while admitting that there is land of accused at the place of occurrence, clearly stated that the River, from where they load sand, is in the ownership of the State. He also admitted that they do not give any royalty to the Government for loading sand. He admitted that they commit theft of sand and *Bajri* from the river. He stated that the quarrel between complainant and accused continued for 4-5 minutes and in this process, complainant did not sustain any injury and no beating, if any, was given to him. He stated that only heated arguments took place and only blood had oozed from the nose of Bhanu Partap. He also admitted that there are Dispensary and Nursing Homes at Kala Amb and Trilokpur. He also admitted that there is a Police Post at Kala Amb, which falls in the middle from Trilokpur to Nahan. He also admitted that accused did not pick up quarrel with him.

9. PW-4 Vinod Kumar, in his cross-examination denied that near the place of occurrence, there is land of accused. He admitted that he has been working with the complainant Bhanu Partap for the last one year and Mining Officer had challanned Tractor of complainant many a times. He admitted that except Bhanu Partap no one sustained injuries. As per this witness, Bhanu Partap was firstly taken to Nahan then to Chandigarh. In his cross-examination, this witness stated that the Police visited the spot after 10-15 days and prepared the Site Plan. While admitting that there are Hospital, Dispensaries and Nursing Homes at Kala Amb and Trilokpur, he also admitted that there is a Police Post at Kala Amb. He stated that the quarrel was reported on the same day at Police Post Kala Amb, however, the Police did not visit the spot on the date of occurrence, but his statement was recorded.

10. PW-8 Head Constable Hari Chand, Investigating Officer of the case, deposed that on 9.7.2007, a person namely Jagdev Jaswal, informed the Police Post Kala Amb, from Regional Hospital Nahan on telephone that on 4.7.2007, a quarrel had taken place between his son and the accused at Trilokpur River, as a consequence of which, his son remained admitted at Regional Hospital, Nahan from 5.7.2007. He alongwith Constable Viveka Nand reached Regional Hospital, Nahan, where PW-1 Bhanu Partap got recorded his statement under Section 154 CrPC (Ext.PW-1/A) alleging therein that on 4.7.2007, at about 5.30 pm, he had gone to Trilokpur River for loading sand, where he was given beatings by the accused, when he tried to rescue Rinku from their clutches. This witness stated that he obtained MLC of the injured Bhanu Partap (Ext. PW-6/A), wherein Medical Officer opined that final report would be given on receipt of report from IGMC, Shimla. On 8.8.2007, Medical Officer in his final opinion termed injuries allegedly suffered by the complainant to be grievous in nature and, accordingly *Rapat* Rojnamcha Nos. 8, 11 and 16 Exts. PW-3/A to PW-3/C, respectively, were entered and sent to the Police Station, Nahan through Constable Bhupender Singh, on the basis of which a formal FIR, Ext. PW-7/A came to be registered. In his cross-examination, this witness denied that there is land of the accused near the River and it is Government River. He admitted that without permission/royalty, on one can carry sand/*Bajri* from the river. He admitted that the father of the complainant had sold Government building of Kandi Project to one Sher Singh. He also admitted that there is a Dispensary at Trilokpur and many Nursing Homes in Kala Amb. He feigned ignorance

whether the accused had made complaint to the Mining Officer for not paying royalty and for loading sand from the River forcibly and whether the Mining Officer had *challaned* him. He deposed that on 4.7.2007, he did not receive any phone from the complainant rather, he stated that on 5.7.2007, he did not visit house of the complainant regarding case in question. While specifically denying the factum with regard to recording of statement of complainant on 5.7.2007, this witness deposed that on 9.7.2007, he, for the first time, met the complainant in Civil Hospital, Nahan, where he recorded his statement under S.154 CrPC. He also admitted that when he recorded statement of complainant, he was fully conscious.

11. Close scrutiny of the aforesaid statements made by material prosecution witnesses creates a serious doubt with regard to correctness of the story/version put forth by the complainant. There are material contradictions and inconsistencies in the statements of prosecution witnesses with regard to the alleged beatings given to the complainant by the accused. PW-2 Ravinder Singh, in his cross-examination, specifically denied the factum with regard to the beatings, if any, given by the accused, rather, he stated that there were only heated arguments between accused and the complainant.

12. Leaving everything aside, all the material prosecution witnesses including complainant, admitted in their statements that there are Hospital, Dispensary and Nursing Homes at Kala Amb and Trilokpur, but there is no plausible explanation rendered on record by either of the witnesses as to why, at the first instance, the complainant, who allegedly suffered grievous injury on his ear, was not taken to a Dispensary or Nursing Home at Trilokpur or Kala Amb. Similarly, all these witnesses admitted the factum with regard to existence of Police Post at Kala Amb, but again there is no explanation that why the complainant or his associates failed to lodge any complaint at Police Post, Kala Amb, after the alleged incident.

13. In the case at hand, alleged incident took place on 4.7.2007, whereas, complaint, if any, came to be lodged on 9.7.2007 and the reason cited by the complainant for delay in lodging FIR, is not worth lending any credence, because, as per complainant, accused kept on insisting for compromise but since they failed to provide him medical aid, complainant's father lodged complaint, which ultimately led to filing of *Challan* against the accused. Aforesaid statement of complainant, wherein he stated that accused kept on pressurizing him for compromise, itself suggests that at the first instance, complainant tried to negotiate /bargain with the accused, but after five days of alleged incident, chose to file the complaint.

14. Apart from above, there are material contradictions in the statements of complainant, PW-1 with regard to lodging of complaint, because, as per statement of PW-1 Bhanu Partap, he, immediately after having suffered injuries, informed the Police, whereafter, Head Constable Hari Singh visited his house at Budlion on 5.7.2007 and recorded his statement, whereas, his aforesaid deposition has been completely denied/contradicted by PW-8, Hari Singh, who, in his cross-examination, stated that on 4.7.2007, he did not receive any phone from complainant. He also stated that on 5.7.2007, he did not visit the house of the complainant and did not record his statement. He, in his cross-examination, deposed that on 9.7.2007, he met the complainant in Civil Hospital, Nahan, for the first time, whereafter, he recorded his statement under S.154 CrPC.

15. Close scrutiny of statements of the material prosecution witnesses compels this court to conclude that no reliance, if any, can be placed by the learned Court below on the statements made by prosecution witnesses, being contradictory and inconsistent with

each other, as such, learned Court below rightly did not place reliance upon the same, while ascertaining guilt, if any, of the accused.

16. By now it is well settled that in a criminal trial evidence of eye-witness requires careful assessment and needs to be evaluated for its creditability. Hon'ble Apex Court has repeatedly held that since fundamental aspect of criminal jurisprudence rests upon well established principle that "no man is guilty until proved so", utmost caution is required to be exercised in dealing with the situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. Most importantly, Hon'ble Apex Court has held that there must be a string that should join the evidence of all the witnesses thereby satisfying the test of consistency in evidence amongst all the witnesses. In nutshell, it can be said that evidence in criminal cases needs to be evaluated on the touchstone of consistency. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in **C. Magesh and others** versus **State of Karnataka** (2010) 5 Supreme Court Cases 645, wherein it has been held as under:-

> "45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasis, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled Surja Singh v. State of U.P. (2008)16 SCC 686: 2008(11) SCR 286 has held:-(SCC p.704, para 14)
>
> > "14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is held to be creditworthy; ..the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."
>
> In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that " no man is guilty until proven so," hence utmost caution is required to be exercised in dealing with situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistence in evidence amongst all the witnesses."

17. Though, the medical evidence led on record by the prosecution, suggests that the complainant suffered injury on his ear but there is no positive evidence adduced on record by the prosecution to connect accused with the alleged beatings, if any, given on the person of the complainant, as such, mere placing of MLC Ext. PW-6/A may not be sufficient to prove the guilt of the accused.

18. This Court also finds that all the witnesses associated by the Police in support of its case are interested witnesses because PW-1 (complainant) has categorically admitted that he is having business terms with other witnesses namely Vinod, Rinku and Billu and they frequently meet each other. Apart from above, complainant-Bhanu Partap has admitted that he has prior animosity with the accused as such, version put forth by the complainant and prosecution witnesses is required to be scrutinized with utmost care and the same cannot be made basis for conviction especially when no cogent and convincing evidence has been led on record in support of the versions put forth by the complainant and other prosecution witnesses, most of whom are interested witnesses.

19. In view of above, this Court finds no reason to interfere with judgment passed by the learned trial Court, which is accordingly upheld. In result, appeal fails and is accordingly dismissed. Bail bonds furnished by accused are discharged. Pending applications, if any, are disposed of.

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

Manish Kumar Aggarwal ...Applicant/plaintiff
Versus
Union of India and another ...Respondents/defendants

CMP(M) No. 1011 of 2017
Decided on: 14.05.2019

Limitation Act, 1963- Section 5- Condonation of delay- Sufficient cause- Existence of – Plaintiffs filing RSA after four years and nine months of judgment of First Appellate Court- Seeking condonation of delay on ground that judgment on which Trial Court had passed decree against him stood referred to Larger Bench in view of conflicting judgments of Hon'ble High Court and Larger Bench itself adjourned matter sine die till outcome of Hon'ble Supreme Court in appeal preferred against judgment relied upon by trial court- Facts showing Hon'ble Supreme Court dismissed appeal against judgment relied upon by Trial Court in January, 2017- Application for contonation of delay in filing RSA moved in July, 2017- Held, no sufficient cause for condonation of delay is made out- Application dismissed. (Paras 8 to 13).

Cases referred:
Commissioner of Sales Tax, U.P. vs. M/s Auriaya Chamber of Commerce, Allahabad, (1986) 3 SCC 50
Devi Chand vs. State, 1994 (4) S.L.J. 2926
Dinesh Kumar vs. State of H.P. and others, 1994 (Suppl.) Shim. L.C. 385
Karamchand Prem Chand Pvt. Ltd. vs. Commissioner of Income Tax, 1975 101 ITR 46 Guj
State of H.P. vs. Chander Dev and Others, 2007 (2), Shimla Law Cases 7

For the Applicant/ Appellant/Plaintiff: Ms. Jyotsna Rewal Dua, Senior Advocate, with Ms.Charu Bhatnagar, Advocate.
For the non-applicants/ respondents: Mr. Lokinder Paul Thakur, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge. *(Oral)*

Present application has been filed by the applicant/appellant/plaintiff (hereinafter to be referred as plaintiff), for condonation of delay of about four years and nine months in filing the Regular Second Appeal against the concurrent finding of the trial Court and First Appellate Court, whereby in the suit filed by the plaintiff, for passing the decree of perpetual prohibitory injunction, restraining the defendants from interfering, trespassing, damaging the suit property or obstructing its approach in illegal and unlawful manner, by claiming therein that he is owner in possession of the suit land and defendants have been

causing interference in the suit land. Trial Court, after putting reliance on ratio of law laid down by Division Bench of this Court in case ***State of H.P. Versus Chander Dev and Others***, reported in ***2007 (2), Shimla Law Cases 7***, had rejected the claim of the plaintiff for passing the decree for perpetual prohibitory injunction, but had passed a decree dated 29th June, 2011, in his favour, restraining the defendants permanently from obstructing the plaintiff from user of the passage owned by the Municipal Council, Nahan, for the purpose of egress and ingress of the suit land till he is evicted in accordance with law therefrom.

2. The impugned judgment, affirming judgment passed by the Civil Judge (Junior Division), Nahan on 29th June, 2011, was passed by learned District Judge on 4th June, 2012 and the copy filed with the proposed Regular Second Appeal reflects that the same was applied on 27th June, 2017 and was attested on 28th June, 2017 and received by the plaintiff on 1st July, 2017.

3. It is claimed by the plaintiff that earlier he was under a bonafide belief that precedent referred in the impugned judgments had attained finality and therefore, he was not likely to be declared as owner of the land. However, on 20th June, 2017, when he visited the local office of the defendants at Nahan, for some settlement with defendants, he came to know about passing of judgment by this High Court on 20th June, 2016, in CWP No.3084 of 2015, wherein the identical issue involved therein, was decided in favour of the similar situated person like plaintiff, whereupon it came in the knowledge of the plaintiff that the legal position has changed in his favour and after becoming aware about change in the position, as enunciated in the judgment delivered in CWP No.3084 of 2015, he applied for copy of the impugned judgment and filed proposed Regular Second Appeal along with present application.

4. It is also case of the plaintiff that delay in challenging the impugned judgment was neither intentional nor willful, but under the bonafide belief regarding finality of the previous legal position according to the precedents referred in the impugned judgment. But, now after knowing about the judgment passed in CWP No.3084 of 2015, it has come in the knowledge of the applicant that the law is otherwise than he was considering it.

5. The application has been opposed by the respondents/defendants, on the ground that the judgment proposed to be assailed in the Regular Second Appeal, was passed on 4th June, 2012, whereafter the plaintiff was sleeping over the matter and never assailed or intended to assail the same and the reasons assigned for assailing the same in the application do not constitute a sufficient cause, which prevented the plaintiff from filing the appeal in time and there is inordinate delay of four years and five months in preferring the appeal, which in the facts and circumstances of the present case, does not deserve to be condoned, particularly for the reason that the plaintiff himself admitted in the application that he had accepted the impugned judgment on 4th June, 2012.

6. I have heard learned counsel for the plaintiff/applicant and respondents/defendants.

7. The trial Court has rejected the claim of plaintiff on the basis of ratio of law laid down by the Division Bench of this Court in *Chander Dev's case* (referred supra), which was assailed in the Apex Court and after allowing the SLP No.449 of 2008, the appeal was registered in the apex Court as Civil Appeal No.6887 of 2008 titled Chander Dev and Ors. Versus the State of Himachal Pradesh. In another case, involving similar issue therein, after allowing the SLP No.8101 of 2009, an appeal bearing Civil Appeal No.2665 of 2009 titled Dhani Ram (deceased) & Ors. Versus State of H.P. & Ors., was registered in the Apex Court

and both the appeals i.e. Civil Appeal No.6887 of 2008 and Civil appeal No.2665 of 2009, were clubbed together.

8. As a matter of fact, both the appeals i.e. Civil Appeal No.6887 of 2008 and Civil appeal No.2665 of 2009, stand dismissed by the Apex Court vide order dated 11th January, 2017, holding that those appeals were devoid of any merit. Therefore, ratio of law laid down by the Division Bench of this Court in *Chander Dev's case* (supra), has attained finality.

9. The applicant has relied upon the judgment dated 20th June, 2016 of the Division Bench of this Court passed in CWP No.3084 of 2015, titled as Asif Beg and Another Versus Estate Officer/Station Commander, reported in Latest HLJ 2016 (HP) (DB) 833, whereby in para Nos.45, 47 and 48 thereof, considering pendency of the appeals i.e. Civil Appeal No.6887 of 2008 and Civil appeal No.2665 of 2009, in the Apex Court, it was considered that ratio of law laid down in *Chander Dev's case*, has not attained finality and noticing two earlier conflicting judgments of the Single Benches of this Court, passed in ***Devi Chand Versus State*** reported in ***1994 (4) S.L.J. 2926*** and ***Dinesh Kumar Versus State of H.P. and others*** reported in ***1994 (Suppl.) Shim. L.C. 385;*** wherein in Devi Chand's case, learned Single Judge has held that operation of Section 104 (9) of the Act is applicable retrospectively and another learned Single Judge in Dinesh Kumar's case, after observing that amendment is retrospective, has further held that intention of the legislature did not appear to take away the vested rights of the tenant; the Division Bench of this Court has referred the matter to the larger Bench. According to the applicant, the ratio of law laid down in *Chander Dev's case*, has been reopened in CWP No.3084 of 2015 and is pending consideration before the larger bench of this Court. All substantial questions of law filed with proposed appeal are also based on reference order passed in this Civil Writ Petition No.3084 of 2015.

10. From the perusal of the latest order dated 16th November, 2018, passed in CWP No.3084 of 2015, it is evident that keeping in view SLP No.8101 of 2009 and Civil Appeal No. 2665 of 2009, involving the question whether the proviso to Section 104 (9) of H.P. Tenancy and Land Reforms Act, 1972, is *sub judice* before the Apex Court, the Larger Bench has adjourned that case sine-die to await the decision of the Apex Court in the appeals pending before it, with liberty to the parties to move an application thereafter for listing of the case for deciding the issue, if any, left out for adjudication by the larger Bench.

11. Condonation of delay is being sought on the basis of reference order made in CWP No.3084 of 2015. The said reference was made after noticing pendency of Civil Appeal No.6887 of 2008 and Civil appeal No.2665 of 2009 before the Apex Court, wherein the parties were directed by the Apex Court to maintain status-quo. But, now both these appeals have been dismissed. Now, after dismissal of the Civil Appeal No.6887 of 2008 and Civil appeal No.2665 of 2009 by the Apex Court, fate of reference to the Larger Bench is writing on the wall.

12. The trial Court has decided the suit filed by the applicant in-consonance with judgment passed in *Chander Dev's case*, which now has attained finality after dismissal of the appeals preferred against thereto. Therefore, there is no change in legal position, rather the position of law relied upon by the trial Court has been affirmed by the Apex Court. As there is no change in legal position, the judgments referred on behalf of the applicant in ***Karamchand Prem Chand Pvt. Ltd. Versus Commissioner of Income Tax*** reported in ***1975 101 ITR 46 Guj*** and ***Commissioner of Sales Tax, U.P. Versus M/s Auriaya Chamber of Commerce, Allahabad***, reported in (***1986) 3 Supreme Court Cases 50***, are not applicable.

13. There is another point, which is relevant to be brought on record. After passing of judgment dated 4th June, 2012, passed by learned District Judge, Sirmaur at Nahan, the concerned Authorities had resorted to the legal recourse for eviction of the applicant by invoking provisions of the Public Premises (Eviction of Unauthorized Occupants), Act, 1971 (in short the Public Premises Act) and resultantly, applicant was ordered to vacate the premises in question on or before 20th July, 2013. This order was assailed by the applicant before the Appellate Authority, i.e. learned Additional District Judge, Sirmaur at Nahan, by preferring an appeal under Section 9 of the Public Premises Act. The said appeal was dismissed vide judgment dated 25th November, 2013, which was assailed by the applicant by filing Civil Writ Petition No.9646 of 2013, titled as Manish Kumar Aggarwal Versus Union of India. The Division Bench of this High Court has dismissed the said writ petition on 12th April, 2017 and present application along with proposed appeal has been filed on 12th July, 2017. The order of eviction passed under Public Premises Act, has also attained finality.

14. In view of aforesaid facts and circumstances, I find that there is no sufficient cause made out for condonation of delay in filing the appeal. Accordingly, present application is dismissed.

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

Sanjay Kumar ..Petitioner.
Versus
Trishla Devi & another ..Respondents.

Cr.MMO No. 88 of 2014
Date of Decision: May 14, 2019

Code of Criminal Procedure, 1973 - Section 125 – Interim maintenance – Nature of- Held, interim maintenance paid during pendency of proceedings has to be adjusted vis-à-vis final maintenance awarded by Court. (Paras 5 to 7)

For the Petitioner: Mr.Rajnish K. Lall, Advocate.
For the Respondents: Mr. Arun Rana, Advocate vice Mr.R.S. Gautam, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J (Oral)

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

"It is, therefore, prayed that this Hon'ble Court may be pleased to send for the records of the case and after examining the legality and proprietary of the proceedings may be pleased to quash and set aside the order Annexure P-1 and P-2 granting maintenance at the rate of Rs. 3000/- per month to respondent No.1 and Rs. 2000/- per month to respondent No.2 and in any case allow the adjustment of Rs. 2000/- per month maintenance awarded to respondents vide interim order Annexure P-3 dated 21.02.2008 by the

Judicial Magistrate 1st Class, Court No.1, Ghumarwin which maintenance has been granted from the date of petition which is 26.02.2007."

2. Brief facts, necessary for adjudication of this petition, are that in an application filed under Section 125 of Cr.P.C., by the present respondents, vide order dated 06.03.2010, the Court of learned Judicial Magistrate, 1st Class, Ghumarwin, District Bilaspur, H.P., has ordered the petitioner herein to pay an amount of Rs. 3000/- per month as maintenance to present respondent No.1 and Rs. 2000/- per month to the present respondent No.2, who were applicants No.1 and 2 respectively before the trial Court.

3. Record demonstrates that in Revision, the aforesaid order stands upheld by the the Court of learned Sessions Judge, Bilaspur, in Criminal Revision No.4 of 2010, titled as *Sanjay Kumar vs. Smt.Trishla Devi & another.*

4. During the course of his arguments today, learned counsel for the petitioner argued that he is not assailing on merit the quantum of maintenance as it stands awarded by the learned Courts below in favour of the respondents. His limited grievance is that while passing final orders both the Courts below erred in not appreciating that the amount of interim maintenance, which stood paid by the petitioner during the pendency of the proceedings before the trial Court, in compliance to order dated 21.02.2008, should have been deducted from the amount which the petitioner has been finally held to pay as maintenance to the respondents. Learned counsel for the respondents has not seriously disputed the said contention of the petitioner.

5. Having heard learned counsel for the parties, I am of the considered view that there is merit in the said contention of the learned counsel for the petitioner, because but obvious when learned trial Court assessed the amount of Rs. 3000/- and Rs. 2000/- respectively, to be paid as maintenance in favour of present respondents No.1 and 2, then, it ought to have had deducted the amount which already stood paid by the present petitioner, in compliance to interim order dated 21.02.2008.

6. At this stage, learned counsel for the petitioner has informed the Court that amount of Rs. 1000/- each was paid to the present respondents from the date of passing of the order i.e. 21.02.2008 till final adjudication of the application filed under Section 125 Cr.P.C.

7. Accordingly, this petition is partly allowed. The amount which stood paid by the petitioner as interim maintenance in favour of the respondents, shall be adjusted towards the final maintenance which the petitioner now has been held liable to pay to the respondents by the learned Courts below. This adjustment shall be made by the petitioner by paying an amount of Rs. 1000/- less to each of the respondents for the length of period, for which, interim amount of maintenance was paid. Meaning thereby that for example, in case Rs. 12000/- each stood paid by him to respondents No.1 and 2, then for the next 12 months, petitioner shall pay Rs. 1000/- less to each respondent than the amount, which he has been ordered to pay as maintenance to them. It is clarified that the above example is just illustrative.

8. The petition stands disposed of in the aforesaid terms, so also pending application(s), if any.

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

Cheryl Templeton and another ....Petitioners.

Versus

Sqn. Ldr. Sukhjit Singh Sidhu (Retd.) ...Respondent.

CMPMO No.: 315 of 2018.
Reserved on: 26.03.2019
Decided on: 15.05.2019.

Code of Civil Procedure, 1908 - Section 151 **–** Additional evidence- Production of- Leave of Court- Grant of- Held, mere writing of three golden words i.e. 'despite due diligence' in application without explaining in some detail as to how and why despite due diligence said evidence could not be produced, will not justify delay in filing documents- Order of Trial Court in allowing application to adduce additional evidence filed after 8 years of closure of evidence by plaintiffs and after one year of hearing of arguments when matter fixed for pronouncement of judgment, set aside being perverse. (Paras 22 to 24)

For the petitioners : Mr. Atul Jhingan, Advocate.
For the respondent : Mr. Dheeraj K. Vashisht, Advocates.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this petition filed under Article 227 of the Constitution of India, petitioners/defendants have prayed for the following reliefs:-

> *"It is therefore most respectfully prayed that this petition may kindly be allowed and the order dated 12.07.2018 passed by the Ld. Civil Judge (Senior Division) Kangra at Dharamshala, on an application under Sec 151 CPC in RBT Civil Suit No. 28/2014/2006, titled Sukhjit Singh versus Cheryl Templeton and another, whereby the Ld Court has allowed the application filed by the plaintiff respondent, may be set aside with costs throughout and the Ld Court may be directed to pronounce the judgment on the basis of the material before it. Any other order that this Hon'ble Court deems fit and proper in the facts and circumstances of the case, may also be passed in favour of the petitioners/ defendants/non-applicants and against the plaintiff/respondent/applicant in the interest of justice."*

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

Respondent/plaintiff (hereinafter referred to as plaintiff) filed a suit against present petitioners/defendants in the year 2006 praying therein that defendants be ordered not to interfere over the vacant possession of the land comprised in Khasra No. 1919/1612, situated at Mohal Mcloedganj, Tehsil and District Kangra (described in the plaint), to the plaintiff by passing a decree of possession in favour the plaintiff and that defendants be restrained from changing the nature of the suit land during the pendency of the suit or from creating any third party interest in the suit property. A decree for a sum of Rs.3,00,000/- being damages for illegal possession of the suit property was also prayed by the plaintiff against the defendants.

3. The suit was initially filed in this Court. Vide order dated 15.06.2009, the suit was transferred to the Court of learned District Judge, Kangra at Dharamshala, in terms of Notification dated HHC/Pj/93-1, dated 21.2.2009. Record further demonstrates that vide order dated 12.3.2014, the case was ordered to be transferred to the Court of learned Civil Judge (Sr. Division), Kangra at Dharamshala, in view of pecuniary jurisdiction of Civil Judge (Senior Division) being enhanced up to Rs.20,00,000/- vide notification No. HHC/Pj/93-I-27023-32, dated 03.10.2013.

4. At that stage, statement of defendants' witnesses were being recorded and an application stood filed under Order 6, Rule 17 of the Code of Civil Procedure by the defendants for amendment of the written statement.

5. Said application was dismissed by the Court of learned Civil Judge (Sr. Divn.), Kangra at Dharamshala, on 07.09.2015. This Court (High Court of HP) set aside the order of learned trail Court dismissing the application for amendment of the written statement. Thereafter replication to the amended written statement was filed before the learned trial Court. Time was granted for framing of additional issues. Proposed issues were filed by the defendants only. Witnesses were examined thereafter by both plaintiff and defendants and on 10.03.2017, learned Court below after closing the rebuttal evidence of the plaintiff, listed the case for arguments on 25.03.2017.

6. Record further demonstrates that arguments were partly heard on 03.04.2017 and the same were finally heard on 13.04.2017 and thereafter the case was ordered to be listed for Order on 27.4.2017.

7. Thereafter, the matter was listed on the following dates: 11.5.2017, 17.5.2017, 29.5.2017, 09.06.2017, 17.6.2017, 27.6.2017, 10.07.2017, 25.7.2017, 3.8.2017, 10.8.2017, 21.8.2017, 31.8.2017, 07.09.2017, 18.9.2017, 22.09.2017, 07.10.2017, 2.11.2017, 3.11.2017, 13.11.2017, 18.11.2017, 12.12.2017, 22.12.2017, 26.12.2017, 30.12.2017, 04.01.2018, 10.01.2018 and 20.01.2018.

8. On 20.01.2018, the following order was passed:-

"Order is not ready having voluminous record. Be put up for order on 26.2.2018. long date given as there are civil vacations."

9. Thereafter, on 26.2.2018, the following order was passed:-

"Order not ready. Put up for order on 06.03.2018."

10. On 6.3.2018, the following order was passed:-

"Re-heard on material point. Put up for order on 16.3.2018."

11. Thereafter the case was listed on 16.3.2018, 29.3.2018, 09.04.2018 and 12.4.2018, but the Order was not announced as the same was not ready.

12. On 12.04.2018, the case was listed for pronouncement of judgment/order on 23.4.2018.

13. On the said date, i.e. on 23.4.2018, learned trial Court listed the case on 28.4.2018 on the request of learned Counsel of the plaintiff who sought time to file some application.

14. On 28.4.2018, an application was filed under Section 151 of the Code of Civil Procedure for adducing certified copy of mutation No. 112 and copy of Jamabandi for the

year 1987-88 of Up-Mohal McLeodganj, Tehsil Dharamshala, District Kangra, HP, as additional evidence. It was mentioned in the application that the applicant/plaintiff had filed a suit for relief of possession and permanent injunction etc. As per applicant, with a view to make the facts clear and assist the Court, he intended to file certified copy of mutation No. 112 and copy of Jamabandi for the year 1987-88 as additional evidence because production of said documents would assist the Court and necessary for just and effective decision of the suit.

15. The application was opposed by the present petitioners *inter alia* on the ground that the plaintiff could not be permitted to adduce additional evidence at a stage when the Court had reserved the matter for pronouncement of the judgment after hearing the final arguments and that the application was filed just to fill up the lacunae as there was no explanation given in the same as to why despite due diligence, the documents were not filed by the plaintiff at the time when the parties were leading evidence.

16. Said application stood allowed by the learned trial Court vide order dated 12.07.2018, which is assailed by way of present petition.

17. Learned Court below allowed the application by holding that the documents in issue, i.e. copy of mutation No. 112 and copy of jamabandi for the year 1987-88, were not new to the parties and the same were required to be placed on record to make the facts clear and assist the Court in rendering justice. It further held that parties have already led evidence in order to substantiate their rival claims and production of said documents would not prejudice any of the parties. It further held that Section 165 of the Indian Evidence Act also provided that the Judge may order the production of any document or thing or ask any question to obtain proper proof of relevant facts. On these grounds, learned Court allowed the application.

18. I have heard learned Counsel for the parties and also gone through the record of the case as also the impugned order.

19. I have narrated in some detail the chronology of the suit as it advanced post its filing in the year 2006. It is not in dispute that the arguments in the case were finally heard on 13.4.2017 and thereafter, the case was ordered to be listed for pronouncement of order on 27.4.2017. Since then, till the filing of the application to lead additional evidence, the case was listed on more than 30 occasions *inter alia* for the purpose of pronouncement of the judgment/order but the judgment/order was not announced.

20. As from the date when the arguments were finally heard and order was reserved in the suit itself, the application stood filed exactly after a lapse of one year for adducing additional evidence.

21. As from the date of closing of evidence of the plaintiff which was closed on 25.9.2010, it took almost eight years for the plaintiff to realize that the documents mentioned in the application filed under Section 151 of the CPC were necessary for the adjudication of the case in hand.

22. A perusal of the application demonstrates that there are no specific averments made in the same as to why despite due diligence, the documents intended to be produced as additional evidence could not be filed at the time of leading evidence. All that is mentioned in the application is that the documents intended to be produced were essential for just decision and to assist the Court and the same could not be filed at the time of leading evidence “despite due diligence”.

23. In my considered view, delay in filing the documents sought to be produced on record as additional evidence cannot be justified by writing three golden words in the application, i.e. "despite due diligence" without explaining in some detail as to how and why despite due diligence the said documents could not be produced on record by the plaintiff. The burden to justify that the documents could not be produced on record earlier despite due diligence was upon the plaintiff and in the present case, plaintiff miserably failed to discharge the said burden. This important aspect of the matter has been completely ignored by the learned trial Court. Learned trial Court has erred in not appreciating that the suit was pending adjudication since the year 2006 and was pending for pronouncement of judgment/order before it for more than one year before filing of the application to lead additional evidence. It also erred in not appreciating that allowing of the application amounted to again reopening the entire case and thus further resulting in delay in adjudication of the lis. In the garb of the documents being purportedly necessary to make the facts clear and assist the Court in rendering justice, such an application could not have been allowed by the learned Court below without appreciating the factual matrix of the case which includes the factum of the same pending for more than 12 years. Filing of the application at such a belated stage by the plaintiff without there being any cogent explanation as to why said documents could not have been produced earlier, in my considered view, was nothing but an attempt to fill up the lacunae by the plaintiff. There is no justification worth its name in the application as to why the documents in issue could not be produced on record at the time of leading of evidence by the parties. That being so, allowing of the said application by learned trial Court is nothing but an act of perversity, as by doing so, learned Court below has exercised jurisdiction vested in it with material irregularity which has caused grave injustice to the present petitioners.

24. In view of reasonings given herein-above, this petition is allowed as prayed for with costs assessed at Rs.20,000/-, which shall be paid by the respondent/plaintiff to the petitioners. Consequently, impugned order dated 12.07.2018, passed by learned trial Court in RBT Civil Suit No. 28/2014/2006, titled as Sukhjit Singh versus Cheryl Templeton and another, is quashed and set aside. Learned trial Court is directed to pronounce the judgment in the suit, as expeditiously as possible but not later than 30th June, 2019. Parties through their learned Counsel are directed to appear before the learned trial Court on 27.05.2019. Registry is directed to forthwith return the record of the case to the learned trial Court so that the same shall reach there well in time. Pending miscellaneous application(s), if any, also stand disposed of.

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

Ram Lal Thakur ..Applicant/Objector.

Versus

Executive Engineer HPPWD ..Non Objector/Respondent.

OMP No. 646 of 2018 in
OMP(M) No. 3 of 2017
Date of Decision: May 16, 2019

Arbitration and Conciliation Act, 1996 (as amended vide Amendment Act, 2015) - Section 34(5) – Notice to opposite party- Whether necessary? Held, requirement of sending prior notice to opposite party is directory in nature. (Paras 2 & 3)

Cases referred:
State of Bihar and others vs. Bihar Rajya Bhumi Vikas Bank Samiti, (2018) 9 SCC 472

For the Applicant: Mr.I.S. Chandel, Advocate.
For the Respondent: M/s Hemant Vaid and Sanjeev Sood, Additional Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

By way of this application, filed under Section 151 of the Civil Procedure Code, a prayer has been made for revival of OMP(M) No. 3 of 2017, by recalling the order dated 02.03.2017. Vide order dated 02.03.2017, recalling of which has been sought, OMP(M) No.3 of 2017 was disposed of in the following terms:-

> "Undisputedly, statutory provisions have not been complied with. No notice stands served upon the State prior to the filling of the present petition. As such, present petition is permitted to be withdrawn, reserving liberty to file afresh, in accordance with law. Limitation for such period for which the present petition came to be pursued shall not come in the way of the present petitioner.
>
> With the aforesaid observations, present petition stands disposed of, so also, pending application(s), if any."

2. Learned counsel for the applicant has submitted that order dated 02.03.2017, needs to be recalled because while passing the said order, this Court has erred in not appreciating that non issuance of Notice under sub-section (5) of Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 1996 Act), was not fatal as arbitration proceedings stood initiated before the said sub-clause was inserted vide an amendment, which came into force w.e.f. 23.10.2015 and further for the reason that Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as the 2015 Act), which came into force with w.e.f. 23.10.2015, clearly contemplated that nothing contained in the said Act which apply to arbitral proceedings commenced, in accordance with the provisions of Section 21 of the Principal Act before commencement of the said Act, unless parties otherwise agreed.

3. Having heard learned counsel for the parties and having gone through the provisions of sub-section (5) of Section 34 of the 1996 Act as also Section 22 of the 2015 Act, in my considered view, there is force in the contention of the learned counsel for the applicant.

4. It is not in dispute that in the present case, arbitration proceedings stood commenced before the learned Arbitrator on 18.10.2014 i.e. before coming into force of the 2015 Act. Though the award is dated 06.04.2016, meaning thereby that it was announced after the 2015 Act came into force, however the fact of the matter still remains that in view of the specific language of Section 26 of the 2015 Act, said Act was not to apply to the said arbitral proceedings, as the same stood commenced in accordance with the provisions of Section 21 of the Principal Act, and there is nothing on record to demonstrate that after the 2015 Act came into force, parties had agreed that henceforth the arbitration proceedings shall be governed as per the provisions of 2015 Act.

5. Besides this, even otherwise, said issue is squarely covered by the judgment of Hon'ble Supreme Court in *State of Bihar and others vs. Bihar Rajya Bhumi Vikas Bank Samiti,* (2018) 9 SCC 472, in which the Hon'ble Supreme Court has held that the provision of sub-section (5) of Section 34 of the 1996 Act, as it stands post amendment cannot be considered as mandatory. The relevant paras of the said judgment are quoted hereinbelow:-

> "24. Shri Tripathi then argued that Section 34(5) is independent of Section 34(6) and is a mandatory requirement of law by itself. There are two answers to this. The first is that sub-section (6) refers to the date on which the notice referred to in sub-section (5) is served upon the other party. This is for the reason that an anterior date to that of filing the application is to be the starting point of the period of one year referred to in Section 34(6). The express language of Section 34(6), therefore, militates against this submission of Shri Tripathi. Secondly, even if sub-section (5) be construed to be a provision independent of sub-section (6), the same consequence in law is the result –namely, that there is no consequence provided if such prior notice is not issued. This submission must therefore fail.
>
> 25. We come now to some of the High Court judgments. The High Courts of Patna, *Bihar Rajya Bhumi Vikas Bank Samiti v. State of Bihar,* 2016 SCC OnLine Pat 10104, Kerala, *Shamsudeen v. Shreeram Transport Finance Co. Ltd.,* 2016 SCC OnLine Ker 23728, Himachal Pradesh, *Madhava Hytech Engineers (P) Ltd. v. Executive Engineers,* 2017 SCC OnLine HP 2212, Delhi, *Machine Tool India Ltd. v. Splendor Buildwell (P) Ltd.,* 2018 SCC OnLine Del 9551 and Gauhati, *Union of India v. Durga Krishna Store (P) Ltd.,* 2018 SCC OnLine Gau 907, have all taken the view that Section 34(5) is mandatory in nature. What is strongly relied upon is the object sought to be achieved by the provision together with the mandatory nature of the language used in Section 34(5). Equally, analogies with Section 80 CPC have been drawn to reach the same result. On the other hand, in *Global Aviation Services (P) Ltd. v. Airport Authority of India,* 2018 SCC OnLine Bom 233, the Bombay High Court, in answering Question 4 posed by it, held, following some of our judgments, that the provision is directory, largely because no consequence has been provided for breach of the time-limit specified. When faced with the argument that the object of the provision would be rendered otiose if it were to be construed as directory, the learned Single Judge of the Bombay High Court held as under: (SCC OnLine Bom para 133).
>
> > "133. Insofar as the submission of the learned counsel for the respondent that if Section 34(5) is considered as directory, the entire purpose of the amendments would be rendered otiose is concerned, in my considered view, there is no merit in this submission made by the learned counsel for the respondent. Since there is no consequence provided in the said provision in case of non-compliance thereof, the said provision cannot be considered as mandatory. The purpose of avoiding any delay in proceeding with the matter expeditiously is already served by insertion of appropriate rule in the Bombay High Court (Original Side) Rules. The Court can always direct the petitioner to issue notice along with papers and proceedings upon other party before the matter is heard by the Court for admission as well as for final hearing. The vested rights of a party to challenge an award under Section 34 cannot be taken away

for non-compliance of issuance of prior notice before filing of the arbitration petition."

The aforesaid judgment has been followed by recent judgments of the High Court of Bombay, *Maharashtra State Road Development Corpn. Ltd. v. Simplex Gayatri Consortium,* 2018 SCC OnLine Bom 805 and Calcutta, *Srei Infrastructure Finance Ltd. v. Candor Gurgaon Two Developers and Projects (P) Ltd.,* 2018 SCC OnLine Cal 5606.

26. We are of the opinion that the view propounded by the High Courts of Bombay and Calcutta represents the correct state of the law. However, we may add that it shall be the endeavour of every court in which a Section 34 application is filed, to stick to the time-limit of one year from the date of service of notice to the opposite party by the applicant, or by the Court, as the case may be. In case the Court issues notice after the period mentioned in Section 34(3) has elapsed, every court shall endeavour to dispose of the Section 34 application within a period of one year from the date of filing of the said application, similar to what has been provided in Section 14 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015. This will give effect to the object sought to be achieved by adding Section 13(6) by the 2015 Amendment Act."

6. In view of the discussion held hereinabove, this application is allowed and order dated 02.03.2017 is recalled and OMP(M) No.3 of 2017 is ordered to be restored to its original number and position.

7. The application stands disposed of in the aforesaid terms.

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

Cr. MMOs No. 337 of 2015 and
33 & 36 of 2016
Reserved on: 04.05.2019
Decided on: 16.05.2019

1. Cr.MMO No. 337 of 2015:

Satish Seth & others ....Petitioners.

Versus

State of H.P. & others ...Respondents.

2. Cr.MMO No. 33 of 2016:

Satish Seth & others ....Petitioners.

Versus

State of H.P. & others ...Respondents.

3. Cr.MMO No. 36 of 2016:

A.K. Sharma & others ....Petitioners.

Versus

State of H.P. & others ...Respondents.

Code of Criminal Procedure, 1973 (Code) – Sections 156(3) & 482 – Quashing of FIRs – Circumstances- FIRs registered against petitioners on orders of Magistrate under various

provisions of Indian Forest Act, Environment Protection Act, Indian Penal Code etc.- Petitioners seeking quashing of FIRs on ground that complaints are false and State Authorities have alternative remedies of demanding compensation from them for alleged violations- Held, petitioners initiated work without getting no-objection certificates from Authorities concerned- Fact finding Committee constituted by Deputy Commissioner also found various irregularities committed by petitioners while executing work- Deputy Commissioner also recommended action against petitioners to State Government- Magistrate had prima-facie material to order registration of FIRs and direct investigation- Petition dismissed. (Paras 12 & 13)

Cases referred:

Amit Ahuja vs. Gian Parkash Bhambri, 2010(93) AIC 488
S.K. Sinha vs. Videocon International Ltd., 2008(2) SCC 492

1. Cr.MMO No. 337 of 2015:

For the petitioners: Mr. R.K. Gautam, Sr. Advocate, with Mr. Gaurav Gautam and Mr. Megha K. Gautam, Advocates.

For the respondents: Mr. S.C. Sharma, Mr. Shiv Pal Manhans and Mr. P.K. Bhatti, Additional Advocates General, with Mr. Raju Ram Rahi, Deputy Advocate General, for respondents No. 1 & 2/State.
Mr. Rajneesh Sharma, Advocate, for respondents No. 4, 26 to 35, 37, 71, 73 to 76, 78, 80 to 82, 84, 88, 89, 91 to 94, 97 to 101, 104 to 107, 110, 112, 113, 115, 119 to 123 and 127.
Mr. Rajiv Rai, Advocate, for respondents No. 19, 22, 36, 83, 96, 102, 103, 108, 114 and 124 to 126.
None for respondents No. 38, 39, 47 to 49, 51, 52, 54, 55, 57, 59, 63 to 65, 129 to 132.
None for respondents No. 3, 5 to 18, 20, 21, 23 to 25, 40 to 46, 50, 53, 56, 58, 60 to 62, 66, 68 to 70, 72, 77, 79, 85 to 87, 90, 95, 109, 116 to 118, 128 and 133.
Names of respondents No. 67 and 111 stand deleted.

2. Cr.MMO No. 33 of 2016:

For the petitioners: Mr. R.K. Gautam, Sr. Advocate, with Mr. Gaurav Gautam and Mr. Megha K. Gautam, Advocates.

For the respondents: Mr. S.C. Sharma, Mr. Shiv Pal Manhans and Mr. P.K. Bhatti, Additional Advocates General, with Mr. Raju Ram Rahi, Deputy Advocate General, for respondents No. 1 & 2/State.
Mr. Rajneesh Sharma, Advocate, for respondent No. 3.
Mr. Amar Singh Sankhyan, Advocate, for respondents No. 4 to 6.
Mr. Rajneesh Sharma, Advocate, for respondents No. 4, 26 to 35, 37, 71, 73 to 76, 78, 80 to 82, 84, 88, 89, 91 to 94, 97 to 101, 104 to 107, 110, 112, 113, 115, 119 to 123 and 127.
Mr. Rajiv Rai, Advocate, for respondents No. 19, 22, 36, 83, 96, 102, 103, 108, 114 and 124 to 126.
None for respondents No. 38, 39, 47 to 49, 51, 52, 54, 55, 57, 59, 63 to 65, 129 to 132.

None for respondents No. 3, 5 to 18, 20, 21, 23 to 25, 40 to 46, 50, 53, 56, 58, 60 to 62, 66, 68 to 70, 72, 77, 79, 85 to 87, 90, 95, 109, 116 to 118, 128 and 133.
Names of respondents No. 67 and 111 stand deleted.

3. Cr.MMO No. 36 of 2016:

For the petitioners: Mr. R.K. Gautam, Sr. Advocate, with Mr. Gaurav Gautam and Mr. Megha K. Gautam, Advocates.

For the respondents: Mr. S.C. Sharma, Mr. Shiv Pal Manhans and Mr. P.K. Bhatti, Additional Advocates General, with Mr. Raju Ram Rahi, Deputy Advocate General, for respondents No. 1 & 2/State.
Mr. Amar Singh Sankhyan, Advocate, for respondent No. 3.
Nemo for respondents No. 4 & 5.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

Since all these petitions raise common questions of law and fact, they are taken up together and are being disposed of with a common order.

2. The present petitions are maintained by the petitioners (accused persons) under Section 482 Cr.P.C. seeking a direction of this Court to quash FIRs No. 210 of 2015, dated 21.12.2015, 216 of 2015, dated 31.12.2015, and 183 of 2015, dated 23.07.2015, which were registered against the accused persons (petitioners herein) under different Sections of Indian Penal Code, Indian Forest Act and Environment Protection Act.

3. Tersely, the facts of the cases, as per the petitioners can be encapsulated as under:

Some of the respondents herein (complainants) preferred complaints under Section 156(3) Cr.P.C. in learned Court below seeking directions to SHOs of concerned Police Stations for registration of FIRs against the petitioners under common Sections 120-B, 145, 351, 464, 467, 468, 405, 415, 416, 417, 422, 420, 452, 283, 271, 341, 379, 392, 395, 399, 506, 148, 166 of IPC, Section 14 of the Environment (Protection Act, 1986) and Sections 41 and 42 of the Indian Forest Act. In addition to the above sections, allegations under sections 156, 167, 471, 410 and 147 IPC were also leveled in some of the complaints. The learned Court below directed for registration of FIRs in the respective Police Stations under the relevant Sections. It is further averred in the petitions that petitioners are associated with the Company and the profile of the company is as follows:

"(i) PKTCL i.e., Parvati Kol Dam Transmission Co. Ltd. has been granted a license by Central Electricity Regulatory Commission (License No. 5/Transmission/CERC dated 15th September, 2008 and therefore, PKTCL is a transmission licensee as per the Section 2(73) and Section 14 of the Electricity Act, 2003.

(ii) Vide Notification dated 17th June 2009 issued by the Ministry of Power, Government of India, PKTCL has been conferred with powers of Telegraph Authority under Section 164 of the Electricity Act, 2003.

(iii) The Ministry of Power, Government of India, vide its letter dated 14th November, 2008 has granted prior approval of the Government under Section 68 of the Electricity Act, 2003 for execution of the Project.

(iv) That all necessary permissions were duly obtained from the Ministry of Power, Government of India before commencement of the works for laying of the transmission lines.

That PKTCL has valid and subsisting No Objection Certificates/Approvals from Ministry of Environment and Forests; Ministry of Civil Aviation; Ministry of Defense; Power Telecom Coordination Committee."

As per the petitioners, the impugned orders, whereby the learned Court ordered registration of FIRs against the petitioners is not maintainable. The petitioners have further averred that the learned Court below intermingled the provisions of Cr.P.C. as the Court below was not acting under Section 202 Cr.P.C.. Thus, the learned Court below had no power to keep the matter pending before it. As per the petitioners, no case or offence is made out against them. The petitioners also annexed various documents with their petitions and they have averred that the complaints have been made against them belatedly. The complaints had been moved with an object of minting money from the petitioners and random allegations have been imputed against the petitioners. The petitioners have further alleged that the complainants have other remedies available for redressal of their grievances, if any. With the above averments, the petitioner prays that the petitions be allowed and the FIRs registered against them may be quashed.

4. The respondents/State filed replies to the petitions. Precisely, the respondents/State contended that it is the discretion of the learned Court below either to enquire the case itself or direct the investigation to be conducted by the Police. It is further averred that investigation in any matter can only be conducted after the registration of FIR. As per the respondents/State the learned Court below has power under Section 202(1) to direct investigation to be made by the police. As per the respondents/State, investigation can only be completed, if the petitioners join the same. After exhaustively examining the material, the learned Court below ordered registration of respective FIRs, as there exists *prima facie* case against the petitioners and now the petitioners are deliberately delaying the investigation on one pretext or other. It is further contended without investigation, it would be wrong to hold that the act done by the present petitioners are justified or by mistake of facts believing themselves bound by law or of justified by law. The allegations against the petitioners can only be ascertained if the matter is thoroughly investigated. In view of the above averments, the respondents/State prayed that the petitions may be dismissed and interim orders passed in the present petitions, whereby further proceedings arising out of the respective FIRs were ordered to be stayed, may kindly be vacated, so that the matters can be investigated.

5. I have heard the learned Senior Counsel for the petitioners, learned Additional Advocate General for the respondents/State, learned counsel for the respective respondents and gone through the records carefully.

6. The learned Senior Counsel for the petitioners has argued that the impugned order(s) whereby the learned Court below ordered registration of FIRs is not sustainable in the eyes of law. He has argued that as the complainants enclosed numerous documents with their complaints, the learned Court below was duty bound to peruse these documents in consonance with the complaint and thereafter only any direction to police could have been issued. He has further argued that as the learned Court below passed the order under

Section 156(3) Cr.P.C., the matter could not be kept pending before the same Court and the learned Court below also called the report after investigation on 19.01.2016, so the learned Court below exercised powers, which were not vested with it. He has argued that the learned Court below amalgamated the provisions of Cr.P.C. The learned Court below was not exercising the powers under Section 202 Cr.P.C., so the matter could not have been kept pending before the same Court. He has further argued that under the garb of the FIRs the respondents are trying to have more compensation, thus with the sole motive of minting money from the petitioners, the present petition has been filed. The work of laying transmission lines was completed in the year 2014 and the complaints were made to the learned Court much later, so there is unexplained delay in filing the complaints. The learned Senior Counsel has further argued that proper remedy for apt compensation is available to the complainants under different Acts, viz., Land Acquisition Act, 2013, Indian Electricity Act, 2007, Indian Telegraph Act, 2003 etc. He has argued that the complainants after receiving compensation took a slew and initiated false criminal proceedings against the petitioners just for financial gains, which is virtually an abuse to the process of law. Lastly, the learned Senior Counsel has argued that in the above backdrop the petitions may be allowed and the pending proceedings before the learned Trial Court, as also the FIRs wherein the petitioners have been indicted be quashed.

7. Conversely, the learned Additional Advocate General for the respondent/State has argued that the learned Magistrate can either enquire the matter himself or direct investigation to be conducted by the Police. He has further argued that in any matter first FIR is registered followed by investigation. He has further argued that the investigation is in initial stage, so the petitioners should join the same with clean hands. The petitioners are unnecessarily delaying the investigation by not producing the relevant records. He has argued that the learned Court below, after application of mind rightly ordered registration of FIRs against the present petitioners under different Sections. The guilt or innocence of the present petitioners can only be ascertained, if the matter is allowed to be investigated and without investigation presumption of innocence cannot be drawn. In the above backdrop, the learned Additional Advocate General prayed that the petitioners may be dismissed and the investigation in the matter be allowed to proceed further.

8. Sh. Amar Singh Sankhyan, learned counsel for respondents No. 4, 5 and 6 (in Cr.MMMO No. 33 of 2016) argued that as per the reply filed to the petition Mr. Daljit Singh Bijral Additional Vice President of Parbati Koldam Transmission Company Limited is incompetent under the law applicable to file and maintain the petition, as the delegated powers to Mr. Alok K. Roy by the share-holders, if any, on the principle of *'delegatus non protest delegare'*. Mr. Daljit Singh Bijral Additional Vice President or his delegate has no locus standi to file and maintain the present petition. He has further argued that no ground is available to the petitioners to invoke the jurisdiction of this Court under Section 482 Cr.P.C. He has argued that the company did not obtain 'No objection certificate' from the competent forest authorities under the Forest Conservation Act, 1980 and Indian Forest Act, 1927, before felling of scheduled species of trees. The company also did not comply various statutory provisions, which were mandatory and by giving go by to these provisions the company executed the work and the petitioners are liable for such wrong execution of work. He has further argued that the provisions of Electricity Act, 2003 and Indian Telegraph Act, 1985, were available to the petitioners only when the PKTCL was BOOT Company, i.e., Built, Operate and Transfer Company, but in the interregnum, due to some reasons the Government converted it to BOO Company, i.e., Built, Operate and Own. Thus, the Government made PKTCL Company as owner of the transmission lines, so the provisions of Electricity Act, 2003 and Indian Telegraph Act, 1985, in the above circumstances, are not applicable for the loss/damages caused by the Company to the complainants and the

petitioners are required to be punished. He has argued that in the above backdrop, the matter is required to be investigated thoroughly. He has prayed that the petitions be dismissed and the investigation be allowed to proceed further.

9. In fact, the controversy in hand is very short, whether the FIRs registered against the petitioners under different Sections (Sections find mention in the earlier part of this judgment) at the instance of the respondents and on the direction of the learned Court below under Section 156(3) Cr.P.C. are liable to be quashed without investigating the matter thoroughly or not?

10. Before touching the merits of the case, it would be apt to extract orders dated 29.08.2017 and 03.10.2017 passed by co-ordinate Bench of this Hon'ble High Court in the present petitions:

29.08.2017:

> *"Perusal of communication dated 28.10.2015, available at Page-71 of CrMMO No. 33 of 2016, suggests that Committee, constituted to inquire into the allegations having been made by the residents of area, submitted its report to the Deputy Commissioner, Bilaspur. Perusal of report, referred to above, suggests that various permissions as required under law, were not taken by the Parbati Koldam Transmission Company Limited (PKTCL), before laying transmission lines. This Court was unable to lay its hands on document, if any, suggestive of the fact that, action, if any, pursuant to report submitted by the Committee, was ever taken by the Deputy Commissioner, Bilaspur.*
>
> *In the aforesaid background, this Court deems it fit to direct the Deputy Commissioner, Bilaspur to file his personal affidavit specifically indicating therein the action taken pursuant to report submitted by the Committee, vide communication dated 28.10.2005. Affidavit, as stated above, shall be filed by the Deputy Commissioner, Bilaspur, within a period of four weeks from today. An authenticated copy of this order be supplied to the learned Additional Advocate General, for necessary compliance by Deputy Commissioner, Bilaspur.*
>
> *List on 3.10.2017."*

03.10.2017:

> *"Sequel to order dated 29.8.2017, Deputy Commissioner, District Bilaspur, has filed his personal affidavit, perusal whereof suggests that the then Deputy Commissioner, Bilaspur, after having received a joint complaint dated 20.1.2015, constituted a Fact Finding Committee comprising of Sub-Divisional Magistrate Sadar, District Bilaspur (Chairman), Divisional Forest Officer, Forest Division Bilaspur and Deputy Superintendent of Police (D.S.P. Headquarter) Bilaspur, vide order dated 29.1.2015 with the direction to submit a comprehensive report within a period of twenty days. It also emerge from the averments contained in the affidavit that subsequently, vide order dated 30.3.2015, Assistant Conservator Forest, Bilaspur, was also included as member in the aforesaid committee in place of DFO Bilaspur. Above referred Committee submitted its joint report through SDM Sadar, District Bilaspur vide letter No. BLS-SDM-SDR/2015-8839 dated 28.10.2015. The Then Deputy Commissioner after having*

perused report of fact finding committee forwarded the same to the Additional Chief Secretary (Forest) to the Government of Himachal Pradesh and to the Additional Chief Secretary (Power) to the Government of Himachal Pradesh vide office letter No. BLS-Peshi-15(3)92-III-57321-22 dated 29.12.2015, with the following request:-

> *"i) Action may kindly be initiated against the PKTCL company officers/officials for violation of the provision of Electricity Act, 2003 and Indian Telegraph Act, 1885 as stated above and nonadherence of parameters of Revenue, Horticulture, Agriculture and Forest Department for providing adequate compensation. ii) As observed by the Committee, the matter may kindly be taken up with the Government of India for streamlining the process for providing compensation in such major projects of national importance."*

2. It is quite apparent from the aforesaid communication that officials of PKTCL Company while erecting towers on the land of various stakeholders failed to comply with the provisions of Electricity Act, 2003 and Indian Telegraph Act, 1985 and as such, the Deputy Commissioner recommended the action against the officials of PKTCL Company.

3. After having carefully perused the aforesaid affidavit filed by the Deputy Commissioner, it is not discernable whether action, if any, was taken by the Additional Chief Secretary (Power) and Additional Chief Secretary (Forest) pursuant to aforesaid recommendation made by the Deputy Commissioner.

4. Accordingly, in view of the above, Additional Chief Secretary (Forest) and Additional Chief Secretary (Power) to the Government of Himachal Pradesh, are directed to file their personal affidavits specifically, indicating therein action/steps, if any, taken by them pursuant to aforesaid communication sent by the Deputy Commissioner (Bilaspur), within a period of three weeks.

5. Authenticated copy be supplied to the learned Additional Advocate General so that necessary compliance is made within the stipulated period."

The above extracted orders unequivocally demonstrate that in the execution of work PKTCL Company failed to comply with the provisions of different Acts and even the Fact Finding Committee also sought that action may be initiated against the said company under the provisions of Electricity Act, 2003 and Indian Telegraph Act, 1885 and also non-adherence of parameters of Revenue, Horticulture, Agriculture and Forest Department for providing adequate compensation.

11. Admittedly, the complainants moved applications to the learned Magistrate below under Section 156(3) Cr.P.C. for registration of FIRs against the petitioners. Section 156 Cr.P.C. is as under:

> *"156(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.*

> *(2) No proceedings of a police-officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.*
>
> *(3) Any Magistrate empowered under section 190 may order such an investigation as abovementioned."*

Thus, a bare perusal of the above Section shows that under Section 190 Cr.P.C. a Magistrate is empowered to order investigation in any cognizable case of which he/she has jurisdiction. Now, it could be apt to extract in *extenso* Section 190 Cr.P.C., which is as under:

> *"190.(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub- section (2), may take cognizance of any offence-*
>
> *(a) upon receiving a complaint of facts which constitute such offence;*
>
> *(b) upon a police report of such facts;*
>
> *(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.*
>
> *(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub- section (1) of such offences as are within his competence to inquire into or try."*

12. Indeed, under Section 190 Cr.P.C. Magistrate, having the jurisdiction, has been empowered to take cognizance of an offence and such a jurisdiction is exclusive. The Magistrate has to only see whether there exists sufficient grounds for further proceedings in the matter and for taking cognizance and no reasons are necessarily to be recorded as only a *prima facie* satisfaction is required, which this Court finds that there was material before the learned Magistrate for concluding that there exists a *prima facie* case. Thus, a Magistrate has only to see *prima facie* commission of the offence. The Hon'ble Supreme Court in ***S.K. Sinha vs. Videocon International Ltd., 2008(2) SCC 492*** as held as under:

> *"19. The expression "cognizance" has not been defined in the Code. But the word (cognizance) is of indefinite import. It has no esoteric or mystic significance in criminal law. It merely means "become aware of" and when used with reference to a court or a Judge, it connotes "to take notice of judicially". It indicates the point when a court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone."*

In view of the above cited judgment, it is discernible that cognizance connotes *'to take notice of judicially'* and this judicial notice can only be taken in case there exists a prima facie case. Now, whether there exists a *prima facie* case or not, it would only be necessary to quote a para of letter No. BLS-Peshi-15(3)92-III-57321-22, dated 29.12.2015, whereby the concerned Deputy Commissioner requested the Government to initiate proceedings against the officers/officials of the Company in question. The relevant para of the said letter is as under:

> *"i) Action may kindly be initiated against the PKTCL company officers/officials for violation of the provision of Electricity Act, 2003 and Indian Telegraph Act, 1885 as stated above and nonadherence of parameters of Revenue, Horticulture, Agriculture and Forest Department for providing adequate compensation. ii) As observed by the Committee, the matter may*

kindly be taken up with the Government of India for streamlining the process for providing compensation in such major projects of national importance."

Thus, in view of the above extracted relevant excerpts of the letter, it can be said that there exists a *prima facie* case and the learned Magistrate rightly ordered registration of FIRs on the basis of material available to her.

13. Admittedly, revision against the order of a Magistrate under Section 156(3) directing the police to register the case and investigate is maintainable. However, Hon'ble Punjab and Haryana High Court in ***Amit Ahuja vs. Gian Parkash Bhambri, 2010(93) AIC 488,*** held that the accused cannot file a petition for quashing of complaint through his Attorney. The instant petitions have also been filed by the Attorney of the petitioners, so the maintainability of the petitions are also to be looked into and this Court finds that the petitions cannot be maintained, except by the accused, so under these circumstances also the petitions deserve to be dismissed. However, in addition to this, it would be apt to observe that the question of maintainability has not been touched, as there exists a *prima facie* case against the petitioners, which is also clear from the records, and the matters need thorough investigation.

14. Admittedly, on 15.09.2008 PKTCL Company was granted license to transmit electricity as a transmission licensee and to this effect an agreement (Annexure P-1) was duly executed amongst Central Electricity Regulatory Commission and PKTCL Company. The above said agreement has clause No. 6, which provides as under:

"6. This licence shall commence on the date of its issue and unless revoked earlier, shall continue to be in force for a period of 25 (twenty five) years."

Thus, it is crystal clear that PKTCL Company was granted licence for 25 (twenty five) years only. The Fact Finding Committee found many irregularities in the execution of the work. The Committee found that the officials of PKTCL Company while erecting towers on the land of various stakeholders failed to comply with the provisions of Electricity Act, 2003 and Indian Telegraph Act, 1985 and as such, the Deputy Commissioner recommended the action against the officials of PKTCL Company. The learned counsel for respondents No. 4 to 6 (Cr.MMO No. 33 of 2016) has argued that initially PKTCL Company was BOOT (Built, Operate and Transfer Company) and after grant of licence on 15.09.2008 it became BOO (Built, Operate and Own), if it is so, now the Company has become owner of the transmission line. In view of the above contention, learned Court below has to see whether in the above circumstances the provisions of Electricity Act, 2003 and Indian Telegraph Act, 1985, are not applicable and PKTCL Company or its officers/officials were authorized to go inside the private property without permission of the landlord, however, it is left open to be adjudicated upon by the learned Trial Court. At this stage, this Court, after analyzing the available material, finds that there exists a *prima facie* case for registration of FIRs against the PKTCL Company and the petitioners.

15. In view of what has been discussed hereinabove, it is more than safe to hold that the learned Court below had not erred in ordering registration of FIRs against the petitioners and now the FIRs need to be investigated thoroughly by the police. Thus, this Court does not find any merits in the petitions, so the same are dismissed. Records of the Court below, if any, be sent back immediately. Pending application(s), if any, shall also stand(s) disposed of.

****

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

Ravi Kapoor @ Jeetendra .....Petitioner.

Vs.

State of Himachal Pradesh and another .....Respondents.

Cr. MMO No.: 87 of 2018
Reserved on: 29.04.2019
Date of Decision: 20.05.2019

Code of Criminal Procedure, 1973 - Sections 468 & 482 –Inherent powers- Exercise of- Quashing of proceedings on ground of inordinate delay- Petitioner seeking quashing of molestation case registered against him after 47 years of alleged incident- State resisting petition- Held, complainant failed in explaining inordinate delay in registering FIR after 47 years of alleged incident- Complainant not disclosing details or particulars of incident and allegation is cryptic and vague- Post incident conduct of complainant unnatural- Petition allowed- FIR quashed. (Paras 30 to 32)

Code of Criminal Procedure, 1973 - Section 468- Limitation- Commencement- Molestation charge- Held, period of limitation would start to operate from date of incident and not from reporting of incident. (Para 11 to 15)

Cases referred:

Jai Prakash Singh vs. State of Bihar, (2012) 4 SCC 379

Kishan Singh vs. Gurpal Singh, (2010) 8 SCC 775

Manoj Kumar Sharma and others vs. State of Chhattisgarh and another, (2016) 9 SCC 1

Sarah Mathew vs. Institute of Cardio Vascular Diseases by its Director Dr. K.M. Cherian and others, (2014) 2 SCC 62

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

Zandu Pharmaceutical Works Ltd. and others vs. Mohd. Sharaful Haque and another, (2005) 1 SCC 122

For the petitioner: M/s D.P. Singh, Janesh Mahajan, Sonam Gupta and Anurag Tandon, Advocates.

For the respondents: M/s Dinesh Thakur & Sanjeev Sood, Additional Advocate Generals, with Mr. R.P. Singh, Deputy Advocate General, for respondent No. 1.
Mr. Rajiv Rai, Advocate, for 'X'.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

By way of this petition filed under Section 482 of the Code of Criminal Procedure, 1973, the petitioner has, *inter alia*, prayed for quashing of FIR No. 1/2018, registered under Section 354 IPC against the petitioner at Women Police Station, Shimla as well as other proceedings emanating therefrom.

2. Before proceeding further, I will at this stage refer to the contents of the FIR. The allegations contained in the said FIR are that the petitioner/accused was the son of the

'X's' father's sister. He was a professional Actor. 'X' saw the accused in family gatherings once or twice a year since she was a young child. They rarely interacted with each other directly and never without other relatives/parents. In January, 1971, when 'X' was about 18 years old, accused arranged with her father to have her join on the set of his movie. Accused had never spoken to her about the shooting of the film nor she had been invited personally to attend the same. These arrangements were made by the accused without 'X' being aware of the same. Accused arrived at her house in a Car with a driver and two male film industry colleagues. She joined the accused in the Car and they drove from New Delhi to Shimla. At Shimla, the group went directly to a hotel. There the accused took 'X' to a room, which had two separate beds. Being tired from the journey, she went to sleep in one of the beds, which was pushed against the Walll. Later, while she was sleeping, accused returned to the room. He joined the two beds together and therein he assaulted her with the intent to outrage her modesty, as narrated in the FIR. As per 'X', the accused had consumed alcohol. Thereafter, accused left her alone and both of them went to sleep silently in the room that night. Further, as per 'X', next morning the accused asked his driver to buy some clothes for her and take her to New Delhi.

3. Quashing of the FIR has been sought, *inter alia*, on the grounds that as per the FIR, the alleged incident dates back to the month of January, 1971 and as there is an inordinate delay in filing the FIR and further as no explanation is there for such an inordinate delay in registration of the impugned FIR, the same deserves to be quashed and set aside, because inordinate delay in registration of FIR raises grave doubt about the truthfulness of allegations, as it loses the advantage of spontaneity and danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberations and consultations.

4. According to the petitioner, FIR has been registered with an oblique motive to harass him. The petitioner has alleged *mala fides* behind lodging of the complaint against him by 'X'. On oath, it has been mentioned in the petition that his family runs a big media house and daughter of 'X' had auditioned in the same and 'X' was enraged as to why her daughter was not adjusted for a role for which she had auditioned. As per the petitioner, the manner in which the incident stood narrated in FIR smacks of *mala fide.* The date of the alleged incident is not mentioned in the FIR nor it is mentioned therein as to in which hotel the alleged incident took place. The FIR does not mention the names of two male actors, who allegedly accompanied the petitioner and 'X' in the Car. No explanation is offered by 'X' for delay of 47 years in lodging the FIR and thereafter the sudden to urge get the FIR registered through a lawyer by sending a copy from United States. There is no mention of the movie during the shooting of which the alleged incident took place. Petitioner being one of the busiest Actors of the Film Industry in the year 1971, was always made to stay either in a suite or most premium room in a hotel while his staff was given separate accommodation and the whole narration of room having two separate single beds and petitioner sharing the room with the complainant was false. He had no time to travel to Shimla by Car and the route usually taken by him was a flight from Mumbai to Delhi and then further flight from Delhi to Chandigarh and then Chandigarh to Shimla by road.

5. Petitioner's further case is that Section 468 of the Code of Criminal Procedure prescribes limitation for offences punishable up to three years. As per the unamended IPC, as it existed in 1971, Section 354 of the Indian Penal Code was a bailable offence and the same was punishable with a maximum sentence up to two years or with fine or with both. Limitation period for taking cognizance on a complaint under Section 354 of the Indian Penal Code was three years. As the FIR has been lodged after a lapse of 47 years,

there is a clear bar on the Courts to take cognizance of the alleged office and therefore also, the FIR deserves to be quashed and set aside.

These are primarily the grounds on which the petitioner has sought quashing of the FIR.

6. State and 'X' have opposed the petition. Learned Additional Advocate General has argued that as the FIR stands registered, the matter should be allowed to be investigated by the Police.

7. 'X' has resisted the petition on the ground that it was incorrect that FIR was barred by limitation, as there is no time limit for lodging of an FIR prescribed in the Criminal Procedure Code. As per 'X', the issue is not barred by limitation, because since FIR stands lodged, now it is for the Police to carry out further investigation and the limitation will either accrue from the date when FIR was lodged or from the day when, post investigation, upon the report to be submitted by the Police under Section 173 of the Criminal Procedure Code, the appropriate Court of law would take cognizance of the offence. As per 'X', since the FIR has been lodged, therefore, the present petition is not maintainable and it is mandatory that investigation be carried out on the allegations contained in the FIR. On the issue of alleged vagueness in the allegations so levelled in the FIR, the contention of 'X' is that the FIR cannot be quashed on the ground of alleged vagueness in the allegations, because it is the job of the Police to make out a case and prosecute the petitioner and it is not for the informant to give more details than mentioned in the FIR. As per 'X', her circumstances were such that it was not only her honour, but the honour of the family which was at stake. Initially, she was extremely reluctant to disclose the said fact to the Police and it was only with the efflux of time when she was able to get over of the trauma that she thought of lodging the FIR. It has also been argued on behalf of 'X' that after the death of her husband and parents, when she became normal, she first time narrated the incident to her daughter on 27th January, 2018 and thereafter, the complaint was made.

8. I have heard learned counsel for the parties at a considerable length and have also gone through the pleadings of the parties, including the documents placed on record.

9. The case of the petitioner is that he is a reputed Veteran Actor and is aggrieved by registration of a false and frivolous FIR against him under Section 354 of the Indian Penal Code, 1860, i.e., FIR No. 1/2018, dated 16.02.2018, registered at Women Police Station, Shimla, wherein false and frivolous allegations stand levelled against him by the complainant (referred to as 'X') (his cousin sister) on the basis of an alleged incident which allegedly took place 47 years back.

10. FIR in issue is based upon information received on 15.02.2018 from informant/victim. The complaint was sent by 'X' from United States of America by way of a Courier and a perusal of the First Information Report demonstrates that a copy of the complaint earlier stood received on 08.02.2018 by post through the office of Superintendent of Police, Shimla. The allegations, as they find mention in FIR, have been enumerated by me hereinabove. It is apparent from the contents of the FIR that as per 'X', the alleged incident is of January, 1971. On the basis of the complaint, the FIR stands registered against the petitioner under Section 354 of the Indian Penal Code.

11. Section 354 of the Indian Penal Code provides as under:

> *"354.* ***Assault or criminal force to woman with intent to outrage her modesty.****- Whoever assaults or uses criminal force to any woman, intending to*

outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to give years, and shall also be liable to fine. "

The Section, as it stands today, was substituted by the Criminal Law (Amendment) Act, 2013, which came into force w.e.f. 03.02.2013. Before the said substitution, Section 354 provided as under:

"354. Assault or criminal force to woman with intent to outrage her modesty.- Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

12. Chapter XXXVI of the Code of Criminal Procedure, 1973 deals with limitation for taking cognizance of certain offences. Section 468 of the same reads as under:

"468. Bar to taking cognizance after lapse of the period of limitation.-(1) Except as otherwise provided elsewhere in this Code, no Court, shall take cognizance of an offence of the category specified in sub-section (2), after the expiry of the period of limitation.

(2) The period of limitation shall be-

(a) six months, if the offence is punishable with fine only;

(b) one year, if the offence is punishable with imprisonment for a term not exceeding one year;

(c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.

(3) For the purposes of this section, the period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment."

13. Section 469, *inter alia,* provides that period of limitation, in relation to an offender, shall commence on the date of the offence, or where the commission of the offence was not known to the person aggrieved by the offence or to any police officer, the first day on which such offence comes to the knowledge of such person or to any police officer, whichever is earlier or where it is not known by whom the offence was committed, the first day on which the identity of the offender is known to the person aggrieved by the offence or to the police officer making investigation into the offence, whichever is earlier.

14. Before its substitution by the Act of 2013, an offence under Section 354 of the Indian Penal Code was punishable with imprisonment for a term which could extend to two years, or with fine, or with both. In terms of the provisions of Section 468 of the Code of Criminal Procedure, no Court shall take cognizance of an offence after the expiry of the period of limitation of three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.

15. Though registration of FIR is mandatory under Section 154 of the Code of Criminal Procedure, if the information discloses commission of a cognizable offence and in such a situation, no preliminary inquiry is permissible, however, still the fact of the matter remains that there is a specific bar under Section 468(2)(c) of the Code of Criminal Procedure that no Court shall take cognizance of an offence after the expiry of the period of

limitation of three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.

16. Hon'ble Supreme Court in ***State of Haryana and others*** Vs. ***Bhajan Lal and others,*** 1992 Supp. (1) Supreme Court Cases 335 has given certain illustrations, wherein, the High Court either in exercise of the extraordinary powers under Article 226 of the Constitution of India or the inherent powers under Section 482 of the Code of Criminal Procedure, can order the quashing of First Information Report. The same read as under:

> *"(1) Where the allegations made in the first information report or the complaint, even if thay are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.*
>
> *(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.*
>
> *(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.*
>
> *(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.*
>
> *(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.*
>
> *(6) Where there is an express legal bar engrafted in any of the provisions of the Code ro 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 th concerned Act, providing efficacious redress for the grievance of the aggrieved party.*
>
> *(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.*

17. The illustrations/guidelines so laid down by the Hon'ble Supreme Court, inter *alia,* provide that an FIR can be quashed by the High Court 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 and also where a criminal proceeding is manifestly attended with *mala fide* and/or where the proceedings 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.

18. As already mentioned above, the petitioner has alleged mala fides behind lodging of the complaint against him by 'X'. On oath, it has been mentioned in the petition

that the petitioner's family runs a big media house and daughter of 'X' had auditioned in the same and complainant was enraged as to why her daughter could not be adjusted for some role for which she had auditioned. It is further mentioned in the petition that had there been any element of truthfulness in the allegations, then 'X' would not have allowed her daughter to audition with the family of the petitioner.

19. In the synopsis submitted on behalf of 'X' dated 29.04.2019, the factum of the daughter of the complainant having auditioned for a role for Balaji Motion Pictures Limited, which is stated to be owned by the family of the petitioner, has not been denied. But, it is mentioned therein that though the daughter of 'X' initially auditioned for the role of a NRI girl, however, later on, when she was contacted by Balaji Motion Pictures for a film, she declined to audition for the film, because the script was extremely explicit. It is also mentioned in the synopsis that when her daughter auditioned with Balaji Motion Pictures Limited, she was not aware about the incident in issue and when 'X' came to know that her daughter was auditioning for Balaji Motion Pictures Limited, she had cautioned her to be careful.

20. Thus, one thing which is evident from the records is that the daughter of 'X' did audition for Balaji Motion Pictures Limited, which is owned by the family of the petitioner and though the 'X' states in the synopsis that she had warned her daughter to be careful during this time, however, it is not clear as to what kind of warning was given by 'X' to her daughter, because it is not her case that she asked her daughter not to audition for the Balaji Motion Pictures Limited.

21. This lends credibility to the contention of the petitioner that lodging of the FIR was an act of mala fide and was a result of the daughter of 'X' having been rejected by a media house owned by the petitioner's family. The complaint has been filed from the United States of America.'X' is stated to be in the United States of America. She wants the Police to carryout investigation on the basis of allegations contained in the complaint which are cryptic, vague and stale.

22. Besides this, a perusal of the contents of FIR demonstrates that same are vague and lead to only one conclusion that the allegations which have been made therein 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.

23. There is no mention as to on the set of the shooting of which film, 'X' met the petitioner, which led to the occurrence of the alleged incident. 'X' has not stated as to who were the two male Film Industry colleagues who travelled alongwith the petitioner and 'X' from Delhi to Shimla in a Car. It is not mentioned therein that in which hotel, the petitioner and 'X' purportedly stayed.

24. It is not mentioned as to which movie was being shot in Shimla. It is hard to believe that if 'X' was subjected to assault with the intent to outrage her modesty, why did she not raise any noise. The date on which the alleged incident took place in Shimla is not mentioned.

25. The events which stand narrated in the FIR post occurrence of the alleged incident are also quite unbelievable and no prudent person can even reach to a just conclusion on the basis of the allegations made in the FIR that there are sufficient grounds for proceeding against the petitioner. There is no cogent explanation whatsoever coming forth from 'X' as to why the complaint was filed at such a belated stage. The reasons given in the response/synopsis do not inspire confidence, because it is hard to believe that it is only after the death of her husband and parents, 'X' became normal so as to be in a position to

make the complaint. This Court fails to understand that what 'X' intends to convey by stating the following in her synopsis:

> *"(17) That the husband of the complainant died on 26th of June, 2009, then the father of the complainant died on June, 2016 and then mother of the complainant died on 19th of November, 2017. Then after becoming normal, the complainant first time narrated the dreadful incident to her daughter on January 27, 2018 and then the complaint was has been made."*

Be that as it may, as already submitted above, said explanation does not inspire any confidence whatsoever.

26. No Court can probably proceed with the trial of the case in the present matter, as admittedly, in the year 1971, when the offence was alleged to have been committed, the maximum punishment for commission of the offence was imprisonment up to two years.

27. Learned counsel for 'X' by placing reliance on the judgment of Hon'ble Supreme Court in ***Sarah Mathew*** Vs. ***Institute of Cardio Vascular Diseases by its Director Dr. K.M. Cherian and others***, (2014) 2 Supreme Court Cases 62, argued that there was no delay in lodging the FIR, as limitation has to be construed as from the date when the FIR is lodged. He further argued that as and when Court of competent jurisdiction shall take cognizance of the offence, in terms of Section 190 of the Code of Criminal Procedure, it is on the said date that it has to be seen whether the matter is within limitation as from the date of lodging of the FIR. In my considered view, said argument is totally misconceived and a result of wrong interpretation of the judgment of the Hon'ble Supreme Court. In Sarah Mathew's case, the five Judges Bench of the Hon'ble Supreme Court was dealing with the question whether for the purpose of computing the period of limitation under Section 468 of the Code of Criminal Procedure, the relevant date is the date of filing the complaint or the date of institution of the prosecution or whether the relevant date is the date on which the Magistrate takes cognizance of the offence. While answering this question, Hon'ble Supreme Court held that for the purpose of computing the period of limitation under Section 468 of the Code of Criminal Procedure, the relevant date is the date of filing of the complaint or the date of issuance of prosecution and not the date on which the Magistrate takes cognizance. In the present case, the date of filing of the complaint is 08.02.2018, as the date of receipt of information which finds mention in the FIR is 08.02.2018. Limitation for the purpose of Section 468 of the Code of Criminal Procedure has to be seen as from the said date vis-a-vis the alleged date of commission of the offence. It is not to be seen from the date of receipt of information by the Police vis-a-vis the date on which cognizance may be taken by the Magistrate concerned in terms of Section 190 of the Code of Criminal Procedure. It is a matter of record that as from the date of alleged incident which as per the victim took place in January, 1971, the complaint is also not within limitation for the purpose of Section 468 of the Code of Criminal Procedure, as date of filing of the complaint is beyond three years as from the year and month when the alleged offence was committed.

28. Hon'ble Supreme Court in ***Kishan Singh*** Vs. ***Gurpal Singh***, (2010) 8 SCC 775 with regard to the effect of delay in lodging FIR has held as under:

> *"22. In cases where there is a delay in lodging a FIR, the Court has to look for a plausible explanation for such delay. In absence of such an explanation, the delay may be fatal. The reason for quashing such proceedings may not be merely that the allegations were an after thought or had given a coloured version of events. In such cases the court should carefully examine the facts*

before it for the reason that a frustrated litigant who failed to succeed before the Civil Court may initiate criminal proceedings just to harass the other side with mala fide intentions or the ulterior motive of wreaking vengeance on the other party. Chagrined and frustrated litigants should not be permitted to give vent to their frustrations by cheaply invoking the jurisdiction of the criminal court. The court proceedings ought not to be permitted to degenerate into a weapon of harassment and persecution. In such a case, where an FIR is lodged clearly with a view to spite the other party because of a private and personal grudge and to enmesh the other party in long and arduous criminal proceedings, the court may take a view that it amounts to an abuse of the process of law in the facts and circumstances of the case. (vide : Chandrapal Singh & Ors. Vs. Maharaj Singh & Anr., AIR 1982 SC 1238; State of Haryana & Ors. Vs. Ch. Bhajan Lal & Ors., AIR 1992 SC 604; G. Sagar Suri & Anr. Vs. State of U.P. & Ors., AIR 2000 SC 754; and Gorige Pentaiah Vs. State of A.P. & Ors., (2008) 12 SCC 531).

29. Similarly, in ***Jai Prakash Singh*** Vs. ***State of Bihar***, (2012) 4 SCC 379, Hon'ble Supreme Court has held as under:

"12. The FIR in criminal case is a vital and valuable piece of evidence though may not be substantive piece of evidence. The object of insisting upon prompt lodging of the FIR in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of actual culprits and the part played by them as well as the names of eye- witnesses present at the scene of occurrence. If there is a delay in lodging the FIR, it looses the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of large number of consultations/deliberations. Undoubtedly, the promptness in lodging the FIR is an assurance regarding truth of the informant's version. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question.

30. Relying upon the judgment of *Jai Prakash Singh (supra)*, in ***Manoj Kumar Sharma and others*** Vs. ***State of Chhattisgarh and another***, (2016) 9 SCC 1, Hon'ble Supreme Court has held that delay in lodging FIR often results in embellishment, which is a creature of an afterthought and on account of delay, FIR not only gets bereft of advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. It further held that extraordinary delay in lodging FIR raises grave doubt about the truthfulness of allegations made therein.

31. While explaining the scope of exercise of powers under Section 482 of the Code of Criminal Procedure, Hon'ble Supreme Court in ***Zandu Pharmaceutical Works Ltd. and others*** Vs. ***Mohd. Sharaful Haque and another,*** (2005) 1 Supreme Court Cases 122 has held as under:

"10. In dealing with the last case, it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is clearly inconsistent with the accusations made, and a case where there is legal evidence which, on appreciation, may or may not support the accusations. When exercising jurisdiction under Section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it

accusation would not be sustained. That is the function of the trial Judge. Judicial process should not be an instrument of oppression, or, needless harassment. Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, lest it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly. At the same time the section is not an instrument handed over to an accused to short-circuit a prosecution and bring about its sudden death. The scope of exercise of power under Section 482 of the Code and the categories of cases where the High Court may exercise its power under it relating to cognizable offences to prevent abuse of process of any court or otherwise to secure the ends of justice were set out in some detail by this Court in State of Haryana v. Bhajan Lal (1992 Supp (1) 335). A note of caution was, however, added that the power should be exercised sparingly and that too in rarest of rare cases. The illustrative categories indicated by this Court are as follows:

> *"(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.*
>
> *(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.*
>
> *(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused. (4) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code. (5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.*
>
> *(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (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 Act concerned, providing efficacious redress for the grievance of the aggrieved party.*
>
> *(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."*

As noted above, 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. The 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. (See:Janata Dal v. H. S. Chowdhary(1992 (4) SCC 305), and Raghubir Saran (Dr.) v. State of Bihar (AIR 1964 SC 1). 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 a 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 482of the Code. It is not, however, necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction or acquittal. The complaint has to be read as a whole. If it appears that on consideration of the allegations in the light of the statement made on oath of the complainant that the ingredients of the offence or offences are disclosed and there is no material to show that the complaint is mala fide, frivolous or vexatious, in that event there would be no justification for interference by the High Court. 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 by themselves be the basis for quashing the proceedings. (See:Dhanalakshmi v. R. Prasanna Kumar(1990 Supp SCC 686),State of Bihar v. P. P. Sharma(AIR 1996 SC 309),Rupan Deol Bajaj v. Kanwar Pal Singh Gill(1995 (6) SCC 194),State of Kerala v. O. C. Kuttan(AIR 1999 SC 1044),State of U.P. v. O. P. Sharma(1996 (7) SCC 705),Rashmi Kumar v. Mahesh Kumar Bhada(1997 (2) SCC 397),Satvinder Kaur v. State (Govt. of NCT of Delhi) (AIR 1996 SC 2983) andRajesh Bajaj v. State NCT of Delhi(1999 (3) SCC 259.

In this judgment, Hon'ble Supreme Court has further held that though Section 473 of the Code of Criminal Procedure provides for extension of period of limitation in certain cases, however, said power can be exercised only when the Court is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary to do so in the interest of justice.

32. Therefore, in these circumstances, where admittedly the FIR has been lodged after more than four decades as from the year when the alleged incident took place and as admittedly the punishment for committing the offence alleged against the petitioner as in the year 1971 was a maximum of two years imprisonment and further as under Section 468 of the Code of Criminal Procedure, 1973, no Court shall take cognizance of an offence after the expiry of period of limitation of three years, if offence is punishable with imprisonment for

term exceeding one year but not exceeding three years, this petition deserves to be allowed and the FIR in issue deserves to be quashed and set aside. In addition, I have already held above that even otherwise, the allegations mentioned in the FIR do not inspire any confidence and no prudent person, on the basis of allegations made in the FIR, can reach to a just conclusion that there are sufficient grounds for proceeding against the petitioner.

33. In view of the discussion held hereinabove, this petition is allowed and FIR No. 1/2018, dated 16.02.2018, registered under Section 354 of the Indian Penal Code at Women Police Station, Shimla is ordered to be quashed and set aside. Petition stands disposed of, so also pending miscellaneous applications, if any.

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

Ankur Gupta .....Petitioner
Versus
State of H.P. ....Respondent.

Cr.MP(M) No. 767 of 2019
Decided on : 21.5.2019

Code of Criminal Procedure, 1973 – Section 438 – Pre-arrest bail- Grant of in rape case- Circumstances- Accused allegedly indulged in sexual intercourse with prosecutrix on pretext of marrying her- Victim, a married lady holds capacity to give consent for such sexual relationship- FIR delayed since last such sexual intercourse- Delay not explained- Prosecution story appears to be tainted one- Accused fully cooperated during investigation- On facts, pre-arrest bail granted subject to conditions. (Paras 2 & 3)

For the petitioner: Mr. Sanjeev Bhushan, Sr. Advocate with Mr. Rajesh Kumar, Advocate.
For the respondent: Mr. Hemant Vaid & Mr. Desh Raj Thakur, Addl. A.Gs. with Mr. Y.S. Thakur & Mr. Vikrant Chandel, Dy. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The instant petition, stands instituted by the petitioner/bail applicant, under, Section 438 Cr.P.C, wherein he seeks grant of anticipatory bail qua him, given his apprehending his arrest, for his allegedly committing offences punishable, under Sections 376 of I.P.C, in case FIR No. 17 of 2019, of, 29.4.2019, registered with Women Police Station, Solan, District Solan, H.P.

2. The prosecutrix is a major. She succumbed, to, the sexual encounter, of, the bail-applicant, on 12.1.2019, under pretext, of, the accused promising, to, perform marriage with her. However, subsequent thereto, respectively, on 11.3.2019, and, on 23.3.2019, she also proceeded to succumb to the sexual overtures, of, the bail-applicant/accused, also upon, the bail-applicant, purveying her, an, allurement of marriage. The prosecutrix being married, hence holds the capacity to mete consent, to the bail-applicant. However, the afore sexual encounters inter-se the bail-applicant/accused, and,

the prosecutrix, are, allegedly stained, with, an, incriminatory tinge, qua theirs emanating, from pretext or allurement of marriage, made to her, by the bail-applicant. However, the afore pretext(s) or allurement(s), of marriage hence wherethrough, the prosecutrix meted consent to the bail applicant vis-a-vis the afore sexual encounter(s), is available, as an espousable incriminatory ascribable role, vis-a-vis, the bail applicant, only on one occasion, (i) and also upon hers immediately thereafter, hence proceeding to report the incident to the police, (ii) importantly upon, the applicant/accused refusing or declining to marry her. However, rather the prosecutrix, proceeding to, on, two occasions subsequent, to, the initial sexual encounter inter-se both, as, stood purportedly generated by, an, allurement of marriage meted to her by the bail-applicant, hence engating herself, in, sexual encounters with the bail applicant, (iii) obviously prima facie renders her incapacitated, to, espouse, that, she upon the afore pretext or allurement of marriage purveyed to her, hence meted consent, vis,a,vis, the sexual overtures of the bail applicant, (iv) and/or, that hence the effect thereof remaining alive, (v) successively throughout, (v) rather prima facie it is to be inferred qua the sexual encounter(s) inter-se the bail-applicant, and, the prosecutrix rather being free from any incriminatory taints, (vi) prominently, also with the FIR being lodged belatedly, since the last sexual encounter, which occurred interse both, on 23.3.2019, and the prosecutrix not rendering any tangible explication vis-a-vis the relevant delay, (vii) thereupon rather rendering, the, prosecution story to stand ingrained with, vice(s) of, pre-meditation and concoctions, whereupon no reliance can be meted, by this Court.

3. The Investigating Officer, is present in Court, and, reports that the bail-applicant, has, rendered the fullest cooperation to him, vis-a-vis, his conducting the investigations into the offences, borne in the FIR. Consequently, the bail application is allowed, moreso, with there being no material placed, on record, by the prosecution, that, in the event of indulgence of pre-arrest bail being granted to the petitioner/bail-applicant, there is every likelihood of (a) his tampering with the prosecution evidence, (b) influencing prosecution witnesses and (c) fleeing from justice, hence the bail application is allowed, and, the order rendered by this Court on 3.5.2019, is, made absolute, subject to compliance by him with the following conditions:-

i) That he shall join the investigation, as and when required by the Investigating agency;

ii) That he shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police;

iii) That he shall not leave India without the previous permission of the Court;

iv) That he shall deposit his passport, if any, with the Police Station, concerned;

v) That in case of violation of any of the conditions, the bail granted to the petitioners shall be forfeited and they shall be liable to be taken into custody;

vi) That he shall apply for bail afresh when the challan is filed before the trial Court.

vii) That upon his re-indulging in criminal activities, it shall be open to the respondent, to move this Court for cancellation of bail.

4. Any observation made herein above shall not be taken as an expression of opinion on the merits of the case and the trial Court shall decide the matter uninfluenced by any observation made herein above.

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

Pritu ....Petitioner.

Vs.

Sh. Babu Ram (since deceased) through his Legal Representatives Lachhman and others .....Respondents.

CMPMO No.: 57 of 2019
Date of Decision: 21.05.2019

Code of Civil Procedure, 1908 – Order XXVI Rule 9 – Local commissioner- Appointment of- When can be ordered? - Plaintiff filing suit for declaration of title on basis of oral exchange- Filing application for demarcation of land by Commissioner- Trial court dismissing such application- Petition against- Held, suit is for declaration of title on basis of some oral exchange between parties- It does not involve any boundary dispute between them- Demarcation of land through Commissioner not required at all- Petition dismissed- Order of trial court upheld. (Para 8)

For the petitioner: Mr. J. R. Poswal, Advocate.
For the respondents: 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 petition, the petitioner has challenged order dated 27.11.2018, passed by the Court of learned Senior Civil Judge, Nalagarh in Case No. 482 of 2014, titled as *Pritu Vs. Babu Ram,* vide which, an application filed under Order 26 Rules 9 and 10 of the Code of Civil Procedure praying for appointment of a Local Commissioner for the purpose of demarcation of the suit land has been dismissed.

2. Brief facts necessary for the adjudication of the petition are that the petitioner herein has filed a suit for declaration with consequential relief of permanent prohibitory injunction, which is pending adjudication before the learned Court below. The suit was initially instituted against the predecessor-in-interest of the present respondents.

3. It is a matter of record that after the framing of issues, respective parties led their evidence and thereafter, the matter was being taken up by the learned Court below for the purpose of hearing.

4. Learned Trial Court adjourned the case for the purpose of hearing five times. Thereafter, an application stood filed by the present petitioner under Section 26 Rule 9 of the Code of Civil Procedure praying for appointment of a Local Commissioner to demarcate

the land comprised in Khasra Nos. 525/269 and 248 in Village Rampur, Tehsil Nalagarh, District Solan, H.P. The reasons mentioned in the application, *inter alia*, were that plaintiff had filed a suit for declaration on the basis of exchange entered into between the parties and said exchange stood denied by the defendant. Plaintiff had got the demarcation carried out somewhere in the year 2005 before the exchange took place. However, said file was not available in revenue record. According to the plaintiff, demarcation was a technical type of work, which only revenue officials could do and he being an illiterate person, could not demarcate the land himself. Therefore, he had no alternative, but to seek the assistance of the Court to have the land demarcated by way of appointment of a Local Commissioner.

5. This application was opposed by the respondents on the ground that the plaintiff had filed the application just for the purpose of collecting evidence in his favour and the same stood filed at a belated stage when five opportunities stood granted by the learned Trial Court on the request of the plaintiff to argue the case on merit. It was further the stand of the respondents before the learned Court below that though the Court had power to appoint a Local Commissioner, but the same can be done where boundary dispute existed and in the present case, there was no boundary dispute between the parties, as suit for declaration stood filed by the plaintiff on the plea of oral exchange and the application was a clever attempt made by him to collect evidence to fill up the lacuna and loopholes in his case.

6. Vide impugned order, learned Trial Court has rejected the application filed by the present petitioner, inter alia, on the ground that appointment of Local Commissioner was not required in the case keeping in view the nature of dispute between the parties and allowing the application would tantamount to collection of evidence for the applicant/plaintiff.

7. I have heard learned counsel for the parties and have also gone through the impugned order as well as the pleadings appended with petition.

8. It is not in dispute that the application under Order 26 Rule 9 of the Code of Civil Procedure was filed by the present petitioner at a belated stage after the parties had led their respective evidence and after plaintiff had availed five opportunities for addressing the Court on merit. Application under Order 26 Rule 9 of the Code of Civil Procedure for appointment of a Local Commissioner was filed on the grounds, which I have already enumerated hereinabove. A perusal of the plaint which is appended with the petition as Annexure P-1 demonstrates that the decree which has been sought by the plaintiff is a decree for declaration to the effect that plaintiff is owner of the suit land described in the plaint and revenue record pertaining to the suit land contrary to the factum of exchange was wrong, illegal, null and void, inoperative, ineffective and liable to be corrected. An alternative decree for vacant possession of the suit land was also prayed. A perusal of the relief thus prayed for by the plaintiff, *prima facie,* demonstrates that it is not the case of boundary dispute. The plaintiff is seeking a declaration against the defendants qua the suit land on the basis of some oral exchange, which purportedly, stood entered into between the plaintiff and the defendants. Whether any such exchange took place or not, is for the learned Trial Court to adjudicate upon, on the basis of pleadings of the parties and the evidence which has been placed on record by them. However, in view of the relief so sought by the plaintiff in the suit, application under Order 26 Rule 9 of the Code of Civil Procedure for appointment of a Local Commissioner for the purpose of demarcation of the land, to say the least, was otherwise also not maintainable.

9. The application was filed at a belated stage, i.e., at the stage of hearing and that too, after availing five opportunities to address the Court on merit. No cogent

explanation has been given by the petitioner as to why the application was filed at such a belated stage.

10. Order 26 Rule 9 of the Code of Civil Procedure provides that in any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute etc., the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court.

11. Even otherwise, in exercise of its jurisdiction under Article 227 of the Constitution of India, primarily, this Court is not to go into the merits of the findings returned by the learned Court below, because what this Court has to see is as to whether there is any jurisdictional error committed by the learned Court below or whether the findings returned by the learned Court below are so perverse that if there are permitted to remain on record, the same would amount to grave injustice to the party concerned.

12. Prima facie, it is the satisfaction of the Court as to whether local investigation is necessary or not for elucidating any matter in issue. Herein, by way of a well reasoned order, learned Court below has returned the findings that the dispute involved in the suit was not such which required appointment of a Local Commissioner.

13. As I have already pointed above, it is not the contention of the petitioner that the learned Court below has committed any jurisdictional error while deciding the application nor the petitioner has been able to point out any perversity with the findings returned by the learned Court below. Accordingly, as this Court does not finds any perversity in the impugned order, the petition being devoid of any merit is dismissed. Miscellaneous applications, if any, also stand disposed of.

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

Indian Meteorological Department ... Petitioner

Vs.

Miss Asha Pandit and others ... Respondents

Civil Revision No. 196 of 2018
Reserved on: 21.05.2019
Date of decision: 23.05.2019.

Land Acquisition Act, 1894 (Act) – Sections 16 & 48 –**General Clauses Act, 1897 (Act of 1897) –** Section 21 – Whether withdrawal from acquisition after taking possession of land is permissible?- Reference Court executing award passed in favour of landowner- State challenging execution on ground that land is no more required by it and Government is competent to cancel previous notification and withdraw from acquisition- Held, possession of acquired land stands already taken and said land duly vested in Government- After taking possession of land, acquisition cannot be de-notified either under Section 48 of Act or Section 21 of Act of 1897. (Paras 8 to 10)

Cases referred:

Bangalore Development Authority and others vs. R. Hanumaiah and others (2005) 12 SCC 508

K.N.Aswathnarayana Setty (dead) through legal representatives and others vs. State of Karnataka and others (2014) 15 SCC 394
LT. Governor of Himachal Pradesh vs. Sri Avinash Sharma 1970 (2) SCC 149
Rajasthan Housing Board and others vs. Shri Kishan and others (1993) 2 SCC 84
Satendra Prasad Jain and others vs. State of U.P. and others (1993) 4 SCC 369
Uma Shankar and others vs. R. Hanumaiah (since deceased) through his Legal Representatives and others (2017) 14 SCC 335
V. Chandrasekaran and another vs. Administrative Officer and others (2012) 12 SCC 133

For the petitioner	:	Mr. Shashi Shirshoo, Central Government Counsel.
For the respondents	:	Mr. M. A. Khan, Senior Advocate, with Ms. Hem Kanta Kaushal, Advocate, for respondent No.1. Mr. Vinod Thakur and Mr. Sudhir Bhatnagar, Addl. A.Gs., with Ms. Svaneel Jaswal, Dy.A.G., for respondents No.2 and 3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

"Whether in a case where possession of the land has been taken under Sections 16 and 17 of the Land Acquisition Act, 1894 (for short 'Act'), can the application for release of land from acquisition still be held to be maintainable"?, is the short question which arises for consideration in the instant revision petition.

2. However, before answering the question, certain minimal facts need to be noticed.

3. The land of respondent No.1 measuring 8513.89 sq. mtrs. Comprising in Khata Khatauni No.3/5, Khasra Nos. 90 to 102, Kitas 13, situated in Mohal Jakhu, Tehsil and District Shimla, H.P. was acquired by respondents No. 2 and 3 for the benefit of the petitioner for installation of "C-Band Dopplers Radar and Meteorological Centre". After completion of all necessary formalities under the Act, the Land Acquisition Collector passed his award on 8.6.2011 thereby awarding flat rate of compensation of Rs.4573.13 paise per square meter.

4. The award was assailed by respondent No.1 before the learned Reference Court and the same was allowed on 7.6.2017 and the compensation was enhanced to Rs.12,812/- per square meter alongwith all consequential benefits.

5. The award so passed by learned Reference Court is subject matter of RFA No.9788 of 2018, which is still pending adjudication before this Court. In the meanwhile, after passing of the award by the learned Reference Court, respondent No.1 filed an Execution Petition seeking implementation of the award passed by the learned Reference Court on 7.6.2017.

6. The petitioner filed objections under Section 47 of the Code of Civil Procedure mainly on the ground that the petitioner was no longer interested in retaining the land and the same was lying un-utilised and the State of Himachal Pradesh was free to take over the land and use it for other purposes as it may consider fit. The objections so filed by

the petitioner came to be dismissed by learned Executing Court on 3.8.2018, constraining the petitioner to file the instant revision petition.

7. It is vehemently argued by Mr. Shashi Shirshoo, learned Central Government Counsel for the petitioner that once the Government had power to issue notification for acquiring the land, it had the power to cancel the notification under Section 21 of the General Clauses Act. Even though, the arguments on the face of it appears to be attractive, but there is no merit in the same.

8. Identical question came up for consideration before the Hon'ble Supreme Court in ***LT. Governor of Himachal Pradesh*** vs. ***Sri Avinash Sharma 1970 (2) SCC 149***, wherein it was clearly held that after possession has been taken pursuant to a notification under Section 17 (1), the land is vested in the Government and the notification cannot be cancelled under Section 21 of the General Clauses Act, nor can the notification be withdrawn in exercise of the powers under Section 48 of the Land Acquisition Act. Rather it was held that any other view would enable the State Government to circumvent the specific provision by relying upon a general power. It was also held that when the possession of the land is taken under Section 17 (1) of the Act, the land vests in the Government and there is no provision by which the land statutorily vested in the Government reverts to the original owner by mere cancellation of the notification. It is apposite to refer to the relevant observations as contained in para-8 which reads thus:

> *"8....It is clearly implicit in the observations that after possession has been taken pursuant to a notification under Section 17 (1) the land is vested in the Government, and the notification cannot be cancelled under Section 21 of the General Clauses Act, nor can the notification be withdrawn in exercise of the powers under Section 48 of the Land Acquisition Act. Any other view would enable the State Government to circumvent the specific provision by relying upon a general power. When possession of the land is taken under Section 17 (1), the land vests in the Government. There is no provision by which land statutorily vested in the Government reverts to the original owner by mere cancellation of the notification."*

9. Similar reiteration of law can be found in the following judgments of the Hon'ble Supreme Court:

> ***(i) Rajasthan Housing Board and others vs. Shri Kishan and others (1993) 2 SCC 84 ;***
>
> ***(ii) Satendra Prasad Jain and others vs. State of U.P. and others (1993) 4 SCC 369 ;***
>
> ***(iii) Bangalore Development Authority and others vs. R. Hanumaiah and others (2005) 12 SCC 508;***
>
> ***(iv) V. Chandrasekaran and another vs. Administrative Officer and others (2012) 12 SCC 133;***
>
> ***(v) K.N.Aswathnarayana Setty (dead) through legal representatives and others vs. State of Karnataka and others (2014) 15 SCC 394; and***
>
> ***(vi) Uma Shankar and others vs. R. Hanumaiah (since deceased) through his Legal Representatives and others (2017) 14 SCC 335.***

10. Thus, what can be taken to be a settled legal proposition is that the land once acquired cannot be restored to the tenure-holders/persons interested, even if it is not used for the purpose for which it was so acquired, or for any other purpose either. The

proceedings cannot be withdrawn/ abandoned under the provisions of Section 48 of the Act, or under Section 21 of the General Clauses Act, once the possession of the land has been taken and the land vests in the State, free from all encumbrances.

11. What essentially follows is that in case possession of the land has been taken, then the application for release of land from acquisition is not maintainable. Once the land is vested in the State free from encumbrances, it cannot be divested.

12. Admittedly, in the instant case the possession of the suit land has been taken from respondent No.1 and consequently, the land has vested in the State free from all encumbrances, it cannot be now divested.

13. The question as posed being no longer *resintegra* in view of the various authoritative pronouncements of the Hon'ble Supreme Court, as referred to above, is answered against the petitioner.

14. Consequently, there is no merit in this revision petition and the same is accordingly dismissed, so also the pending application(s) if any.

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

Shishu Pal and Ors .....Petitioners
Versus
State of HP and Ors. .....Respondents

CWP No. 1751 of 2017
Decided on: 28.5.2019

Constitution of India, 1950 – Articles 14 & 16– Discrimination in grant of additional increment- Justification- Petitioners alleging discrimination regarding grant of additional increment to them after completion of 20 years of regular service vis-à-vis other employees similarly situated- Respondents contending that it is a Trust being run on donations- Held, rules of State Government specifically made applicable to employees of Trust- Increments are to be given to class-IV employees of all categories irrespective of promotions- No plausible explanation given for adoption of pick and choose method and not following Government instructions- Benefits cannot be denied merely because employees salary is paid out of donations- Petition disposed of with direction to respondents to take decision within two months. (Paras 5 to 8)

For the Petitioners: Mr. Ajay Sharma, Senior Advocate with Mr. Ashutosh Bhardwaj, Advocate.

For the Respondents: Ms. Ritta Goswami and Mr. Ashwani Sharma, Additional Advocate Generals with Ms. Divya Sood, Deputy Advocate General and Mr. Manoj Bagga, Assistant Advocate General, for the State.
Mr. Avneesh Bhardwaj, Advocate, for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

In nutshell, grouse of the petitioners, who are admittedly class-IV employees working on different posts for the last 20 years in the respondent-trust, is that respondents have adopted pick and choose policy while giving benefit of one additional increment on completion of 20 years of regular service in terms of office memorandum dated 31.7.2012 and 15.12.2012, issued by the Principal Secretary (Finance) to the Government of Himachal Pradesh, whereby it was decided that one additional increment on completion of 20 years of regular service would be given to all the class-IV employees irrespective of the fact that some of them have been promoted within Class-IV categories.

2. Before adverting to the factual matrix of the case, it would be apt to take note of the communication dated 15.12.2012 (Annexure P-2), which reads as under:-

> ***"The undersigned is directed to refer to this Department's OM of even number dated 31st July, 2012 on the above cited subject and to say that references are being received in this department for clarification whether benefit of additional increment on 20 years of service will also be admissible to those employees who have been promoted within the Class-IV category.***
>
> ***The matter has been considered and it is clarified that one additional increment, on completion of 20 years regular service will, be given to all class-IV employees, irrespective of the fact that some of them have been promoted within the class-IV categories. However, this benefit will be admissible only to those Class-IV categories which remain as such in the pay scales of Class-IV notified vide Finance Department O.M. No. Fin(PR)B(7)1/98-II dated 3.5.2001 and notifications No.Fin(PR)B(7)-1/2009 dated 26-8-2009 and Fin(PR)B(7)-64/2010 dated 27.9.2012.***
>
> ***This may kindly be brought to the notice of all concerned."***

Close scrutiny of aforesaid communication reveals that vide office memorandum dated 31.7.2012, Government of Himachal Pradesh decided to give benefit of one additional increment on the completion of 20 years of service to the class-IV employees in all categories. Subsequently, vide aforesaid communication dated 15.12.2012, Principal Secretary (Finance) while giving clarification pursuant to the queries made by the different departments again reiterated that one additional increment on completion of 20 years service would be given to all class-IV employees irrespective of the fact that some of them have been promoted within class-IV categories.

3. Perusal of Annexure P-3 i.e. communication dated 17.11.2012, issued by the Sub Divisional Officer (Civil) Barsar cum Chairman, Baba Balak Nath Temple Trust, Barsar, further reveals that pursuant to aforesaid office memorandum dated 31.7.2012, respondents No.2 and 3 have granted benefit of additional increment to one Sh. Surender Nath (class-IV employee of the respondent-trust) after completion of 20 years services. However, interestingly, respondent-trust arbitrarily without assigning any cogent and convincing reasons, refused to grant such benefit of additional increment to the petitioners herein, who have admittedly completed more than 20 years of service and as such, Employees' Association vide resolution dated 5.4.2016 (Annexure P-4), requested respondent authorities to consider their cases.

4. It further emerges from the record that Sub Divisional Officer (Civil) Barsar cum Chairman, Baba Balak Nath Temple Trust, Barsar, vide communication dated 11.12.2015 forwarded the matter to the Deputy Commissioner Hamirpur cum Commissioner Baba Balak Nath Temple Trust, Deothsid, Barsar (Annexure R-1 annexed with the reply of

respondents). In the aforesaid communication, Sub Divisional Officer (Civil) Barsar cum Chairman, Baba Balak Nath Temple Trust, Barsar, specifically mentioned that employees, who have completed 20 years of service in the respondent-trust are entitled to the benefit of additional increment in terms of office memorandum No. Fin(C)B(7)-3/2012 dated 31.7.2012. However, the Deputy Commissioner Hamirpur cum Commissioner Baba Balak Nath Temple Trust, Deothsid, Barsar, vide communication dated 3.2.2016, rejected the claim as forwarded by the Sub Divisional Officer (Civil) Barsar cum Chairman, Baba Balak Nath Temple Trust, Barsar, on very flimsy grounds without even bothering to look into the office memorandum dated 31.7.2012. The Deputy Commissioner, in communication dated 3.2.2016 (Annexure R-2 annexed with the reply of the respondents) has observed that since salary of temple employees is not paid by the government, but by the donations of the thousands of the pilgrims and as such, Sub Divisional Officer (Civil) Barsar cum Chairman, Baba Balak Nath Temple Trust, Barsar, ought to have legally examined the case before forwarding the case to him.

5. Having carefully perused the contents of aforesaid communication dated 3.2.2016 issued by the Deputy Commissioner Hamirpur cum Commissioner Baba Balak Nath Temple Trust, Deothsid, Barsar, this Court has no hesitation to conclude that Deputy Commissioner proceeded to decide the case of employees, who have completed more than 20 years service, in a very hot haste manner without application of mind. Communication dated 3.2.2016, issued by the Deputy Commissioner, nowhere suggests that Deputy Commissioner while rejecting the case of the petitioners examined question with regard to applicability of instructions contained in the office memorandum dated 31.7.2012, qua the employees of the respondent-trust. Reasons assigned by the Deputy Commissioner while rejecting the case of the petitioners are not tenable, especially, in view of the fact that some of the employees, who have completed more than 20 years of service in respondent-trust, have been already given benefit of additional increment in terms of office memorandum dated 31.7.2012 issued by the Government of Himachal Pradesh.

6. After having carefully examined documents made available on record as well as arguments advanced by Mr. Ajay Sharma, learned Senior Counsel, representing the petitioners, this Court is not persuaded to agree with Mr. Avneesh Bhardwaj, learned Counsel representing the respondent-Trust, that instructions/rules framed by the Government of Himachal Pradesh are not applicable to the employees of the trust, who are paid salary from the donations received by the temple. As has been taken note herein above, one of the employee has been already granted benefit of additional increment in terms of aforesaid policy decision taken by the state Government. Apart from above, there are ample documents annexed with the petition as well as rejoinder to the reply filed by the trust suggestive of the fact that respondent-trust has been following/adopting rules/instructions framed by the State Government from time to time. Employees Service Rules 2001 Baba Balak Nath Temple Trust Employee, Terms and working Condition (8th amendment) Rules, 2007 further reveals that age of retirement and benefit on account of gratuity of the employees of trust are also to be governed as per government rules/instructions. Fixation of pay on promotion of the employees of respondent trust is also regulated by the government rules and as such, claim of the petitioners cannot be merely rejected on the ground that since salary of the employees is paid out of the donations, they cannot be granted benefit in terms of office memorandum dated 1.7.2012, issued by the Government of Himachal Pradesh.

7. Leaving everything aside, there is no plausible explanation rendered on record by the respondents for adopting pick and choose method, while granting benefit of additional increment after completion of 20 years of service to its employees in terms of

government notification dated 31.7.2012. Mr. Avneesh Bhardwaj, learned counsel, was unable to assign any reason for granting benefit of additional increment to one of its employee namely Surender Nath, ignoring all other employees, who have admittedly completed more than 20 years. The Deputy Commissioner, while rejecting the recommendations made by the SDO (Civil) has not categorically stated that instructions contained in office memorandum dated 31.7.2018 are not applicable to the employees of the respondent-trust.

8. Consequently, in view of the above, present petition is allowed and Annexure R-2 annexed with the reply of the respondents dated 3.2.2016 is quashed and set-aside and respondent-trust is directed to consider the case of the petitioners as per similarly situate persons, afresh, in light of office memorandum dated 31.7.2012 issued by the Government of Himachal Pradesh, expeditiously, preferably within a period of two months. Accordingly, present petition is disposed of, along with pending applications if any.

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

Jaram Singh .....Appellant/Plaintiff.

Versus

Santosh and another ....Respondents/Defendants.

R.S.A. No. 407 of 2018

Date of decision: 29th May, 2019

Indian Easements Act, 1882 – Sections 13 and 15 – **Specific Relief Act, 1963** - Sections 37 and 38 – Easement of passage by necessity as well as prescription- Whether simple suit for permanent prohibitory injunction is maintainable or whether plaintiff is required to seek declaration?- Held, suit for mere injunction on strength of alleged easementary right cannot be maintained- Easementary right becomes enforceable only when it is declared by court of law- Easement does not accrue to person independent of any adjudication- Therefore, plaintiff must seek declaration qua easementary right(s). (Paras 8 to 10)

Cases referred:

Brahama Kumaris Ishwariya Vishwa Vidayalya vs. Dev Parkash 2013 (2) RCR (Rent) 32

D.Ramanatha Gupta vs. S. Razaack AIR 1982 Karnataka 314

Vanga Ramanujayya vs. Atyam Suryanarayan Murthy 2007 (4) ALT 268

For the Appellant : Mr. D.N. Sharma, Advocate.

For the Respondents : Mr. Nimish Gupta, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (*Oral)*

Whether in absence of any relief for declaration can a suit for injunction be maintained? is a moot question that falls for consideration. However, before answering this question, brief facts need to be noticed.

The parties shall be referred to as the 'plaintiff' and the 'defendants'.

2. The plaintiff filed a civil suit for permanent prohibitory and mandatory injunction against the defendants on the ground that he is owner in possession of the land comprised in Khata Khatauni No.6/6, Khasra No. 385, measuring 13-00-00 bighas, situated in Mohal Pukhri, Pargna Chuhan, Tehsil Dalhousie, District Chamba, H.P. It was pleaded that defendant No.1 is also owner of Khasra Nos. 381 and 395, Khata Khatauni No. 79/94, measuring 01-01-00 bighas, situated in the same Mohal. It was further pleaded that the plaintiff has constructed a house over Khasra No. 385 for last more than 25 years and it was also alleged that there is a passage which starts from CBA Pathankot PWD road and goes through Khasra No. 380, 381 and upto Khasra No. 385. It was also pleaded that the said path is in existence for more than 25 years and the plaintiff is using the same and as such, the plaintiff claimed that he has acquired the right of easement by way of necessity and prescription as there is no other alternative path. It was further averred that on 21.6.2010 the defendants forcibly started digging the suit land for raising the construction and they also threatened to demolish the path. The plaintiff requested them not to do so, but they were adamant for the said illegal act and as such, the plaintiff prayed that the suit may be decreed for permanent prohibitory and mandatory injunction.

3. The defendants contested the suit by filing written statement, wherein preliminary objections qua maintainability, locus standi and cause of action were raised. On merits, it was denied that the plaintiff constructed the house about 25 years back and it was alleged that the plaintiff purchased the land on 21.6.1991 and they are raising the construction on their own land. They further alleged that there is already another alternative path exist on the spot and denied the passage/path over the suit land.

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

1. *Whether the plaintiff is entitled for decree of permanent prohibitory injunction, as prayed for? OPP*

1A) Whether plaintiff has right of easement by way of prescription over the Khasra No. 380 and 381 belonging to the defendants as he is using the same as path for access to his house for last more than 25 years, as alleged? OPP

2. Whether the plaintiff is entitled for decree of mandatory injunction, as prayed for?OPP

3. Whether the suit is not maintainable, as alleged? OPD

4. Whether the plaintiff has no locus standi to file the present suit, as alleged? OPD

5. Whether the plaintiff has no locus standi to file the present suit, as alleged? OPD

6. Relief.

5. After recording the evidence and evaluating the same, the learned trial Court dismissed the suit on 18.4.2018 and the appeal filed against the same also came to be dismissed by the learned Additional District Judge, Chamba on 25.8.2018.

6. Aggrieved by the judgments and decrees passed by both the learned Courts below, the appellant/plaintiff has filed the instant appeal.

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

7. As observed above, the solitary issue that is required to be considered in this case is "*whether in absence of any relief for declaration can a suit for injunction be maintained*?".

8. In ***D.Ramanatha Gupta vs. S. Razaack AIR 1982 Karnataka 314***, it was held by the Karnataka High Court that a suit for mere injunction is not maintainable when the suit is based on alleged prescriptive right without a prayer for declaration that the plaintiff has acquired such prescriptive right.

9. Similar issue came up before the High Court of Andhra Pradesh in ***Vanga Ramanujayya vs. Atyam Suryanarayan Murthy 2007 (4) ALT 268,*** wherein after relying upon the judgment of Karnataka High Court, it was observed as under:

> *"6. On behalf of the appellant, a plea, which is purely legal in nature, is raised to the effect that a suit for mere injunction on the strength of easementary rights cannot be maintained, unless the corresponding relief of declaration is also prayed for. It hardly needs any emphasis that an easementary right becomes enforceable only when it is declared by a court of law. Unlike other categories of rights, it does not accrue to the persons, independent of any adjudication. The judgment of the Karnataka High Court referred to above, is directly on this point."*

10. The issue in question thereafter came up before High Court of Punjab and Haryana in ***Brahama Kumaris Ishwariya Vishwa Vidayalya vs. Dev Parkash 2013 (2) RCR (Rent) 32,*** wherein it was observed as under:

> *"6. The plaintiff who seeks permanent injunction based on easementary right will have to necessary seek for declaration that he has got such a right. Unless such a right is established and declared plaintiff cannot seek for permanent injunction. In my view the First Appellate Court has lost sight of the above proposition of law."*

11. The learned counsel for the plaintiff has not been able to persuade this Court to take a view different from the one taken by various Courts in the aforesaid decisions. Moreover, he has also failed to cite any judgment taking a contrary view.

12. On the basis of the aforesaid exposition of law, this Court clearly held that the suit filed by the plaintiff was not maintainable and was rightly dismissed by both the learned Courts below.

13. Consequently, there is no merit in the present appeal and the same is dismissed, so also the pending application(s) if any, leaving the parties to bear their own costs.

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

Ravi Shankar .....Petitioner.

Versus

State of Himachal Pradesh and another .....Respondents.

Cr. MMO No. 167 of 2019.
Date of decision: 29th May, 2019.

Code of Criminal Procedure, 1973 – Section 482 - Inherent powers - Exercise of – Quashing of FIR- Petitioner, accused of obstructing constable from discharging her official duties, filing petition for quashing of FIR pursuant to compromise- Permission to withdraw prosecution granted by District Magistrate as well as by Department of complainant- On facts, petition allowed- FIR quashed. (Paras 10 to 14)

Cases referred:

Gian Singh vs. State of Punjab and another (2012) 10 SCC 303

Narinder Singh & Ors. vs. State of Punjab & Anr. JT 2014 (4) SC 573

Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai and others vs. State of Gujarat and another, (2017) 9 SCC 641

State of Madhya Pradesh vs. Laxmi Narayan and others, 2019 (4) Scale, 200

State of Rajasthan vs. Shambhu Kewat, (2014) 4 SCC 149

For the Petitioner :	Mr. Prashant Sharma, Advocate.
For the Respondents:	Mr.Vinod Thakur and Mr. Sudhir Bhatnagar, Additional Advocate Generals with Mr. Bhupinder Thakur, Deputy Advocate General and Mr. Ram Lal Thakur, Assistant Advocate General, for respondent No.1.
	Ms.Megha Kapur Gautam, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

By medium of this petition under Section 482 of the Code of Criminal Procedure (for short 'Code'), the petitioner has sought quashing of FIR No.23/2013, dated 07.02.2013, registered at Police Station, Sadar, District Bilaspur, H.P. under Sections 353, 332, 504 and 506 of IPC as well as consequential proceedings i.e. Criminal Case No. 41/2 of 2013 titled 'State of H.P. versus Ravi Shankar', pending before the learned Chief Judicial Magistrate, Bilaspur, District Bilaspur, H.P.

2. Brief facts of the case are that the petitioner was accused of obstructing the complainant/respondent No.2, who while discharging her official duties as a Constable in the H.P. Police was deployed at District Bilaspur on 07.02.2013. Thereafter, on the basis of her statement, an FIR came to be registered and after completion of the investigation, challan was submitted in the Court and the same is pending consideration in the Court of learned Chief Judicial Magistrate, Bilaspur.

3. It is on the basis of the compromise entered inter se the petitioner and respondent No.2 that the prayer for quashing has been made in this petition.

4. Petitioner and respondent No.2 are present in person and have been identified as such by their respective counsel(s).

5. However, the moot question is whether such a course is available to this Court.

6. To answer this question, certain judgments of the Hon'ble Supreme Court need to be noticed. In ***Gian Singh*** *versus* ***State of Punjab and another (2012) 10 SCC 303,*** it was held that power of the High Court in quashing of the criminal proceedings or FIR or complaint in exercise of its inherent power is distinct and different from the power of a Criminal Court for compounding offences under Section 320 Cr.P.C. While exercising inherent power of quashment under Section 482 Cr.P.C., the Court must have due regard to the nature and gravity of the crime and its social impact. It warned the High Court for quashing proceedings in heinous and serious offences of mental depravity, murder, rape, dacoity etc.

7. The Principles laid down in ***Gian Singh's case*** (supra) were, in turn, reaffirmed by the Hon'ble Supreme Court in ***Narinder Singh & Ors.*** *versus* ***State of Punjab & Anr. JT 2014 (4) SC 573*** wherein the Hon'ble Supreme Court after summing up the legal position laid down the following guidelines for the High Court in giving adequate treatment to the settlement between the parties and exercising its powers under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings, which read thus:-

> *"(I) Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.*
>
> *(II) When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:*
>
> *(i). ends of justice, or*
>
> *(ii). to prevent abuse of the process of any Court.*
>
> *While exercising the power the High Court is to form an opinion on either of the aforesaid two objectives.*
>
> *(III)Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.*
>
> *(IV)On the other, those criminal cases having overwhelmingly and pre-dominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.*
>
> *(V)While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.*
>
> *(VI)Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the*

society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

(VII) While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime."

8. The principles in ***Narinder Singh's case*** (supra) were thereafter reiterated and reaffirmed in ***Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai and others versus State of Gujarat and another, (2017) 9 SCC 641,*** wherein the Hon'ble Supreme Court laid down the following broad principles for exercising inherent jurisdiction under Section 482 Cr.P.C. for quashing of FIR/criminal complaint, which read thus:-

"*(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court;*

(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

(vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

(x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

9. Similar issue with regard to exercise of power under Section 482 Cr.P.C. came up recently before the Hon'ble Supreme Court in ***State of Madhya Pradesh*** *versus* ***Laxmi Narayan and others, 2019 (4) Scale, 200*** wherein the Hon'ble Supreme Court

was required to resolve the apparent conflict between two decisions of the said Court in the cases of ***Narinder Singh (supra)*** and ***State of Rajasthan*** *versus* ***Shambhu Kewat, (2014) 4 SCC 149.*** After taking into consideration, the majority of decisions, as have already been quoted above along with host of the other judgments on the issue, the legal position was summarized as under:-

> *"13. Considering the law on the point and the other decisions of this Court on the point, referred to hereinabove, it is observed and held as under:*
>
> *i) that the power conferred under Section 482 of the Code to quash the criminal proceedings for the non-compoundable offences under Section 320 of the Code can be exercised having overwhelmingly and predominantly the civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes and when the parties have resolved the entire dispute amongst themselves;*
>
> *ii) such power is not to be exercised in those prosecutions which involved heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society;*
>
> *iii) similarly, such power is not to be exercised for the offences under the special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender;*
>
> *iv) offences under Section 307 IPC and the Arms Act etc. would fall in the category of heinous and serious offences and therefore are to be treated as crime against the society and not against the individual alone, and therefore, the criminal proceedings for the offence under Section 307 IPC and/or the Arms Act etc. which have a serious impact on the society cannot be quashed in exercise of powers under Section 482 of the Code, on the ground that the parties have resolved their entire dispute amongst themselves. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to framing the charge under Section 307 IPC.*
>
> *For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. However, such an exercise by the High Court would be permissible only after the evidence is collected after investigation and the charge sheet is filed/charge is framed and/or during the trial. Such exercise is not permissible when the matter is still under investigation. Therefore, the ultimate conclusion in paragraphs 29.6 and 29.7 of the decision of this Court in the case of Narinder Singh (supra) should be read harmoniously and to be read as a whole and in the circumstances stated hereinabove;*
>
> *v) while exercising the power under Section 482 of the Code to quash the criminal proceedings in respect of non-compoundable offences, which are private in nature and do not have a serious impart on society, on the ground that there is a settlement/compromise between the victim and the offender, the High Court is required to consider the antecedents of the accused; the conduct*

of the accused, namely, whether the accused was absconding and why he was absconding, how he had managed with the complainant to enter into a compromise etc."

10. Now, the question to be determined is whether under the inherent powers under Section 482 Cr.P.C., the proceedings can be quashed on the basis of the compromise entered into between the parties where the offence is against a public servant.

11. Noticeably, none of the judgments referred to hereinabove deal with a case where quashing is sought on the basis of the compromise entered into between the parties where the offence is against a public servant, who at the relevant time was discharging his/her official duties.

12. The allegations levelled by respondent No.2 as a public servant for an offence in discharge of her official duty cannot be treated to be in her individual and private capacity.

13. However, taking into consideration the peculiar facts and circumstances of the case, more particularly the fact that respondent No.2 has sought specific permission from the District Magistrate as also from her department to compromise the matter and the same stands granted in her favour, I find no impediment in allowing this petition.

14. Consequently, in the given facts and circumstances of the case and for the reasons afore-stated, the instant petition is allowed. Accordingly, FIR No.23/2013, dated 07.02.2013, registered at Police Station, Sadar, District Bilaspur, H.P. under Sections 353, 332, 504 and 506 of IPC as well as consequential proceedings i.e. Criminal Case No. 41/2 of 2013 titled 'State of H.P. versus Ravi Shankar', pending before the learned Chief Judicial Magistrate, Bilaspur, District Bilaspur, H.P., are quashed.

15. The petition stands allowed in the aforesaid terms. Pending application, if any, also stands disposed of.

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

Aarti Goel .....Appellant.
Versus
Ranjeet Shyam ....Respondent.

Cr. Appeal No. 181 of 2018.
Reserved on: 16th May, 2019.
Date of Decision: 30th May, 2019.

Negotiable Instruments Act, 1881 (Act)– Sections 138 & 139– Dishonour of cheque- Complaint- Essential requirements- Held, complaint for offence under Section 138 of Act is maintainable on proof of issuance of cheque, return memo, notice of dishonorment to drawer within stipulated period and payment of cheque amount within stipulated period by him to complainant. (Paras 8 & 9)

Negotiable Instruments Act, 1881– Sections 138 & 139 – Dishonour of cheque issued in name of a properitary concern- Complaint, who can file?- Held, sole proprietor of business concern can file complaint in his own name. (Paras 8 & 9)

Cases referred:
Milind Shripad Chandurkar vs. Kalim M. Khan and another, (2011)4 SCC 275

For the Appellant: Mr. Y.P. Sood, Advocate.
For the Respondent: Mr. Raman Jamalta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal, is, directed by the complainant/appellant herein, against, the verdict of acquittal pronounced by the learned trial court, upon, Complaint No.168-3 2015/2014.

2. The facts relevant to decide the instant case are that the complainant/ appellant herein is the sole proprietor of Aseem Trading Company situated at NH-22, Bye Pass, Panthaghati, Shimla, H.P., and, is dealing in the sale of building material. It has been averred that the accused purchased certain building material from the complainant on credit worth Rs.1,22,191/-. In order to discharge his legally enforceable liability, the accused has issued a cheque bearing No. 800915 dated 5.8.2014 for Rs.1,22,191 drawn on UCO Bank, Main Branch Shimla, H.P., in favour of the complainant against his account being maintained by him with his bankers. When the aforesaid cheque was presented by the complainant for encashment with her banker, namely, State Bank of Patiala, Kasumpti, Shimla, H.P., the cheque was dishonoured for reasons "Funds Insufficient". It has been further averred that the complainant received the memo of dishonour from her banker on 6.8.2014 and on receipt of the same, the complainant issued a legal notice dated 2.9.2014 which was sent to the accused by registered post on both his correct addresses, calling upon him to make the payment of cheque amount within 15 days. It has been averred that despite the receipt of the legal notice, the accused failed to make the payment of the cheque amount within the statutory period. Hence, the present complaint.

3. The learned trial Court, on, finding sufficient material on record, to proceed against the accused, hence, issued notice to the accused. On his appearance before the learned trial Court, notice of accusation for his committing an offence punishable under Section 138 of the Negotiable Instruments Act, stood put to him. In proof of the case, the complainant examined herself as a witnesses. On conclusion of recording of the complainant's evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure, was recorded by the learned trial Court, wherein he claimed innocence and pleaded false implication. In defence, the accused examined himself as DW-1.

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

5. The learned counsel appearing for the complainant/appellant herein, has, concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial court, standing, not based on a proper appreciation, by it, of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation by it, of the material on record. Hence, he contends qua the findings of acquittal warranting reversal by this Court in the exercise of its appellate jurisdiction, and, theirs standing replaced by findings of conviction.

6. On the other hand, the learned counsel appearing for the accused/respondent herein, has with considerable force and vigour, contended qua the findings of acquittal recorded by the learned trial court, rather standing based on a mature

and balanced appreciation, by it, of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

7. The charge against the accused, would be concluded, hence to be cogently proven, upon, (a) cheque, borne in Ex.CW1/A being proven to be in the handwriting of the accused, (b) return memo, borne in Ex.CW1/B, containing recitals qua, upon, presentation of Ex.CW1/A, before the bank concerned, it being refused to be honoured also hence being proven, to, be issued, from, the bank concerned. A perusal, of, the record appertaining therewith unravels qua cogent evidence, in proof, of, aforesaid rather existing hereat.

8. The learned counsel appearing for the respondent/accused, has made a strenuous submission before this Court, qua the order of acquittal, as, recorded by the learned trial Court, vis-a-vis, the accused/respondent herein, assigning validity by his placing reliance, upon, a verdict rendered by the Hon'ble Apex Court, in a case titled as ***Milind Shripad Chandurkar vs. Kalim M. Khan and another***, reported in ***(2011)4 SCC 275***, wherein, the Hon'ble Apex Court, had, (i) upon, the complaint being instituted by the payee, of the negotiable instrument thereat, and, who had proclaimed himself, to be the sole proprietor, of the proprietorship concern, nomenclautred as Vijay Automobiles, whereas, he omitted to place on record rather documentary evidence, to sustain the afore espousal hence proceeded to decline, the relief to him, upon, an application moved before the Appellate Court, under, the provisions of 391 of the Cr.P.C., (ii) wherethrough, the payee had strived to adduce evidence, hence, making echoings qua his being the sole proprietor, of the afore firm, and, thereupon his being a valid payee, of, the negotiable instrument thereat. Even though, this Court would, in, tandem therewith, also decline the relief to the appellant herein, vis-a-vis, the motion, constituted in an application, as, cast under the provisions of Section 391 of the Cr.P.C, (iii) wherethrough, she seeks leave to tender into evidence, document(s) rather personifying hers being, the, sole proprietor of the apposite firm, and, hence, seeks to make a loud espousal, qua her being, a, valid payee of the negotiable instrument, comprised in Ex.CW1/A, (iv) AND, thereafter seeks to avail the statutory benefits, of, the presumption embodied in Section 149, of, the Negotiable Instruments Act. However, for the reasons, to be assigned hereafter, the dismissal of the complaint, of, the complainant thereat, by the Hon'ble Apex Court, through a verdict rendered in Milind Shripad Chandurkar's case (supra), holds therewithin, certain evidentiary parameters, rather bearing gross distinctivity, with, the evidentiary material existing hereat, (v) thereupon, constraining, to, lean to this Court that the decision rendered by the Hon'ble Apex Court, in Milind Shripad Chandurkar's case (supra), vis-a-vis, the extantly distinguishable therefrom, hence, evidentiary material, rather, being not applicable thereto.

9. Even though in the verdict of the Hon'ble Apex Court, as, rendered in Milind Shripad Chandurkar's case (supra), there is evident similarity, inter se the evidence led, in the complaint thereat, by the complainant, comprised, in, his echoing, in his affidavit qua his being the sole proprietor of Vijay Automobiles, (i) and, alike hereat, the complainant thereat, in his cross-examination, also though makes an echoing qua hers not producing, any documentary evidence, to, sustain the afore echoings. However, the afore partial affinity, vis-a-vis, the afore factum, as embodied, in, the cross-examination, rendered by the complainant, wherein, she has also rendered alike echoing(s) qua hers being sole proprietor of the apposite firm, (ii) however, the afore affinity or similarity, vis-a-vis, the afore trite similarly testified factum/probandum, by the complainant therein, and, the complainant hereat, would not beget an alike therewith conclusion (iii) as in the extant case, hence, the striking contradiction(s) therewith, is rested, upon, rather the complainant, subsequent to the closure of the complainant's evidence, had, while participating, in, the proceedings drawn, under Section 313 of the Cr.P.C., (iv) had, therein, to a specific question meted to

him, vis-a-vis, the complainant being the sole proprietor of Aseem Trading Company, rather meted a categorical, and, absolute denial thereto, (v) hence, his failing to make an echoing, in, denial qua the afore Aarti Goel, hence being the sole proprietor of Aarti Trading Company, carries the consequential effect(s) of the accused, acquiescing qua the payee, of the dishonoured negotiable instrument, being the sole proprietor, of, Aseem Trading Company. Amplifying vigour to the afore inference, is, mobilised, by the the accused also not categorically, denying qua the issuance of the cheque by him, vis-a-vis, the complainant, not being towards, any legally enforceable debt or other liabilities, rather his defending the issuance of the dishonoured negotiable instrument, comprised in Ex.CW1/A, only on anvil, of his not making the payment through cehques rather through cash. Furthermore, the accused while stepping into the witness box, as DW-1 in his examination-in-chief, (vi) has not rendered any echoing qua the complaint being not maintainable, on the ground, qua the afore Aarti Goyal, being not the sole proprietor of Aseem Trading Company, (vii) and, rather with his in his cross-examination, rather admitting the suggestion put to him, qua the requisite mandatory notice prior to the institution of the complaint, being received by him, (viii) and, yet his evidently failing to make, any response thereto, on the ground that Aarti Goyal, being not the validly constituted payee, of Ex.CW1/A, (ix) and when the afore factum is entwined with the afore lack of response, to the statutory notice, and, with his also not contesting, the scribings, occurring on Ex.CW1/A, (x) thereupon, it is to be concluded, that, even he has scribed the name of the complainant, on, Ex.CW1/A, rather begetting the further sequel qua, in contemporaneity to the issuance, of, Ex.CW1/A, his being aware qua Aarti Goyal being the sole proprietor, of Aseem Trading Company, (xi) prominently also when he has meted, in proceedings drawn under Section 313 Cr.P.C., an answer to question No.2, that, he was making liquidation of his liabilities, vis-a-vis, the material purchased by him, from Aseem Trading Company, through cash, than through issuing cheques, (xii) thereupon, it is to be concluded that he was aware, given his protracted engagement, in, commercial transactions, with, Aseem Trading Company, qua rather the complainant being the sole proprietor thereof, (xiii) and, he has rather surmisally, for the afore reasons, made, mis-dependence, upon, the verdict of the Hon'ble Apex Court, rendered in Milind Shripad Chandurkar's case (supra), (xiv) and also made a mis-endeavour, that, for want of documentary evidence being adduced by Aaarti Goel, that, she is the sole proprietor of Aseem Trading Company, hence, hers being not a validly constituted payee, of the negotiable instrument, and, also has reared a gross mis-espousal, that, Ms. Aarti Goel, is not, entitled to the statutory presumption available, vis-a-vis, the payee of the negotiable instrument, qua it, being issued in discharge of a legally enforceable debt, and, other legal liabilities, which rather emerged/subsisted, inter se, the accused, and, the complainant.

10. For the reasons which have been recorded hereinabove, the instant appeal is allowed, and, the verdict impugned before this Court is set aside. Accused/respondent be produced before this Court on 17.6.2019 for hearing him on the quantum of sentence. All pending applications also stand disposed of.

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

Ajay Sharma ....Petitioner.

Versus

Shruti Sharma ... Respondent.

Cr.R. No. 275 of 2018.

Decided on: 26.4.2019.

Protection of Woman from Domestic Violence Act, 2005 – Section 23(2) **–** Interim maintenance – Quantum of- Challenge thereto- Petitioner husband challenging order of Trial Court as upheld by Appellate Court directing him to pay Rs.4000/- per month as interim maintenance to his wife- Held, petitioner having done Master's degree in Business Administration- Gainfully employed at Ludhiana- Relationship inter-se parties not disputed- Petitioner legally bound to maintain his wife- Award of Rs.4000/- P.M. not unreasonable- Order not perverse- Petition dismissed. (Paras 5 to 7)

For the petitioner. : Mr. Devender K. Sharma, Advocate.
For the respondent : Mr. Sanjeev Kumar Suri, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J *(Oral)*

By way of this petition the petitioner has assailed order dated 26.12.2017, passed by the Court of learned Judicial Magistrate 1st Class, Court No.II, Amb, District Una, H.P., in case titled as Shruti Sharma Vs. Ajay Sharma, vide which in a petition filed under Section 12 of the Protection of Woman from Domestic Violence Act, 2005, an application stood filed under Section 23(2) of the Act was allowed by learned Court below directing the present petitioner to pay an amount of `4,000/- per month as interim maintenance, as also the judgment passed by the Court of learned Additional Sessions Judge(I), Una, District Una, H.P. in Criminal Appeal No. 4 of 2018 dated 19.6.2018, vide which the appeal filed by present petitioner against the order passed by learned trial Court stood dismissed.

2. Brief facts necessary for adjudication of the petition are that respondent-wife, herein, has filed petition under Section 12 of the Protection of Woman from Domestic Violence Act, 2005 against the petitioner-husband, which is pending adjudication before the Court of learned Judicial Magistrate 1st Class, Court No.II, Amb, District Una, H.P. Along with this petition, an application under Section 23(2) of the Act was filed seeking ad-interim maintenance. Learned trial Court taking into consideration the fact that husband was earning an amount of `40,000/- per month directed him to pay an interim maintenance of `4,000/- per month to the wife. Said order, in appeal, has been upheld by learned appellate Court.

3. Feeling aggrieved, petitioner has filed the present petition, assailing the said order.

4. I have heard learned counsel for the parties and have also gone through the impugned order as also the record appended with the petition.

5. A perusal of the record demonstrates that the contention of the wife was that the her husband was an educated person, who after doing his MBA was serving in the Accounts Department at Syntax Company at Ludhiana and was earning `40,000/- per month. The petition stood filed on account of maltreatment and misbehaviour which was met to the wife by her husband and other relatives. Husband denied before the learned trial Court that he was either engaged with Syntax Company at Ludhiana or was earning an amount of `40,000/- per month. Learned trial Court while allowing the application filed under Section 23(2) of the Act held that nothing was produced on record by the husband to substantiate that he was either not gainfully employeed with the Company and what his

actual income was. Learned trial Court held that even otherwise, as the relationship of wife and husband was not disputed, therefore, also husband was morally and legally obliged to maintain his wife.

6. In appeal, learned appellate Court while upholding the said judgment of the learned trial Court held, as was borne out from the stand of the husband itself, that he was working as a part time assistant accountant, as per his own admission, it could not be said that an amount of `4,000/- per month was unreasonable as the husband was settled at Ludhiana where there were sufficient opportunities for such like professionals. It held that there were sufficient avenues with the husband to earn his livelihood.

7. In my considered view, the findings returned by both learned Court below are reasonable findings which stand returned by learned Courts below on the basis of the pleadings which were placed before the said Courts by the respective parties. Even before this Court the relationship of the petitioner and the respondent has not been disputed. It has also not been disputed that the petitioner who has done his Master's degree in Business Administration presently is gainfully employeed at Ludhiana. The contention of the petitioner before this Court is that presently as the mother of the petitioner is suffering from cancer, therefore, he is not in a position to pay maintenance amount of `4,000/-. In my considered view, on this count the relief which has been granted in favour of the respondent cannot be interfered with by this Court taking into consideration the fact that the respondent is the legally wedded wife of the present petitioner. There is no perversity with the findings returned by learned Courts below whereby the petitioner has been directed to pay `4,000/- per month as interim maintenance. The amount so arrived at by learned both Courts below is a reasonable amount, as in todays world, it cannot be said that an amount of `4,000/- for monthly maintenance of wife is on the higher side.

In view of observations made hereinabove, as there is no merit in the present petition, the same is dismissed.

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

Amar Nath .....Petitioner.

Vs.

Ganga Devi .....Respondent.

CMPMO No.: 34 of 2018
Date of Decision: 21.06.2019

Legal Services Authority Act, 1987- Section 21 - Award of National Lok Adalat – Challenge thereto- Permissibility – Petitioner challenging award of National Lok Adalat on ground that disputed land is his self acquired property and he cannot be asked to surrender it in terms of compromise arrived before it- Held, before Lok Adalats, disputes are settled out of faith and trust than on law and legal parameters without any fraud, coercion and misrepresentation- Parties entered into compromise out of their free will and volition and it was not result of fraud or misrepresentation- Petition dismissed being an abuse of process of law with costs of Rs.25000/-. (Paras 5 to 9)

For the petitioner: M/s Y.K. Thakur and Deepak Negi, Advocates.

For the respondent: Mr. Parmod Singh Thakur, Advocate.

The following judgment of the Court was delivered

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition filed under Article 227 of the Constitution of India, the prayer is to quash and set aside the Award dated 09.12.2017, passed by the National Lok Adalat in Civil Suit No. 200-1 of 2017. The order impugned reads as under:

> *"Vide separate statement in writing, the defendant-Amar Nath has stated that he has compromised the matter with the plaintiff, according to compromise deed Ext. CA and has no objection, of the suit is decreed as per compromise deed Ext. CA. Plaintiff has also stated vice his separate statement, on record, duly identified by Sh. K.K. Bhardwaj, Ld. Counsel, that he has heard, read and understood the compromise deed Ext. CA and according to which suit may be decreed.*
>
> *In view of the statements of the parties and compromise deed Ext. CA, the suit is hereby disposed of as amicably settled in terms of compromise deed Ex. CA. Let compromise decree be passed accordingly subject to fulfillment of provision of Transfer of Property Act, 1882 and Registration Act, 1908. Compromise deed Ext. CA shall form part of the compromise decree. File after its due completion be consigned to record room."*

2. Learned counsel for the petitioner has argued that the impugned Award dated 09.12.2017, passed by the National Lok Adalat is bad in law as the alleged compromise entered into on 24.11.2017 was perverse and illegal. According to him, the unilateral terms of the impugned compromise were not binding upon the petitioner. The suit land was his self acquired property and he could not be called upon to surrender the same in terms of the compromise. As per him, the compromise was a sheer abuse of the relationship between him and his son, which relation was exploited by his son.

3. On the other hand, learned counsel for the respondent has argued that the filing of the present petition was nothing but an abuse of the process of law. He has argued that the compromise was entered into between the parties out of their own free will and volition and the same was not a result of any fraud or misrepresentation. According to him, the petition has been filed just to wriggle out of the compromise, which the petitioner entered into with the respondent with open mind. He has further argued that as this was not a case of fraud or deceit, therefore, the petitioner cannot be permitted to assail the Award passed by the National Lok Adalat in the present proceedings.

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

5. The Award was passed by the National Lok Adalat on the basis of a compromise deed referred therein. A perusal of the record demonstrates that the Civil Suit was listed before the Court of learned Civil Judge (Junior Division), Court No. III, Ghumarwin, District Bilaspur on 24.11.2017, on which date, petitioner-Amar Nath made a statement in the Court that he had compromised the matter with Ganga Devi, the plaintiff therein as per Ex.-CA and he had no objection in case the suit of Ganga Devi was decreed in

terms of the said compromise Ex.-CA. During the course of arguments, learned counsel for the petitioner did not dispute the recording of the said statement of the petitioner before the learned Trial Court. He has also not disputed the signatures of petitioner-Amar Nath below the said statement. In other words, it has not been disputed that Amar Nath did appear before the learned Trial Court on 24.11.2017 and made a statement on oath that he had entered into a compromise with the present respondent in terms of Ex.-CA and that he had no objection in case suit of the respondent, who was plaintiff before the learned Trial Court was decreed in terms of Ex.-CA.

6. The Award has been passed by the National Lok Adalat on the basis of the said compromise deed Ex.-CA on 09.12.2017. There is nothing on record to demonstrate that between 24.11.2017 and 09.12.2017, any application was filed by the present petitioner before the learned Civil Court that his statement recorded on 24.11.2017 was a result of coercion, deceit or misrepresentation and that he was not bound by it. In other words, when the Award was passed by the learned National Lok Adalat on 09.12.2017, there was no challenge to the statement of the petitioner, as was recorded before the learned Civil Court by him.

7. In this factual background, in my considered view, the filing of the present petition is nothing, but an abuse of the process of law. The petitioner has not been able to make out any case that the Award passed by the National Lok Adalat was a result of fraud, deceit or misrepresentation. Except the bald assertion of the petitioner that his statement on 24.11.2017 recorded before the learned Trial Court was a result of misrepresentation, he has not placed any material on record to substantiate the said allegation.

8. As I have already mentioned above, there is nothing on record to demonstrate that between 24.11.2017 and 09.12.2017 any application was filed by the petitioner before the learned Trial Court that his statement recorded before the learned Trial Court on 24.11.2017 was a result of fraud, coercion or mis-representation. Therefore, as the petitioner has miserably failed to demonstrate that the Award passed by the National Lok Adalat is a result of fraud, coercion or misrepresentation, as has been argued in this petition, the same being devoid of any merit, is dismissed.

9. Herein, this Court wants to add a word of caution also. The National Lok Adalats are performing humongous task of settling the disputes between the litigants. Before the National Lok Adalats, the disputes are settled more out of faith and trust, than on law and legal parameters. If litigations of the present kind, wherein the Awards passed by the National Lok Adalats are assailed on whimsical grounds are encouraged, then it will be extremely difficult for the Lok Adalats to perform their duties and settle the disputes between the parties amicably. In view of the said observations, as this Court is satisfied that the present petition is nothing but an abuse of the process of law, cost of `25,000/- is imposed upon the petitioner, which shall be deposited by him with this Court within a period of four weeks from today. Thereafter, on an application, which may be filed by the respondent, the said amount shall be released in her favour. To ascertain as to whether the cost has been paid by the petitioner by depositing the same in the Registry of this Court, the case shall be listed for this limited purpose before the Court on ***22nd July, 2019.***

Petition stands dismissed in above terms, so also pending miscellaneous applications, if any.

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

Anup Dutta ...Plaintiff/Non-applicant.
Versus
Mohinder Singh & others ...Defendants/applicants.

OMP Nos.: 42 & 441 of 2014 in
Civil Suit No.38 of 2005.
Date of Decision : 11.06.2019.

Code of Civil Procedure, 1908 - Section 151- Order VIII Rules 1 & 9- Written statement to amended plaint- Filing and withdrawal thereof- Consequences- Defendant filing written statement under his signatures and refuting claim of plaintiff- He then filing additional written statement to amended plaint on similar lines but through his GPA- Subsequently defendant filing application and praying for filing of fresh written statement to amended plaint by taking contrary pleas taken in earlier written statements and virtually admitting claim of plaintiffs- Held, defendant remained silent as to written statement filed under his signatures at first instance immediately after his service- Written statement filed earlier through GPA to amended plaint was on same lines- He cannot be permitted to take contrary stand to prejudice of other defendants. (Paras 44 to 46)

Code of Civil Procedure, 1908– Order XXII Rule 4- Substitution of legal representatives- Whether legal representatives can take stand contrary to stand of their predecessor? Held, legal representatives cannot travel beyond pleadings of their predecessor in interest. (Paras 33 & 34)

Cases referred:

Afsar Shaikh and another vs. Soleman Bibi and others, AIR 1976 SC 163
B.L. Sreedhar and others vs. K.M. Munireddy (dead) and others, 2003(2) SSC 355
Bal Kishan vs. Om Parkash and another, 1986 SC 1952
Dalip Singh vs. State of Uttar Pradesh and others, 2010(2) SCC 114
Gajraj vs. Sudha and others, 1999 (3) SCC 109
J.C. Chatterjee and others vs. Shri Sri Krishan Tandon and another, 1972 SC 2526
Jagnarain and others vs. Radhey Shyam Singh and another, AIR 2004 Allahabad 215
Janki Vashdeo Bhojwani and another vs. Indusind Bank Ltd. and others, AIR 2005 SC 439
S. Malla Reddy vs. future Builders Cooperative Housing Society and others, (2013) 9 SCC 349
Shyam Sundar Bazaz vs. Sanwarmal Jalan and others, AIR 2005 Jharkhand 109
Sunil Poddar and others vs. Union Bank of India, 2008 (2) SCC 326
Vidyawati vs. Manmohan and others, 1995 SC 1653
Vishwa Nath vs. State of H.P. and another, Latest HLJ 2016 (HP) Suppl. 250

For the plaintiff	:	Ms. Ambika Kotwal, Advocate.
For defendants No.1 (a) & 1 (b)	:	Ms.Seema K. Guleria, Advocate.
For defendants No.1(c)	:	Mr.Divya Raj Singh Thakur, Advocate.
For defendants Nos. 1 (d) and 1 (e)	:	Mr.Parneet Gupta, Advocate.
For defendants Nos. 2 (a), 1 (b) & 2 (d)	:	Ms.Anu Tuli Azata, Advocate.
For defendants Nos.		

2 (c) & 3 : Mr.Rajnish Maniktala, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

Originally plaintiff Anup Dutta had filed a civil suit against defendant No.1 Mohinder Singh alias Mohan Inder Singh (now deceased), defendant No.2 Faiz Murtaza Ali and defendant No.3 Sayed Masoom Ahmed. During pendency of suit deceased defendant No.1 Mohinder Singh and defendant No.2 Faiz Murtaza Ali stand substituted through their legal heirs defendant No.1(a) to 1(e) and defendant No.2(a) to defendant No.2(c), respectively, who have taken different stands having adverse impact on claim of another/others. Hereinafter Mohinder Singh and Faiz Murtaza Ali have been referred defendant No.1 and defendant No.2, respectively.

2. Main suit has been filed for specific performance of agreement dated 3rd July, 2002 executed between plaintiff and defendant No.1 with respect to land/property comprised in khata No.74, khatauni Nos.104 to 109, kitas-43, measuring 40-76-73 hectares, situated in Muhal Gopalpur, Tehsil Palampur, District Kangra, H.P. and seeking further declaration to the effect that mutual settlement documents purported to be mutual settlement dated 24th July, 2002, agreement/compromise dated 25th July, 2002 are void and inoperative against the right of the plaintiff having been got executed from the plaintiff under coercion and undue influence and seeking further declaration that sale deeds No.1054 dated 19th September, 2003, 1104 dated 3rd October, 2003 and 77 dated 17th January, 2004, registered in the office of Sub-Registrar, Palampur, District Kangra, H.P. through Power of Attorney of defendant No.1 in favour of defendant No.2 Faiz Murtaza Ali are wrong, void and inoperative against the rights of the plaintiff.

2. After filing, on listing of the suit before the Registrar (Vigilance) on 12th July, 2005, notice to defendants was issued for 31st August, 2005. An application for interim orders was also listed before the Court on 14th July, 2005, therein also, notice returnable for 31st August, 2005 was issued to the defendants, and such notice was duly served upon defendant No.1 in person as is evident from the acknowledgment of registered post, signed by defendant No.1, available in Part-B of the Court record. Thereafter, Power of Attorney duly signed by defendant No.1 engaging Mr. Neeraj Maniktala, as his counsel, was also filed in the Registry of this Court on 29th August, 2005.

3. In the original written statement dated 28th August, 2005 filed on 20th September, 2005 by defendant No.1 to the plaint, passing of a decree as prayed by the plaintiff, was opposed on the ground that defendant No.1 had already transferred a portion of the suit land, measuring 11-39-82 hect., in favour of defendant No.2 by executing registered sale deeds referred in the plaint with further assertion that mutation in pursuance to those sale deeds also stood attested and defendant No.1 was not owner-in-possession of the entire suit property. It was further contended on behalf of defendant No.1 that plaintiff, being a very clever man and an instrument in the hand of local land mafia, had managed to procure different papers, signed by defendant No.1, through his (defendant No.1) one of the most trusted servants namely Nirmal Singh on the pretext that those papers were required to be sent to the counsel for use in the land deal entered between defendant No.1 and defendant No.2 and had used those papers to execute the agreement to sell, which is basis of filing of present suit and plea taken by the plaintiff in the plaint was opposed. This written statement was signed, verified and supported by an affidavit of defendant No.1

itself. This written statement was signed on 28th August, 2005 and filed on 20th September, 2005.

4. On 20th March, 2010, an application bearing OMP No.657 of 2009, filed by the plaintiff, was allowed for amendment of the plaint and amended plaint was taken on record, wherein basic nature and prayer of the suit along with its contention remained the same. Amended written statement to amended plaint was filed on 19th June, 2010. It was filed through Mr. Prithvi Raj, holder of 'General Power of Attorney' on behalf of defendant No.1, wherein also the stand of defendant No.1 remained the same.

5. Thereafter, in response to notice under Order 12 Rule 8 of the CPC served by plaintiff upon defendant No.1, original Power of Attorney, appointing Prithvi Raj as his Power of Attorney by defendant No.1, was also placed on record alongwith reply to the said notice, filed on 27th July, 2010.

6. During pendency of the suit original defendant No.2 Faiz Murtaza Ali had expired on 20.6.2013 whereupon applications bearing OMP (M) No.4009 of 2013 and 4010 of 2013 for bringing on record his legal representative i.e. defendants No.2(a) to 2 (d) were filed on 19th September, 2013. In response to these applications, legal heirs 2(a), 2(b) and 2 (d) have denied the right of proposed LR 2(c) Rohani Murtaza in the suit property, whereas proposed legal heir 2(c) Rohani Murtaza had denied the title of the proposed legal heirs 2(a), 2(b) and 2(d) in the suit property.

7. Pending adjudication aforesaid applications, OMP No.42 of 2014 was filed by defendant No.1 on 07th January, 2014 under Order 8 Rule 9 read with Section 151 CPC, seeking leave of the Court to file a fresh written statement, after rejecting the earlier written statement alleged to have been filed on his behalf. Proposed fresh written statement, admitting the claim of plaintiff, was also filed with this application, taking plea that defendants No. 2 and 3 by exercising their influence over the police and with the help of their Advocate had fabricated a false story against the plaintiff and manipulated the documents for their own benefit, and defendant No.1 had no role to play therein and also in lodging F.I.R against the plaintiff and subsequent events thereto by stating that lateron the said F.I.R was got cancelled by defendant No.1 by filing his own affidavit with further plea that as he never intended to lodge the said F.I.R and also that defendant No.1 had not entered into any agreement to sell out the suit land with any person except the plaintiff and the execution of the agreement with plaintiff on 3rd July, 2002 was admitted and claimed that he had no role in abduction of plaintiff, compromise dated 24.07.2002 and extortion of agreement from plaintiff on dated 25th July, 2002 and that he (defendant No.1) had never directed defendant No.3 to enter into any compromise with plaintiff and further that on contacting by the plaintiff on telephone he could not come to rescue the plaintiff due to pressure of defendant No.2 and defendant No.3 and the alleged incident dated 25th July, 2002 had happened at the instance of Suksham Butail, defendant No.2 and defendant No.3 with the connivance of police of Patiala, Palampur and Dharamshala alleging further that the execution of GPA in favour of Suksham Butail and the sale deeds referred in plaint, alleged to have been executed by Suksham Butail on his behalf in favour of defendant No.2, are illegal, fake and fabricated, having no bearing upon the right, title and interest of defendant No.1 and it is also contended that power of attorney executed in favour of Prithvi Raj had not authorized him to get the mutation attested on behalf of defendant No.1 and further that the said power of attorney did not pertain to the parcel of the land for the mutatiton of which it was used. According to this proposed written statement, the aforesaid illegal sale deeds were handwork of defendants No. 2 and 3 and thus not binding upon defendant No.1. It is also contended in this written statement that permission under Section 118 of the H.P. Tenancy and Land Reforms Act, obtained in favour of defendant No.2, was

also illegal. Ultimately prayer for disposing of the suit in favour of the plaintiff has been proposed in this proposed written statement.

8. On 10.4.2014, OMP(M) Nos. 4009 and 4010 of 2013 were allowed and defendant No.2 (a) to 2(d) were ordered to be brought on record as legal representatives of defendant No.2 to represent his estate involved in the suit subject to all just exception.

9. Defendant No.1 had expired on 30th January, 2014. He was unmarried. His two brothers and parents had expired during his lifetime and on the basis of the Will, two legal heirs i.e. defendant No.1 (a) Ranjeet Singh and defendant No.1 (b) Charan Dass alongwith surviving natural heirs of defendant No.1 i.e. 1 (c) Sangeeta Devi, 1 (d) Rajinder Kaur were proposed to be brought on record by filing OMP(M) No.21 of 2014 on 26th April, 2014. In response thereto, proposed legal representative 1 (d) Rajinder Kaur had stated that one Smt. Nalini Kumari, being a daughter of predeceased brother of defendant No.1, was also natural legal heir of defendant No.1. Vide order dated 28th December, 2016, OMP(M) No.21 of 2014 was allowed and all persons mentioned as legal heirs of defendant No.1 in the said application and in reply thereto filed by proposed legal heir 1 (d) Rajinder Kaur, were ordered to be brought on record as defendants No.1 (a) to 1 (e).

10. Without waiting for their impleadment on record, defendant No.1 (a) Ranjeet Singh and defendant No.1 (b) Charan Dass, had preferred OMP No.441 of 2014, seeking leave of the Court to file fresh written statement to the suit on their behalf. Fresh written statement, proposed to be filed on behalf of respondents No.1 (a) and 1 (b) and placed on record with application, is the same as was proposed to be filed by defendant No.1 alongwith OMP No.42 of 2014.

11. In the aforesaid background, now two applications bearing OMP No. 42 of 2014 and OMP No.441 of 2014 are pending consideration which are being disposed of by this order. These applications are being pursued by defendants No.1(a) & 1(b) and plaintiff is also canvasing for allowing these applications whereas defendants No.2(c) and 3, represented by common counsel, are opposing these applications and defendant No.2(a), 2(b) and 2(d), represented by another but common counsel, though are denying the right of defendant No.2(c) in the suit property, but are also opposing these applications. Defendants No.1(d) and 1(e) are also towing the line of defendants No.2(a) to 2(d) and 3. Defendant No.1(c) represented by separate Advocate is also following the same course like defendants No.1(d) and 1(e).

12. I have heard learned counsel for the parties and have also gone through the record and case law cited by them. OMP No.42 of 2014 was signed on 25th December, 2013 and filed on 7th January, 2014, seeking permission therein to file fresh written statement. Plea taken by and on behalf of defendant No.1 is that two months prior to drafting this application he was surprised after knowing that his General Power of Attorney (GPA) holder Prithvi Raj had already filed written statement in June/July, 2010 without taking his instructions, without his consent and behind his back and that too with respect to whole suit land whereas he (Prithvi Raj) was having General Power of Attorney only with respect to the part of the suit land measuring 29-15-19 hect., whereas total suit land is measuring 40-76-73 hect. and thus said Prithvi Raj was neither competent nor authorized to file the written statement. It is pleaded that Prithvi Raj, attorney of defendant No.1, had acted on the advice and in active connivance with defendant No.2 and defendant No.3, being under their influence and control so as to cause wrongful harm to the plaintiff and applicant (defendant No.2) and to cause wrongful gain to defendants No.2 and 3 and before filing of the said written statement neither Prithvi Raj nor counsel engaged by defendant No.1 enquired anything from him (defendant No.1) and being ill, weak, vulnerable at that time he

(defendant No.1) had neither intended to file any written statement nor was mentally prepared to involve himself in any kind of litigation and now for having regard to many hardships being faced by the plaintiff due to unauthorized act of said Prithvi Raj, he (defendant No.1) thought it proper to file correct version of his written statement so as to bringing on record point-wise reply to the plaint in order to cut the pending litigation to the minimum.

13. In reply to the application by the contesting defendants it is pointed out that though subsequent written statement to the amended plaint, filed **on** 19th June, 2010**,** was signed by Prithvi Raj on behalf of defendant No.1 being his general power of attorney however in this subsequent written statement filed through Prithvi Raj, the stand taken by defendant No.1 in his earlier written statement filed in 2005 was reiterated alongwith addition of reply on the same time to additional amended portion of the subsequent plaint. Now, fresh written statement, proposed to be filed on behalf of defendant No.1 is entirely contradictory to the original written statement filed by defendant No.1, and thus is not permissible under law.

14. In rejoinder filed by defendant No.1(a) and 1(b) it has been stated that being legal representatives of deceased defendant No.1, they have entered in his shoes and thus have a right to contest the case on the similar line which was adopted by defendant No.1 and therefore, they have right for insisting for leave of the Court to file a fresh written statement on behalf of defendant No.1, as proposed by the said defendant No.1 himself during his life time and the separate application bearing OMP No. 441 of 2014, filed by them, is also on the similar line having no conflict with the stand of deceased defendant No.1 Mohinder Singh. It is further contended that the written statement on behalf of defendant No.1 filed through General Power of Attorney Prithvi Raj and the separate written statement filed by defendant No.2 and 3 to the amended plaint were attested on the same day i.e. 10.06.2010 at Palampur and were entered at Sr. No. 644 and 645 in the Register of Oath Commissioner wherein identifier in both cases is one and the same Advocate, namely, Rajinder Goghra and the language of these two written statement is also similar indicating the connivance of Prithvi Raj, GPA of defendant No.1, with defendants No. 2 & 3 to file written statement by deceitful means without knowledge and instruction of deceased defendant No.1 Mohinder Singh and the said defendant No.1 had never taken the stand as depicted in the written statement filed on his behalf and he had never filed the said written statement and the said written statement is purely manipulated by defendants No. 2 & 3 and further that defendants 1(a) & 1(b) had received the information under RTI on 26.02.2018 with regard to the application submitted to the Secretary (Revenue) to the Government of Himachal Pradesh wherein defendant No.2 has himself admitted the illegality and incorrectness of the permission granted to him to purchase *tea garden* under Section 118 of the H.P. Tenancy & Land Reforms Act and after knowing the act and conduct of GPA Prithvi Raj and connivance with defendants No. 2 and 3, defendant No.1 had cancelled the General Power of Attorney by issuing notice dated 28th December, 2013 through his Advocate Rajender Ghogra stating therein that the said GPA had been revoked few years back but he had come to know that the said GPA was still being misused by said Prithvi Raj and having nefarious designs and obnoxious acts and conduct of his GPA, defendant No.1 had served notices dated 25th December, 2013 and 4th January, 2014 upon counsel, so engaged by defendants No. 2 and 3, withdrawing Vakalatnama of his counsel, namely, Sh. Neeraj Maniktala, Rajneesh Maniktala and of Shri Rajinder Ghogra, Advocates. It is contended that apparently GPA Prithvi Raj, either misused the signed papers of defendant No.1 or got his signatures by deceitful means for the benefit of defendants No. 2 and 3 and to the detriment of the plaintiff, whereas deceased defendant No.1 had sympathy with the plaintiff who had to suffer a lot due to act and conduct of his self-proclaimed power of

attorney having connivance with some mischievous persons and therefore, plaintiff has entered into a fresh agreement in addition to his earlier agreement dated 3rd July, 2002 by signing and executing an addendum on 24th January, 2014 at Patiala (Pb.) whereby both the parties have agreed to perform their respective part of obligations under the earlier agreement dated 3rd July, 2002.

15. Surprisingly, after filing the rejoinder, applicants/defendants 1(a) and 1(b) have also filed additional rejoinder to the application alongwith certain documents but without any leave or permission of the Court. Contents of these additional rejoinders and documents filed therewith are not being considered, as, such practice is unknown to procedure in law. Naturally new plea and facts were placed on record in original rejoinder(s) filed by and on behalf of defendants No.1(a) and 1(b). Defendant No.2(c) was permitted to file sur-rejoinder in response thereto, wherein it is contended that so called '*Addendum*' alleged to have been executed at Patiala (Pb.) on 24th January, 2014 bears forged signatures of deceased defendant No.1 as it was executed in Patiala but attested at Rajpura, situated at a distance of 25 kilometers from Patiala and both witnesses to the agreement are from distant place i.e. Yol Cantt., the native place of the plaintiff, and no one has identified deceased Mohan Inder Singh, who was seriously ill during his last days and has expired on 30th January, 2014 and also that the agreement is coming from the custody of defendant No.1(a), who happened to be servant of deceased defendant No.1 and is also witness to the General Power of Attorney executed by defendant No.1 in favour of Prithvi Raj, duly registered with Sub Registrar, Patiala in the year 2004.

16. It is also averred in rejoinder that defendants No. 2 and 3 are misleading this Court since 2002 till date in present suit and in pending PIL No. 903 of 2003 titled as Deepak Mahajan & Others Vs. State of Himachal Pradesh & Others and therefore their claim is not sustainable in the eyes of law. In response thereto in sur-rejoinder it is contended that large number of petitioners in Deepak Mahajan's case have filed affidavits that the said PIL was filed on the instructions of the plaintiff and therefore, the said PIL is not a genuine one but a proxy litigation.

17. In rejoinder as well as in sur-rejoinder certain facts have been mentioned, raising new issues, which are not part of the pleadings of the application as well as reply and also not relevant for adjudication of the issue involved in present applications. Therefore, those averments of the applicants and non-applicants alongwith documents related thereto are not being discussed herein.

18. Issue involved in these applications is whether it is permissible to defendant No.1 or his legal representatives to file fresh written statement taking a converse stand to the pleadings to the written statement(s) filed earlier to the original plaint as well as amended plaint.

19. Learned counsel for the applicant-defendant Nos.1(a) & 1(b), besides reiterating the contention raised in application, rejoinder and additional rejoinder, has contended that amended written statement on behalf of defendant No.1 was filed through GPA but GPA was not filed and therefore, the said written statement could not have been taken on record for want of filing of GPA alongwith it and also that GPA, so produced on record lateron, was only valid for a part of the suit land and therefore, Prithvi Raj GPA was not holding power of attorney authorising him to act on behalf of the defendant including filing of written statement qua the entire suit land and thus for want of a valid GPA to deal with the entire suit land, amended written statement, on the basis of the said GPA, cannot be considered a written statement filed on behalf of defendant No.1 and further that after amendment of the plaint, earlier written statement filed under the signatures of defendant

No.1, which was also not filed by defendant No.1 but was a procured one, has lost its significance as it is no more part of the record after allowing the amendment of the plaint and granting permission to file the fresh written statement to the amended plaint, and therefore, there is no valid and legal written statement on record filed on behalf of defendant No.1, as such, the objections of contesting non-applicants/defendants, alleging the filing of two written statements with contradictory stand, is not sustainable.

20. Referring to provisions of Order 22 Rule 4(2) CPC, it is further canvassed that defendants No.1(a) and 1(b), who have been made party after the death of defendant No.1, are entitled to take any defence and therefore, are entitled to file fresh written statement as proposed. It is further contended that as the first written statement filed in the year 2005 is not part of the record and the second written statement filed in the year 2010 through GPA is not filed by defendant No.1 or his authorized agent, there is no written statement on record and therefore, either written statement filed with OMP No.42 of 2014 is to be taken on record or written statement filed by his legal representatives defendants No.1(a) and 1(b) is to be taken on record.

21. Reliance has been placed on the judgment passed by Coordinate Bench of this Court in ***Vishwa Nath Vs. State of H.P. and another*** reported in **Latest HLJ 2016 (HP) Suppl. 250** wherein by referring the judgment of the Allahabad High Court titled as ***Jagnarain and others Vs. Radhey Shyam Singh and another,*** **AIR 2004 Allahabad 215** it has been held that once plaint has been allowed to be amended, unamended portion cannot be allowed to be taken into consideration.

22. Plaintiff is also supporting the prayer made in these applications, as it is beneficial to him, as in fresh written statement, proposed to be filed on behalf of defendant No.1, case of the plaintiff is being admitted. Learned counsel for the plaintiff has contended that as the written statement filed through GPA is liable to be discarded for want of filing GPA alongwith it and even if the GPA, produced on record after issuance of notice under Order 12 Rule 8 CPC, is considered to be production of GPA on the basis of which written statement was filed then also the GPA was not authorized to file the said written statement for the reason that the said GPA, so produced on record, is for the land measuring about 29 hectares whereas entire suit land is measuring about 40 hectares and therefore, for want of legal and valid GPA written statement filed in the year 2010 through GPA is no written statement on behalf of defendant No.1. Therefore, defendant No.1 or his legal representatives are entitled to file fresh written statement.

23. Reliance has also been placed on the pronouncement of the Apex Court in case titled as ***Janki Vashdeo Bhojwani and another*** *Vs.* ***Indusind Bank Ltd. and others,*** reported in **AIR 2005 Supreme Court 439**, wherein it is held that order 3 Rule 1 & 2 empowers the holder of Power of Attorney to act on behalf of the principal only in respect of acts done by the Power of Attorney holder in exercise of power granted by the instrument and acts done beyond that cannot be said to have been acts of the principal.

24. It is further contended that plea of fraud committed by GPA upon defendant No.1 in connivance with defendants No.2 and 3, has been specifically pleaded as required under order 6 Rule 4 CPC by stating in the application that documents/papers used for filing first written statement, have been obtained by fraud and referring ***Afsar Shaikh and another*** *Vs.* ***Soleman Bibi and others*** reported in **AIR 1976 Supreme Court 163,** it is canvassed that the plea taken by the applicants and deceased defendant No.1 is not general in nature but specific in nature and, therefore, written statements earlier filed on behalf of defendant No.1 are liable to be discarded with leave of the Court to file fresh one.

25. It is also contended that not only fraud has been specifically pleaded in the application but also a copy of FIR No.72/2005 dated 10th March, 2005 lodged by the plaintiff in Police Station Palampur with respect to the fraud committed by the GPA and defendants No.2 and 3 has been placed on record in the documents filed by him. Therefore, there is sufficient material on record to establish the fraud committed by the GPA, entitling defendant No.1 or his legal representatives 1(a) and 1(b) to file a fresh written statement. It has been contended on behalf of the plaintiff that objection, with respect to filing of written statement by GPA Prithvi Raj without having valid GPA as on that particular day, was taken by the plaintiff at the very initial stage in OMP No.442 of 2010 **and** OMP No.528 of 2010 by raising a specific objection that GPA so placed on record in reply to notice under Order 12 Rule 4 CPC did not authorize Prithvi Raj for filing written statement with respect to the entire suit land as the said GPA was with respect to the land measuring 29-15-19 hect.

26. The arguments advanced on behalf of defendant Nos.2(c), 3, 2(a), 2(b) and 2(d) are almost common and learned counsel for them have reiterated the ground taken for opposing these applications and have further submitted that learned counsel for contesting defendants have reiterated the objection taken in reply(ies) to the application(s) and have contended that perusal of original written statement filed on 20th September, 2005 by defendant No.1 himself and comparison thereof with the amended written statement filed on 17th June, 2010 after amendment of the suit in December, 2009 through GPA Prithvi Raj is clearly indicating that identical stand has been taken on behalf of defendant No.1 in both the written statements. Therefore, the GPA had not committed any fraud rather had reiterated the stand taken by defendant No.1 in original written statement filed by the said defendant itself. It is further contended that rather plaintiff and defendants No.1(a) and 1(b) are in collusion with each other and defendants No.1(a) and 1(b) who were the servants of deceased defendant No.1 but now claiming execution of Will in their favour by deceased defendant No.1, are playing in the hands of the plaintiff. It is further contended that fresh written statement proposed to be filed is not permissible being in total variance with the earlier written statement filed on behalf of defendant No.1 and as a total new plea has been taken in the proposed fresh written statement whereas stand converse to earlier written statement filed by the defendant is not permissible under the law and right and scope of filing written statement by legal representatives cannot be filing of the written statement contrary to the stand taken by deceased defendant No.1. Reliance in this regard, has been placed upon a judgment passed by the Apex Court in ***S. Malla Reddy Vs. future Builders Cooperative Housing Society and others*** reported in **(2013) 9 SCC 349**.

27. It is also contended that the suit was filed after execution of three sale deeds in favour of defendant No.2 whereby land measuring about 11 hectares had already been transferred in favour of defendant No.2 and defendant No.1 was owner in possession of the remaining land measuring about 29 hectares only and therefore, at the time of execution of GPA in favour of Prithvi Raj on 30th July, 2004, after execution of last sale deed on 17.01.2004, the area of land owned and possessed by Mohinder Singh, measuring approximately 29 hectares, has rightly been mentioned. Therefore, there is no deficiency in the GPA executed in favour of Prithvi Raj on the basis of which he had filed amended written statement to the amended plaint.

28. Other legal representatives of deceased defendant No.1 other than defendants No.1(a) and 1(b), who are arrayed as a party defendant No.1(c), 1(d) and 1(e), through their respective counsel, have supported the original as well as amended written statement filed by and on behalf of defendant No.1 and have concurred with the arguments advanced on behalf of defendants 2(a) to 2(d) and defendant No.3. It is further contended that in view of the order dated 11th May, 2011 passed in OMP No.528 of 2010 defendant

Nos.1(a) and 1(b) are not entitled to raise the issue related to the validity of GPA and competency of GPA Prithvi Raj on the ground that the said Power of Attorney does not authorize Prithvi Raj to deal with the entire suit land.

29. Defendants opposing these applications have also placed on reliance on judgment passed by Jharkhand High Court in Shyam Sundar Bazaz vs. Sanwarmal Jalan and others, **AIR 2005 Jharkhand 109**, whereby an additional written statement by legal heirs, which was new and different from the original case of deceased defendant, was not allowed to be filed. Reliance has also been placed on judgment of the Apex Court in ***S. Malla Reddy*** *Vs.* ***future Builders Cooperative Housing Society and others,*** reported in **(2013) 9 SCC 349**, wherein defendants were not allowed to resile/withdraw from the admission made in the written statement by taking recourse to Order 8, Rule 9 or Order 6 Rule 16 CPC by seeking permission to file a fresh written statement. Judgment pronounced by the Apex Court in ***B.L. Sreedhar and others vs. K.M. Munireddy (dead) and others,*** **2003(2) SSC 355** has also been referred wherein it has been held that when one person by his declaration, act or omission has caused or permitted another person to believe something to be true and to act upon that belief, neither he nor his representatives shall be allowed in any suit or proceedings between himself and such persons or his representatives to deny the truth of that thing.

30. It is also contended that originally, in the applications, material facts have been concealed deliberately without mentioning that the original written statement was filed under the signatures of defendant No.1 itself but only referring the filing of written statement through GPA so as to give an impression that GPA has filed the written statement at first instance and also without stating other material facts which were disclosed and admitted in the rejoinder after raising the objections by the other defendants contesting the applications and therefore, it is further contended that for such deliberate act of concealing the material facts, applicants are not entitled to the relief claimed in these applications and to substantiate this plea reliance has also been placed on judgments in ***Sunil Poddar and others vs. Union Bank of India,*** **2008 (2) SCC 326** and *Dalip Singh vs. State of Uttar Pradesh and others,* **2010(2) SCC 114**.

31. On behalf of the defendants contesting the applications, following pleadings of original written statement dated 23.8.2005 filed by defendant No.1, amended written statement dated 10.6.2010 filed by GPA holder of defendant No.1 and pleadings in written statement now proposed to be placed on record as a fresh written statement have been referred to demonstrate the contradictory stands/pleadings so as to canvass the dis-entitlement of filing proposed fresh written statement:

Sl.No.	Pleadings of the Original Written Statement dated 23.8.2005 filed by Defendant No.1.	Pleadings of Amended Written Statement dated 10.6.2010 filed by GPA Holder of Defendant No.1.	Pleadings in the Written Statement sought to be placed on record with OMP No. 42/2014
1.	Agreement to sell dated 22.4.2002 executed between Defendant No.1 and Defendant No.2 for sale of the suit property/ land.	Agreement to sell dated 22.4.2002 executed between the Defendant No.1 and Defendant No.2 for sale of the suit property/land. **Para-2**	No averments/ submissions have been made with respect to the said Agreement to sell.

	Para-2.		
2.	Three Sale deeds dated 19.9.2003, 3.10.2003 & 17.1.2004 were executed in favour of Defendant No.2. **Para-1**	Three Sale Deeds dated 19.9.2003, 3.10.2003 & 17.1.2004 were executed in favour of Defendant No.2. **Para-1**	These sale deeds are illegal.
3.	Application for grant of permission for sale of the suit property was filed by Defendant No.1 before the Government of H.P.	Application for grant of permission for sale of the suit property was filed by Defendant No.1 before the Government of H.P.	Defendant No.1 has never applied for any permission for grant of permission for sale of the suit property.
4.	The Government of H.P. granted permission to Defendant No.1 for sale.	The Government of H.P. granted permission to Defendant No.1 for sale.	No application for permission was made.
5.	The agreement dated 3.7.2002 was fraudulently got signed by the Plaintiff through servants of Defendant No.1.	The agreement dated 3.7.2002 was fraudulently got signed by the Plaintiff through servants of Defendant No.1.	The agreement dated 3.7.2002 was duly executed between the Defendant No.1.
6.	After coming to know about the fraudulent signatures on the agreement dated 3.7.2002, an FIR No.409 of 2002 was lodged by the Defendant No.1 at P.S. Patiala.	After coming to know about the fraudulent signatures on the agreement dated 3.7.2002, an FIR No.409 of 2002 was lodged by Defendant No.1 at P.S. Patiala.	FIR No.409 of 2002 was lodged by Defendants No.2&3 at P.S. Patiala.
7.	Agreement dated 3.7.2002 was fraudulently got executed.	Agreement dated 3.7.2002 as fraudulently got executed.	Defendant No.1 is ready and willing to honour the agreement and execute the sale deed.

32. Issue with respect to nature of right of legal representative provided under Order 22 Rule 4 (2) CPC is no longer res-integra and in view of the pronouncement of the Apex Court in ***Gajraj vs. Sudha and others,* 1999 (3) SCC 109**, ***J.C. Chatterjee and others vs. Shri Sri Krishan Tandon and another*, 1972 SC 2526**, ***Bal Kishan vs. Om Parkash and another,* 1986 SC 1952** and ***Vidyawati vs. Manmohan and others,* 1995 SC 1653,** it is settled that legal representative of deceased defendant is not entitled to raise plea by way of an additional written statement which is new and different from the original

plea of the deceased defendant and he is authorized to file an additional written statement or statement of objections raising all pleas which the deceased defendant had or might have raised except those which were personal to the deceased defendant and in case he is having an independent right, title and interest in the property then he has to get himself impleaded in a suit as a party defendant other than the capacity of legal representative of deceased defendant for setting up his own right, title and interest in the lis by filing an application under Order 1 Rule 10 CPC to implead him in his independent capacity.

33. In the present case defendants No.1(a) and 1(b) have not been arrayed as the defendants in their independent capacity but as legal representative of deceased defendant No.1 and further nothing has been placed on record to establish that they are having any right for their impleadment in their independent capacity nor their impleadment as such has been preferred rather in the facts and circumstances available on record they are not entitled to be arrayed as a party defendant in their independent capacity, therefore they have no right to take a new plea by filing additional written statement or fresh written statement which is not only new but also inconsistent and materially different from the original stand of the deceased defendant No.1. Therefore, fate of application OMP No.441 of 2014 filed on behalf of defendants No.1(a) and 1(b) will depend upon the fate of OMP No.42 of 2014 filed by deceased defendant No.1. In case defendant No.1 is found to be entitled to file additional/fresh written statement only then defendants No.1(a) and 1(b) shall be entitled for filing such written statement.

34. For the reasons assigned hereinafter, I am of the considered view that deceased defendant No.1 was not entitled for filing fresh written statement in the facts and circumstances of the present case.

35. Before proceeding further it would be appropriate at this stage, to discuss authorization to Prithvi Raj to file amended written statement to the amended plaint as GPA of defendant No.1 executed in his favour on 30th July, 2004, on the basis of which written statement dated 10th June, 2010 was filed on 19th June, 2010.

36. It is admitted case of the parties that entire suit land comprised in khata No.74, khatauni No.104 to 109 is measuring 40-76-73 hectares and vide sale deeds dated 19th September, 2003, 3rd October,2003 and 17th January, 2004, executed on behalf of defendant No.1 through his Power of Attorney, land measuring 11-39-82 hect., was transferred in favour of defendant No.2 before filing of the suit on 2nd July, 2005. General Power of Attorney in favour of Prithvi Raj was executed after execution of sale deeds and before filing of the suit. At the time of execution of this GPA, after transfer of land to defendant No.2 vide aforesaid recorded sale deeds, defendant No.1 was owner in possession of the suit land measuring approx 29 hectares. In GPA in question exact measurement of land has not been mentioned but it is mentioned that GPA, with respect to land comprised in khata No.74, khatauni No.104 to 109, measuring approx 29-15-19 hectares, was executed in favour of Prithvi Raj by deceased defendant No.1. Because of execution of the aforesaid sale deeds, defendant No.1 was having right to file written statement only with respect to the remaining land which was approximately 29 hectares. Therefore, for filing the written statement through GPA, authorization to file written statement for the remaining land was required and from the GPA placed on record in response to notice under Order 12 Rule 8 CPC it is evident that the said GPA, executed in favour of Prithvi Raj, was for that much land only which was being owned and possessed by defendant No.1. Therefore, it is incorrect to say that Prithvi Raj was not having valid GPA for entire land belonging to defendant No.1 at the time of filing written statement dated 10th June, 2010 filed on 19th July, 2010. This GPA contains Clause 3 authorizing Prithvi Raj to file, prosecute and defend all civil, revenue and criminal cases in all Courts on behalf of defendant No.1.

37. It is also relevant to notice here that at earlier point of time, similar objections were raised by the plaintiff after filing of this written statement through GPA by filing OMP No.442 of 2010 and 528 of 2010 praying for not taking on record written statement filed on behalf of defendant No.1 through GPA Prithvi Raj. The said plea of the plaintiff was rejected by this Court vide order dated 11th May, 2011. There is nothing on record that the said order was ever assailed by either of party and now under the garb of filing application under Order 8 Rule 9 CPC the said issue cannot be reopened.

38. In facts and circumstances, available on record, it cannot be inferred that GPA Prithvi Raj has committed any fraud upon defendant No.1, at the time of execution of General Power of Attorney or filing Written Statement to the amended plaint. Therefore, judgment in ***Afsar Shaikh (supra)*** is not applicable in present case.

39. So far as competence of Prithvi Raj for filing the Written Statement, with respect to entire suit land, is concerned, that has already been discussed herein before, as also in the order dated 11.5.2011, passed in OMP No.528 of 2010, he had already been held competent to file the Written Statement on behalf of defendant No.1, with respect to the land in ownership and possession of defendant No.1 at that time. Therefore, ratio of law laid down in ***Janki Vashdeo Bhojwani's*** case is not applicable in present case.

40. Parties to lis are not illiterate, rustic villagers, rather they are well conversant with the legal complicacies of their actions and inactions and they are also found to be indulging in execution of various documents, including General Power of Attorneys, Agreements to Sell, Sale Deeds, etc. and also filing/ lodging complaints/FIRs with the authorities. Service upon defendant No.1 Mohinder Singh was effected in the month of August, 2005. Thereafter, Power of Attorney (Vakalatnama) on his behalf was filed in the Registry of this Court on 29.8.2005 and Written Statement on his behalf, under his signatures, dated 23.08.2005, was filed on 20.9.2005. Defendant No.1, during his life time, at any stage of the suit, has not disputed service of summons of suit upon him. Filing of Power of Attorney, duly signed by him, engaging Mr. Neeraj Maniktala, Advocate, as his counsel, has also not been disputed, specifically, rather it is stated that the said counsel was engaged but through defendants No.2 and 3. In his application filed for filing fresh Written Statement, he is completely silent about the Written Statement filed under his signatures, at the first instance, in September, 2005. On pointing the filing of the first Written Statement, under his signatures, in reply to OMP No.42 of 2014, filed by the contesting defendants in 2017, it has been clarified that the said Written Statement was manipulated by defendants No.2 and 3. Defendant No.1 had expired on 30.1.2014 and during his life time, he had not commented upon the circumstances, under which the Written Statement, at the first instance, was filed in September, 2005. However, in the pleadings of defendants No.1(a) and 1(b), filed being Legal Representatives of defendant No.1, it is contended that the said Written Statement was result of manipulation of defendants No.2 and 3.

41. In OMP No.42 of 2014, preferred by defendant No.1 himself, in January, 2014, it has been averred that he (defendant No.1) was surprised after knowing that his General Power of Attorney holder Prithvi Raj had already filed Written Statement in June-July, 2010, without taking his instructions, consent but behind his back. In the proposed fresh Written Statement, it is proposed stand of defendant No.1 that since beginning he intended to favour the plaintiff, as he had entered into an Agreement to Sell with him, as claimed in the plaint and, therefore, he was not keen to contest the case. He was served in 2005, and even if his plea is to be taken as true that he came to know, in October/November, 2013, about filing of Written Statement through his General Power of Attorney, then also eight years long period is not a small period. Keeping in view the

acquaintance of defendant No.1 with the Court procedures, it is unbelievable that for eight years, after his service, he did not bother to enquire about the status or fate of the suit filed by the plaintiff, that too when it was claimed by him that he was intending to help the plaintiff, who, according to his fresh stand, had suffered a lot, on account of connivance of his GPA with original defendants No.2 and 3. Not only this, it has also come on record that cross FIRs were also lodged by plaintiff as well as defendant No.1 against each other. According to defendant No.1, the FIR on his behalf was manipulated by defendants No.2 and 3, which lateron was withdrawn by him, as he intended to favour the plaintiff. Surprisingly, despite having intention to favour the plaintiff, by executing the sale deed in his favour, defendant No.1 Mohinder Singh did not agree for resolution of dispute, raised by the plaintiff in the present suit, for such extraordinary unexplained long period.

42. Execution of Power of Attorney in favour of Prithvi Raj has also not been disputed, rather claim is that the said Power of Attorney was revoked in the year 2013, after noticing the act and conduct of the said Power of Attorney, which, according to defendant No.1, was contrary to his will and desire. In any case, on the day of filing the Written Statement, Prithvi Raj was holding valid General Power of Attorney of the land, which was in ownership and possession of defendant No.1 at that time, as some portion of the suit land had already been transferred in favour of defendant No.2, on account of sale deed in his favour, through one Suksham, who was holding Power of Attorney in his favour on behalf of defendant No.1. In the Power of Attorney executed in favour of Prithvi Raj, area of land owned and possessed by defendant No.1 has been mentioned approximately 29 hectares. As noticed supra, said Power of Attorney was executed after execution of sale deeds of land measuring about 11 hectares, in favour of defendant No.2, out of the total land measuring about 40 hectares.

43. Though it is pleaded on behalf of defendant No.1 that said Suksham has manipulated the documents, in connivance with defendants No.2 and 3, in order to harm the plaintiff, for the benefit of defendant No.2, sale deeds executed in the year 2003 through said Suksham have been never been assailed by defendant No.1. Defendant No.1 has neither denied the receipt of sale consideration nor has any foul play played by his Power of Attorney Suksham, on his behalf to grab the sale consideration, been alleged at any point of time. Further, no criminal or civil action, ever taken by defendant No.1 against said Suksham and defendants No.2&3, has been brought on record till date.

44. Even if fresh version propounded on behalf of defendant No.1 is accepted to be true, then also sale deeds executed in favour of defendant No.2 on behalf of defendant No.1, through Power of Attorney Suksham, were in the knowledge of defendant No.1, since at least 2005, even if his fresh version is accepted to be true. But, till date no challenge to the same has been laid down, despite taking plea in the fresh Written Statement proposed to be filed that defendant No.1 was interested to honour the agreement to sell executed in favour of plaintiff. Even otherwise, in case defendant No.1 had been really intending to favour the plaintiff, there was none to prohibit him from executing the sale deed in favour of plaintiff at least qua remaining suit land, which was in his ownership and possession, after excluding the area involved in the three sale deeds executed in favour of defendant No.2.

45. In the aforesaid facts and circumstances, it is unbelievable to accept that after the service of summons in the year 2005 till October/November, 2013, defendant No.1 was not having any knowledge about the filing of Written Statement by Prithvi Raj, being his General Power of Attorney, that too without taking his instructions or without his consent or behind his back.

46. Defendant No.1, during his life time, remained silent about the Written Statement filed under his signatures, at the first instance, immediately after service of summons upon him. The amended written statement was filed on the same line, which was taken in the first Written Statement. As held by a Coordinate Bench of this Court in *Vishwa Nath (supra)*, relied upon by applicants, it is true that once amended pleadings are on record, unamended pleadings are not to be taken into consideration. However, it does not preclude the Court or any other party to have comparison of unamended pleadings, i.e. Written Statement filed at first instance in present case, to take into consideration for comparison with the subsequent amended pleading, i.e. Written Statement filed through GPA Prithvi Raj, so as to ascertain as to whether GPA had acted upon and had filed the amended Written Statement in consonance with the stand taken by the original defendant himself in the original unamended Written Statement. Therefore, plea raised on behalf of defendants/applicants No.1(a) and 1(b) and plaintiff that after amendment of the plaint, earlier Written Statement has lost its significance and is no more part of the record and, thus, cannot be taken into consideration, is not sustainable, as the said Written Statement is not being taken into consideration for deciding the suit but for determining the fact as to whether Written Statement filed by the General Power of Attorney is in consonance with the stand already taken by defendant No.1 in his Written Statement filed under his signatures or not.

47. On comparison Written Statement filed by Prithvi Raj, as General Power of Attorney, on behalf of defendant No.1 cannot be said to have been filed contrary to his instructions, against his will, without his consent or behind his back, rather, it is found to be in consonance with the original stand of defendant No.1.

48. It is further stand of defendant No.1 in OMP No.42 of 2014 that his Power of Attorney Prithvi Raj had acted on advice and in active connivance with defendants No.2 and 3, whereas he (defendant No.1) had neither intended to file any Written Statement nor was mentally prepared to involve himself in any kind of litigation and now having regard to many hardships, being faced by the plaintiff, he thought it proper to file correct version of his Written Statement. As discussed, herein above, the said plea of defendant No.1 is not only unsustainable, but also contrary to the facts and circumstances established on record. In any case, if he was not intending to file any Written Statement, he could have made such statement through his counsel and could have acceded to the claim of the plaintiff, immediately after service of summons upon him. There is nothing on record, indicating that he was ever prevented by anybody from appearing in the Court or filing a Written Statement favouring the plaintiff or making any statement acceding to the claim of the plaintiff in the present suit. He has come forward with fresh Written Statement, after eight years of his service in the suit, with a prayer to decree the suit in favour of the plaintiff, but without commenting upon or assailing the sale deed executed in favour of defendant No.2.

49. Considering the entire facts, plea taken in the application filed by defendant No.1 appears not only to be an afterthought, but also neither convincing nor confidence inspiring.

50. Once it is established that Written Statement, at the first instance, was filed by defendant No.1 himself and the subsequent amended Written Statement filed by Prithvi Raj, as his Power of Attorney, is on the same line, the plea that amended Written Statement filed by Prithvi Raj, on behalf of defendant No.1, and the separate Written Statement filed by defendants No.2 & 3 to the amended plaint, which were attested on the same day at Palampur and were entered at Serial Nos.645 and 644, respectively, in the Register of Oath Commissioner, and the identifier in both the cases was one and the same Advocate and also that the language of the Written Statements was also similar, indicate the connivance of

Prithvi Raj and defendants No.2&3, is also not sustainable, as the subsequent amended Written Statement is in consonance with the initial stand taken in first Written Statement filed under the signatures of defendant No.1.

51. Pleas that defendant No.1 was not having permission under Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act, in his favour, at the time of execution of three sale deeds and that General Power of Attorney in favour of Prithvi Raj had been revoked in the year 2013 and that defendant No.1 has served notice upon his counsel, withdrawing his *Vakalatnama*, are of no impact upon adjudication of the present applications, as the basic question involved herein is that as to whether defendant can be permitted to file written statement contrary to the stand already taken in his earlier Written Statement. As has been held by the Apex Court in ***S. Malla Reddy (supra),*** the defendants cannot be allowed to resile/withdraw from the admission made in the Written Statement, by taking recourse to Order VIII Rule 9 or Order VI Rule 16 of the Code of Civil Procedure.

52. In appropriate cases, where a genuine ground for filing fresh Written Statement is made out, defendant(s) may be permitted to file fresh/additional Written Statement, as provided under Order VIII Rule 9 of the Code of Civil Procedure. It is to be kept in mind that provision of Rule 9 of Order VIII starts with negative clause, declaring that no pleading subsequent to Written Statement by a defendant, other than by way of defence to set off or counterclaim shall be presented, except by leave of the Court. No doubt, later part of this Order empowers the Court to require, at any time, a Written Statement or additional Written Statement from any of the parties, if it thinks fit to do so, but the fact remains that Rule 9 starts with prohibitive language.

53. In present case, it is not a suit simpliciter against one defendant or more than one defendant, where all the defendants are having one and the same stand, rather here is a suit where not only the original defendants were claiming independent right, title or interest on the respective portion of suit land, but also the legal heirs of defendant No.1 as well as defendant No.2 are having clash of interest on account of their respective stands. In case the sole defendant or all the defendants would have decided to accede to the claim of the plaintiff, there may not have been any necessity or occasion to file fresh Written Statement, rather the suit would have been compromised between the parties. In present case, certain portion of land stands transferred in favour of defendant No.2 qua which his legal heirs are fighting with each other. With respect to remaining portion of the suit land, legal representatives of defendant No.1 are having converse stand. On the basis of earlier Written Statement(s) filed by and on behalf of defendant No.1, defendant No.2 had taken a position. Now suddenly, at this stage, defendant No.1 or his legal heirs cannot be permitted to shift their stand contrary to their earlier stand. In any case, if defendant No.1 or his legal representatives intend to favour the plaintiff, no one can stop them from deposing in favour of the plaintiff, while appearing in the witness box, however, veracity and admissibility of their such deposition is to be evaluated and assessed on the basis of pleadings of the parties and with comparison to evidence led by other defendants, but in accordance with law.

54. Had there been reliable, cogent and tangible material on record, establishing that none of the Written Statements, i.e. first one or amended, have been filed by defendant No.1 or under his instructions, defendant No.1 or his legal representatives would have been definitely entitled for filing fresh Written Statement. But the facts are establishing contrary.

55. In view of above discussion, considering the entire facts and circumstances, referred herein above, and the case law cited by the parties, I am of the considered opinion that no ground for allowing OMP No.42 of 2014 is made out and, hence, the same is dismissed.

56. As the application filed by the original defendant has been found to be devoid of merit, as discussed supra, his legal heirs cannot be permitted to travel beyond the scope of Written Statement filed by or on behalf of defendant No.1, which is already on record. Therefore, their application, being OMP No.441 of 2014 is also dismissed.

57. Observations made hereinabove shall not have any impact on merits of respective pleas taken by the parties in the main suit, but shall be construed to have been discussed for adjudication of aforesaid applications only.

Applications stand disposed of.

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

Cr.MPs(M) No. 1184 & 1185 of 2019
Decided on: 26th June, 2019

1. Cr.MP(M) No. 1184 of 2019:

Asha Devi ....Petitioner
Versus
State of Himachal Pradesh ...Respondent

2. Cr.MP(M) No. 1185 of 2019:

Reeta ....Petitioner
Versus
State of Himachal Pradesh ...Respondent

Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 3 (1) (s) –Regular bail – Grant of- Held, petitioners have already joined investigation- Nothing to be recovered from them- Petitioners aged ladies and not in position to tamper with evidence or flee away from justice- Petitioners ordered to be released on conditional bail. (Paras 5 & 7)

For the petitioner: Mr. N.K. Thakur, Sr. Advocate, with Mr. Karamveer Singh, Advocate.

For the respondent/State: Mr. Shiv Pal Manhans and Mr. P.K. Bhatti, Additional Advocates General, with Ms. Svaneel Jaswal, Deputy Advocate General.

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. 3(1)(s) of SC&
ST Act read with Section 34 IPC, registered in Police Station Haroli, District Una, H.P.

2. As per the averments made in the petitions, the petitioners are innocent and have been falsely implicated in the present case. They are neither in a position to tamper

with the prosecution evidence nor in a position to flee from justice. No fruitful purpose will be served by keeping them behind the bars for an unlimited period, so they be released on bail.

3. Police report stands filed. As per the prosecution story, on 24.04.2019 police received a complaint from complainant, Smt. Chaand Rani. The complainant alleged that on 23.04.2019, when she was working in Deepak Fastner Limited Company, the petitioners and one Kamlesh came and asked her that why she did not participate in factory strike. The complainant tried to leave to her home, but the above women restrained her and used casteist remarks. The petitioners and co-accused Kamlesh insulted the complainant. On the basis of the complaint, so made by the complainant, police registered a case and investigation ensued. Police prepared the spot map and recorded the statements of the witnesses. Police also obtained records qua the caste of the complainant. On 21.06.2019 the petitioners joined the investigation and they were arrested. The petitioners were medically examined. Lastly, it is prayed that the bail applications of the petitioners be dismissed, as the petitioners were found involved in a serious offence and in case at this stage they are released on bail, they may tamper with the prosecution evidence and may also flee from justice.

4. I have heard the learned Senior Counsel for the petitioners, learned Additional Advocate General for the State and gone through the record, including the police report, carefully.

5. The learned Senior Counsel for the petitioners has argued that the petitioners have been falsely implicated in the present case. He has further argued that the petitioners willingly joined the investigation and they are co-operating in it. The petitioners are neither in a position to tamper with the prosecution evidence nor in a position to flee from justice. The petitioners are ladies and their custodial interrogation is not required, as they are co-operating in the investigation. He has further argued that no fruitful purpose will be served by keeping the petitioner behind the bars for an unlimited period. Conversely, the learned Additional Advocate General has argued that the petitioners were found involved in a serious offence and in case at this stage they are enlarged on bail, they may tamper with the prosecution evidence and may also flee from justice. It has been argued that the bail applications of the petitioners may be dismissed.

6. In rebuttal the learned Senior Counsel for the petitioner has argued that the petitioners cannot be kept behind the bars for an unlimited period, so they may be released on bail.

7. At this stage, after taking into consideration the manner in which the offence is alleged to have been committed, the nature of the offence, considering the fact that the petitioners are ladies and they have willingly joined the investigation, the age of the petitioners, the fact that the petitioners are neither in a position to tamper with the prosecution evidence nor in a position to flee from justice, the fact that the petitioners cannot be kept behind the bars for an unlimited period and all other material, which has come on record, and without discussing the same at this stage, this Court finds that the ends of justice would only be met in case the petitioners are released on bail. Accordingly, the petitions are allowed and it is ordered that the petitioners, who have been arrested by the police, in case FIR No. 3(1)(s) of SC & ST Act read with Section 34 IPC, registered in Police Station Haroli, District Una, H.P., shall be released on bail forthwith in this case, subject to their furnishing personal bonds in the sum of `25,000/- (rupees twenty five thousand) each with one surety each in the like amount to the satisfaction of learned

Judicial Magistrate 1st Class, Una, District Una, H.P. The bail is granted subject to the following conditions:

(i) That the petitioners will appear before the learned Trial Court/Police/authorities 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.

8. In view of the above, the petitions are disposed of.

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BEFORE HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Avtar @ Tari ... Petitioner.

Versus

State of Himachal Pradesh ...Respondent

Cr.MP(M) No.1066 of 2019
Reserved on : 17-06-2019
Date of decision : 19th June,2019

Code of Criminal Procedure, 1973 - Section 439 – **Narcotic Drugs and Psychotropic Substances Act, 1985 (Act) –** Section 20 & 37 – Recovery of 1.585 kgs of charas - Regular bail- Grnat of- Accused contending that pure contents of contraband (resin) bring it below commercial quantity, being so rigors of Section 37 of Act are not attracted and he should be enlarged on bail- Held, as per Mehboob Khan case, 2014 (2) RCR (Criminal) 447, percentage of resin in cannabis, alone is not charas and prima facie entire recovered contraband is 'charas' irrespective of percentage of resin in it- Recovered contraband falls in commercial category- Rigors of Section 37 of Act apply- Accused not entitled for bail- Petition dismissed. (Paras 7 to 9 & 13)

Case referred:

State of H.P. vs. Mehboon Khan (FB), 2014 (2) RCR (Criminal) 447

For the Petitioner : Mr. Sanjeev Kumar Suri, Advocate

For the Respondent : Ms. Ritta Goswami, Additional Advocate General, Ms. Divya Sood, Deputy Advocate General and Mr. Manoj Bagga, Assistant Advocate General.

The following judgment of the Court was delivered:

Anoop Chitkara, Judge

The present petition is under Section 439 of the Code of Criminal Procedure for grant of bail in case FIR No. 9/16, dated 31-01-2016, registered under Section 20 of Narcotic Drugs and Psychotropic Substances Act, 1985, at Police Station Aut, District-Mandi, HP.

2. This Court had issued notice to respondent vide order dated 12-06-2019 and on 17-06-2019 police had filed status report.

3. I have heard learned counsel for the petitioner as well as respondent and have also gone through the status report.

4. The case of the prosecution is that 1kg 585 gms Charas was recovered from the possession of the bail petitioner, which as per police is a commercial quantity under Section 20 (ii) (C) of Narcotic Drugs and Psychotropic Substances Act.

5. To the contrary, learned Counsel appearing for the petitioner, in paragraph no.2 of his petition, has submitted that although the total weight of the contraband allegedly recovered is 1.585 k.g., however, the percentage of resin would bring it below the commercial quantity. Resultantly, rigors of Section 37 of Narcotic Drugs and Psychotropic substances Act will not attract. The submission of the counsel for the bail petitioner is that percentage of resin is to be considered and not the entire bulk of 1.585 kg. He further submitted that if resin is considered, then it would fall below 1 kg, which is less than commercial quantity.

6. In the status report, the reference has been made to report of Regional Forensic Science Laboratory, Junga. Expert after conducting Scientific Chemical Test, gave his opinion as follows: “the quantity of purified of resin as found in the exhibit stated as Charas is 27.74% w/w. The exhibit is extract of cannabis and sample of charas” Thus the net weight of purified resin comes to 440 grams (approximately).

7. *In State of H.P. v. Mehboon Khan (FB), 2014 (2) RCR (Criminal) 447*, holds as follows,

> “Para 55.
>
> 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 less 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 less 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."

8. In view of this pronouncement of full bench, the controversy is no more res-integra. The definition of charas as per mandate of Section 2 (iii) of the NDPS Act is :-

" 2 (iii) "cannabis (hemp)" means:-

(a) charas, that is, the separated resin, in whatever form, whether crude or purified, obtained from the cannabis plant and also includes concentrated preparation and resin known as hashish oil or liquid hashish;

(b) Ganja, that is, the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops),

(c) any mixture , with or without any natural material, of any of the above forms of cannabis or any drink prepared therefrom;

(iv) "cannabis plant" means any plant of the genus cannabis;"

9. It is clear that as per Section 2(iii) (a) of the NDPS Act charas is the resin in whatever form whether crude or purified, provided such resin has been obtained from the canabis plant. It is common knowledge that charas is made when resin is separated from flowering tops/ leaves of cannabis plant. That is why, Legislature, used the word "separated resin". Now when resin is separated from the flowering tops as well as leaves of the cannabis plant, it would be crude or purified, depending upon the procedure adopted for such process. If the process for separating resin is scientific and done in good chemical laboratory or done by experts using modern instruments, then the resin so separated would be very purified. To the contrary when the resin is separated from the leaves and flowers of cannabis plants by using old age traditions or manual process, like rubbing of body or hands or by splashing on wooden logs or through leather, then such resin would be in crude form. The legislature did not differentiate between the charas whether crude or purified. Therefore, the percentage of resin in cannabis alone is not charas and prima facie the entire cannabis irrespective of percentage of resin is charas.

10. Ms. Divya Sood, Deputy Advocate General has brought to the notice of this Court that one bail application no. Cr.MP(M) No. 613 of 2019, where the similar question is pending adjudication by a larger bench of this Court.

11. Be that as it may, the matter is subject matter of adjudication before the larger bench and it is for the larger bench to adjudicate upon this issue.

12. Therefore, it shall be open for the petitioner to file a bail petition, on the ground of percentage of resin, if the findings in the above referred matter are given in his favour by larger bench.

13. As on date, the petitioner has no case for bail because bulk quantity involved is more than 1 kg and resin alone cannot be taken to determine the quantity. Resultantly, the bail petition is dismissed.

14. Pending application(s), if any, also stand disposed of.

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

Chanchal Kumar ....Petitioner.
-Versus-
Prem Parkash and another .....Respondents.

COPC No.: 210 of 2018
Decided on: 27.06.2019

Constitution of India, 1950 – Article 215 – Contempt jurisdiction of High Court- Nature of- Held, contempt jurisdiction exercised by High Court is punitive in nature- Court must be satisfied beyond reasonable doubt that there is willful disobedience of Court order by contemnor- Petitioner not bringing cogent evidence regarding position of disputed premises as existed before and as existed after grant of restraint orders for establishing that contemnors continued with construction despite stay- Disobedience of said orders not proved- Petition dismissed. (Paras 3 & 4)

For the petitioner: Mr. Naveen K. Bhardwaj, Advocate.
For the respondents: Mr. Balwant Singh Thakur, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

The allegation contained in the present petition is that order passed by this Court on 28.11.2017, restraining the respondents herein from raising any construction over the suit land has been willfully disobeyed by them by continuing to raise construction over the same even after passing of the said order. In order to substantiate the said fact, alongwith the petition, certain photographs are appended as Annexure C-3.

2. Learned counsel for the respondents has submitted that after the passing of the restraint order by this Court, no construction whatsoever has been raised over the suit premises and in fact whatever construction was raised, the same was raised as far back as in the year 2014.

3. When learned counsel for the petitioner was asked as to which of the photographs appended as Annexure C-3 depicts the position of the suit land as it existed on 28.11.2017, i.e., the day when the order was passed by the Court, learned counsel has fairly submitted that from the photographs, the same cannot be deciphered, because the only photograph in which a person can be seen with a newspaper in her hands, pertains to the year 2014. However, he has submitted that alongwith his rejoinder, he has appended another photograph as Annexure C-4, which depicts the position as it existed on 05.12.2017.

4. Be that as it may, in my considered view, in order to substantiate the factum of order dated 28.11.2017 having been willfully disobeyed by the respondents, it was incumbent upon the petitioner to have placed on record by way of cogent material the position of the suit premises as it existed on 28.11.2017, because in the absence of the same, this Court cannot infer that there is any breach of the order passed on 28.11.2017.

5. As the consequence of contempt power being exercised by the Court is punitive in nature, therefore, unless the Court is satisfied beyond reasonable doubt that there is disobedience of the Court order, in my considered view, no action can be taken against the alleged contemnor.

6. As the petitioner has not been able to substantiate the alleged willful disobedience of the Court order dated 28.11.2017, this petition is dismissed. Notices are discharged.

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

Chande Ram ....Petitioner.
Vs.
State of Himachal Pradesh .....Respondent.

Cr.MP(M) No.: 1076 of 2019
Date of Decision: 24.06.2019

Code of Criminal Procedure, 1973 – Section 439 – Regular bail- Grant of- Circumstances- Accused alleged of possessing intermediate quantity (200 gms) of charas seeking regular bail- However, previously he was convicted of possessing 107 Kgs of charas and he had served 10 years imprisonment- Held, taking past history of accused into consideration, possibility of his again indulging in same or similar offence, if released on bail cannot be ruled out- Petition dismissed being devoid of any merit. (Paras 4 & 6)

Case referred:
Maulana Mohd. Amir Rashadi vs. State of U.P., Criminal Appeal No. 159 of 2012, decided on 16.01.2012

For the petitioner: Ms. Sheetal Vyas, Advocate.
For the respondent: Mr. Dinesh Thakur, Additional Advocate General, with Mr. Amit Kumar Dhumal, Deputy Advocate General.
HC Mast Ram No. 82, I.O. Police Post Jari, Police Station Kullu, is present in person alongwith case record.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition filed under Section 439 of the Code of Criminal Procedure, the petitioner has prayed for grant of regular bail in FIR No. 05 of 2019, dated 05.01.2019, registered against him under Section 20 of the ND & PS Act at Police Station Kullu, District Kullu, H.P.

2. Allegation against the petitioner is that 200 grams of *charas* was recovered from his conscious possession leading to the registration of FIR in which he stands arrested.

3. Learned counsel for the petitioner has argued that the petitioner is behind bars since 05.01.2019 and taking into consideration the fact that the alleged *charas* recovered from the conscious possession of the petitioner is 200 grams only, he may be released on bail by imposing strict conditions upon him.

4. On the other hand, learned Additional Advocate General has objected the grant of bail and has argued that the present petitioner previously also has been convicted under the provisions of ND & PS Act and the sentence imposed upon him was of more than 10 years, as charas weighing 107 kgs. was found from his conscious possession. He submits that in case bail is granted to him, not only it will send a wrong message to the Society, but there is a possibility that he will again indulge in the same offence.

5. I have heard learned counsel for the parties and have also gone through the status report filed by the State.

6**.** The status report demonstrates that the challan in the case has already been filed before the appropriate Court and the case is now listed on 17th July, 2019 for further proceedings. Though it is not in dispute that presently allegation against the petitioner is that he has been apprehended with 200 grams of charas, but fact of the matter remains that the petitioner has already undergone 10 years conviction under the provisions of ND & PS Act on account of recovery of more than 107 Kgs. charas from him. While considering as to

whether a person is entitled to be released on bail under Section 439 of the Code of Criminal Procedure, the Court, *inter alia,* has to see the gravity of the offence alleged against the petitioner and also whether if released on bail, there is possibility or probability that the petitioner may again indulge in same or similar offence. Here the petitioner, who already stood convicted under the provisions of ND & PS Act, that too, for possession of more than 107 Kgs. of *charas*, has again been apprehended with 200 grams of *charas*. This Court is of the view that taking into consideration the past history of the petitioner, the possibility cannot be ruled out that if released on bail, he may again indulge in same or similar offence. Reliance by learned counsel for the petitioner on the judgment of the Hon'ble Supreme Court in ***Maulana Mohd. Amir Rashadi*** Vs. ***State of U.P.***, Criminal Appeal No. 159 of 2012, decided on 16.01.2012 is of no assistance in the present case. Therein, the accused, who was a sitting Member of Parliament, was facing several criminal cases. Hon'ble Supreme Court while rejecting the objection raised against his plea for grant of bail, held that it was not in dispute that most of the cases registered against the accused therein had ended in acquittal for want of proper witnesses or were pending trial and merely on the basis of criminal antecedents, the claim of the accused could not be rejected for grant of bail. Herein, the facts are totally different. Here the petitioner already stood convicted under the provisions of ND & PS Act for possession of more than 107 Kgs. of *charas* and now again he has been found in possession of 200 grams of *charas*. As the factual matrix in the case relied upon by the learned counsel for the petitioner has no bearing in the present case, therefore, reliance placed on the said judgment is totally misplaced.

In view of the observations made hereinabove, the petition is dismissed being devoid of any merit.

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BEFORE HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Chander Mohan Thakur ...Petitioner.
Versus
State of Himachal Pradesh & another ...Respondent.

Cr.MMO No. 153 of 2019
Order reserved on : 19-06-2019
Date of Decision : 24th June, 2019

Code of Criminal Procedure, 1973 – Section 482 – Inherent powers- Exercise of- Quashing of FIR- Principles- Held, in appropriate cases, inherent jurisdiction may be exercised to quash criminal proceedings to prevent abuse of process of Court or to secure ends of justice- But Court must have regard to nature and gravity of offence- Criminal proceedings which would cause oppression and prejudice may also be quashed- On facts, FIR registered for rash driving and consequent simple injuries ordered to be quashed pursuant to compromise of parties. (Paras 11 to 14 & 17)

Cases referred:

Ashok Chaturvedi and others vs. Shitul H. Chanchani and another, 1998(7) SCC 698
Gian Singh vs. State of Punjab, 2012(10) SCC 303
Himachal Pradesh Cricket Association vs. State of Himachal Pradesh, (SC) 2018 (4) Crimes 324
Kunstocom Electronics (I) Pvt. Ltd. vs. Gilt Pack Ltd. and another, (2002) 2 SCC 383

Madhavrao Jiwaji Rao Scindia vs. Sambhajirao Chandrojirao Angre, 1988 (1) SCC 692
Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and Ors. vs. State of Gujarat & anr., Criminal Appeal No. 1723 of 2017, decided on 4.10.2017
R.P. Kapur vs. State of Punjab, AIR 1960 SC 866
Shakuntala Sawhney v. Kaushalya Sawhney, (1979) 3 SCR 639
State vs. Gulam Meer (Madhya Bharat), AIR 1956 (Madhya Bharat) 141
Vinod Kumar vs. State of HP, Cr. M.M.O No. 14 of 2019 decided on 8-01-2019

For the petitioner : Mr. I. N. Mehta, Advocate,
For the respondent no.1 : Ms. Ritta Goswami, Additional Advocate General,
Ms. Divya Sood, eputy Advocate General
for respondent no.1. /State.
For the respondent no.2. : Mr. Saurav Rattan, Advocate.

The following judgment of the Court was delivered:

Anoop Chitkara, Judge.

The present petition is under Section 482 Cr. P.C. for quashing of F.I.R. No. 231/18, dated 3-11-2018, registered at Police Station Dhalli, District -Shimla (H.P.) under Sections 279 and 337 IPC and for quashing of all consequent Criminal proceedings.

2. The present F.I.R. stands registered on the basis of information given by Dharuv Kumar, who has been arrayed as respondent No. 2 in the present petition.

FACTS:

3. The gist of the entire case is as follows:

(a) The present FIR was registered on the basis of information given by Dharuv Kumar (respondent no.2.) to police Station-Dhalli, Shimla, H.P.

(b) He has stated that he is driver by profession and is also an apprentice with a mechanic.

(c) On 3-11-2018 at 2:00 p.m., (day time) he received a phone call from Manohar Singh that his vehicle required servicing. Then to bring that vehicle for servicing, he went to the house of Manohar Singh which is near I.H.M. at Kufri. From there he brought his car bearing registration No. HP63A-4231 from Kufri. Beside him, Manohar Singh, and Arun Jaryal were also sitting in the car.

(d) At about 2:25 p.m., when he reached at a place Thanda Pani near Chharabra, then from the opposite direction, a Santro Car, bearing registration No. CH01Y-1364, came with a very high speed and hit his car. Both the cars suffered extensive damage and people sitting in both the cars received injuries. Later on he came to know name of the driver of the Santro car as Chander Mohan Thakur (petitioner)

(e) The present petition has been filed by the accused Chander Mohan Thakur for quashing of FIR. In this petition, in paragraph no.

2, petitioner claimed that at the time of accident there was a dense fog and due to low visibility accident took place.

(f) He further stated on affidavit that he had applied brakes and also blew horn but respondent no. 2 got confused and the vehicles skidded and collided with each other.

(g) He further stated that after the accident, first aid was given to the injured persons, who were discharged on the same date.

(h) That on the spot the matter had been compromised between the parties but police insisted upon registration of FIR.

(i) Now the parties have entered into a written compromise which has been placed on record as annexure P2.

(j) Sh. Dharuv (respondent no.2) had put in appearance in the Court on 19th June, 2019. He made a statement on oath that he has compromised the entire matter with the accused Chander Mohan, the present petitioner.

(K) Similarly, the statement of Manohar Singh, one of the injured, was also recorded. He also stated that he has compromised the matter with the present petitioner. The statements are placed on record.

REASONING:

4. The following aspects would be relevant to arrive at a final conclusion in this petition:-

(a) When the accident had taken place then only witnesses to such accident were petitioner, Dharuv (respondent no.2), Arun Jaryal, Manohar Singh, Promila and Sheetal, who were sitting in these two vehicles.

(b) Mr. I.N.Mehta, Advocate for the petitioner has placed on record another compromise deed dated 18th June, 2019, which has been entered into between all the injured persons and between all the occupants of the car.

(c) As per the evidence collected on the spot as well as inferable from compromise deeds, only minor injuries were received by the occupants of the cars.

(d) All the injured persons have amicably settled the matter between them and stated that at the time of accident, there was dense fog. It was also raining and due to this visibility was very low.

(e) The entire facts and evidence, point out that accident just happened due to factors beyond the control of humans and not because of the fault of any of the driver, certainly not because of the petitioner/accused.

(f) Judicial notice can be taken of the fact that when it is raining, then the friction between tyres of the vehicle and the surface of the road reduces. Secondly, on the day of accident it was raining, therefore, the skidding is possible in hilly roads.

(g) Although, the withdrawal of FIR would be through District Magistrate as a normal procedure. However, there is inherent jurisdiction

of the High Court under Section 482 of the Code of Criminal Procedure to intervene in such kind of matter. It is not the requirement of law that the cancellation has to be approved only through the District Magistrate. Inherent Jurisdiction of High Court under section 482 CrPC can always be exercised, depending upon the facts and circumstances of each and every case.

(g) Even if, this case is put to trial, the parties are likely to maintain the stand which they have taken in this compromise, which is likely to result in the acquittal of the accused.

STAGE OF QUASHING FIR:

5. In *Ashok Chaturvedi and others v. Shitul H. Chanchani and another*, 1998(7) SCC 698, Hon'ble Supreme Court holds that the determination of the question as regards the propriety of the order of the Magistrate taking cognizance and issuing process need not necessarily wait till the stage of framing the charge. The Court observed thus :-

> "…. …. ….This argument, however, does not appeal to us inasmuch as merely because an accused has a right to plead at the time of framing of charges that there is no sufficient material for such framing of charges as provided in Section 245 of the Criminal Procedure Code, he is debarred from approaching the court even at an earliest (sic earlier) point of time when the Magistrate takes cognizance of the offence and summons the accused to appear to contend that the very issuance of the order of taking cognizance is invalid on the ground that no offence can be said to have been made out on the allegations made in the complaint petition. It has been held in a number of cases that power under Section 482 has to be exercised sparingly and in the interest of justice. But allowing the criminal proceeding to continue even where the allegations in the complaint petition do not make out any offence would be tantamount to an abuse of the process of court, and therefore, there cannot be any dispute that in such case power under section 482 of the Code can be exercised."

6. In *Kunstocom Electronics (I) Pvt. Ltd. v. Gilt Pack Ltd. and another*, (2002) 2 SCC 383, Hon'ble Supreme Court holds as under:-

> "8. …. …. ….There is no hard and fast rule that the objection as to cognizability of offence and maintainability of the complaint should be allowed to be raised only at the time of framing the charge."

JUDICIAL PRECEDENTS ON JURISPRUDENCE OF QUASHING:

7. In *R.P. Kapur v. State of Punjab*, AIR 1960 SC 866, a three Judges Bench of Hon'ble Supreme Court observed as under:-

> "6. …. … …It is well established that the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any Court or otherwise to secure the ends of justice. Ordinarily, criminal proceedings instituted against an accused person must be tried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction. However, we may indicate some categories of cases where

> the inherent jurisdiction can and should be exercised for quashing the proceedings. There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to the abuse of the process of the Court or that the quashing of the impugned proceedings would secure the ends of justice. If the criminal proceeding in question is in respect of an offence alleged to have been committed by an accused person and it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, the High Court would be justified in quashing the proceedings on that ground. Absence of the requisite sanction may, for instance, furnish cases under this category. Cases may also arise where the allegations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no question of appreciating evidence arises; it is a matter merely of looking at the complaint or the First Information Report to decide whether the offence alleged is disclosed or not. In such case, it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal Court to be issued against the accused person. A third category of cases in which the inherent jurisdiction of the High Court can be successfully invoked may also arise. In cases falling under this category the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases, it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction under S. 561-A, the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial magistrate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained. Broadly stated that is the nature and scope of the inherent jurisdiction of the High Court under S. 561-A in the matter of quashing criminal proceedings, and that is the effect of the judicial decisions on the point (Vide : In Re: Shripad G. Chandavarkar, AIR 1928 Bom 184, Jagat Chandra Mozumdar v. Queen Empress, ILR 26 Cal 786, Dr. Shankar Singh v. State of Punjab, 56 Pun LR 54 : (AIR 1954 Punj 193), Nripendra Bhusan Roy v. Gobina Bandhu Majumdar, AIR 1924 Cal 1018 and Ramanathan Chettiyar v. Sivarama Subramania, ILR 47 Mad 722 : (AIR 1925 Mad 39)."

8. In *Madhavrao Jiwaji Rao Scindia v. Sambhajirao Chandrojirao Angre*, 1988 (1) SCC 692, a three judges bench of the Hon'ble Supreme Court holds:-

> "7. The legal position is well-settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the court to take into consideration any special

features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilised for any oblique purpose and where in the opinion of the court chances of an ultimate conviction is bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage."

JUDICIAL PRECEDENTS ON QUASHING ON COMPROMISE:

9. A three Judges bench of Hon'ble Supreme Court, in *Gian Singh v. State of Punjab*, 2012(10) SCC 303, has settled the law on quashing on account of compromise/compounding, in the following terms:

> "53. Section 482 of the Code, as its very language suggests, saves the inherent power of the High Court which it has by virtue of it being a superior court to prevent abuse of the process of any court or otherwise to secure the ends of justice. It begins with the words, 'nothing in this Code' which means that the provision is an overriding provision. These words leave no manner of doubt that none of the provisions of the Code limits or restricts the inherent power. The guideline for exercise of such power is provided in Section 482 itself i.e., to prevent abuse of the process of any court or otherwise to secure the ends of justice. As has been repeatedly stated that Section 482 confers no new powers on High Court; it merely safeguards existing inherent powers possessed by High Court necessary to prevent abuse of the process of any Court or to secure the ends of justice. It is equally well settled that the power is not to be resorted to if there is specific provision in the Code for the redress of the grievance of an aggrieved party. It should be exercised very sparingly and it should not be exercised as against the express bar of law engrafted in any other provision of the Code.
>
> 57. Quashing of offence or criminal proceedings on the ground of settlement between an offender and victim is not the same thing as compounding of offence. They are different and not interchangeable. Strictly speaking, the power of compounding of offences given to a court under Section 320 is materially different from the quashing of criminal proceedings by the High Court in exercise of its inherent jurisdiction. In compounding of offences, power of a criminal court is circumscribed by the provisions contained in Section 320 and the court is guided solely and squarely thereby while, on the other hand, the formation of opinion by the High Court for quashing a criminal offence or criminal proceeding or criminal complaint is guided by the material on record as to whether the ends of justice would justify such exercise of power although the ultimate consequence may be acquittal or dismissal of indictment.
>
> 58. Where High Court quashes a criminal proceeding having regard to the fact that dispute between the offender and victim has been settled although offences are not compoundable, it does so as in its opinion, continuation of criminal proceedings will be an exercise in futility and justice in the case demands that the dispute between the parties is put to an end and peace is restored; securing the ends of justice being the ultimate guiding factor. No doubt, crimes are acts which have harmful

effect on the public and consist in wrong doing that seriously endangers and threatens well-being of society and it is not safe to leave the crime-doer only because he and the victim have settled the dispute amicably or that the victim has been paid compensation, yet certain crimes have been made compoundable in law, with or without permission of the Court. In respect of serious offences like murder, rape, dacoity, etc; or other offences of mental depravity under Indian Penal Code or offences of moral turpitude under special statutes, like Prevention of Corruption Act or the offences committed by public servants while working in that capacity, the settlement between offender and victim can have no legal sanction at all. However, certain offences which overwhelmingly and predominantly bear civil flavour having arisen out of civil, mercantile, commercial, financial, partnership or such like transactions or the offences arising out of matrimony, particularly relating to dowry, etc. or the family dispute, where the wrong is basically to victim and the offender and victim have settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may within the framework of its inherent power, quash the criminal proceeding or criminal complaint or F.I.R if it is satisfied that on the face of such settlement, there is hardly any likelihood of offender being convicted and by not quashing the criminal proceedings, justice shall be casualty and ends of justice shall be defeated. The above list is illustrative and not exhaustive. Each case will depend on its own facts and no hard and fast category can be prescribed."

10. In *Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and Ors. vs.* State of Gujarat & anr., Criminal Appeal No. 1723 of 2017, decided on 4.10.2017, a Three Judges Bench of Hon'ble Supreme Court, laid down the broad principles for quashing of FIR, which are reproduced as follows:

"15. The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions :

(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court;

(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

> (v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;
>
> (vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;
>
> (vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;
>
> (viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;
>
> (ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and
>
> (x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

11. In the present case, the offences are not compoundable under section 320 CrPC. However, in view of the entire facts and circumstances of the case, the inherent jurisdiction under section 482 CrPC can be invoked to quash the FIR and subsequent proceedings.

12. A Full Bench of Madhya Bharat High Court, in State v. Gulam Meer (Madhya Bharat), AIR 1956 (Madhya Bharat) 141, holds,

> "16. An offence under Section 279, I.P.C. is distinct from an offence under Section 337 or Section 338, I.P.C. and, therefore, a person convicted of an offence under Section 337 or Section 338, I.P.C. can also be convicted for an offence under Section 279, I.P.C. If, however, the two offences are committed in the same transaction, Section 71, I.P.C. will govern the assessment of punishment."

13. A Co-ordinate Bench of this High Court, in Vinod Kumar Vs. State of HP in Cr. M.M.O No. 14 of 2019 decided on 8-01-2019 held as under:

> "11. In the case at hand also, the offences alleged against the accused do not involve offences of mental depravity or of heinous nature like rape, dacoity or murder and as such, with a view to maintain harmony and peace in society, this court deems it appropriate to quash the FIR as well as consequential proceedings, especially keeping in view the fact that the complainant has compromised the matter and he is no longer interested in carrying on with the criminal proceedings against the accused. Otherwise also, possibility of conviction in the case is bleak and remote, since complainant himself is not interested in carrying on with the criminal proceedings initiated at his behest."

14. In view of the entirety of the facts of the case, as well as judicial precedents, a few of which have been mentioned hereinabove, I am of the considered opinion that continuation of these proceedings will only cause unnecessary burden on the trial Courts but in all likelihood is going to cause distressing hardship on both the victim as well as the accused, without resulting into any fruitful purpose whatsoever. Moreover, our trial Courts are already burdened with so many cases and it will be a total wastage of the valuable time of the Courts. If these types of proceedings are permitted to be continued and the accused are prosecuted, it will serve no purpose whatsoever. Therefore, I am of the considered opinion that this is a fit case where the inherent jurisdiction of the High Court under Section 482 of the Code of Criminal Procedure is invoked to quash the above mentioned FIR and consequent proceedings.

15. In *Himachal Pradesh Cricket Association v. State of Himachal Pradesh (SC)*; 2018 (4) Crimes 324, Hon'ble Supreme Court holds as under:-

> "47. As far as Writ Petition (Criminal) No. 135 of 2017 is concerned, the appellants came to this Court challenging the order of cognizance only because of the reason that matter was already pending as the appellants had filed the Special Leave Petitions against the order of the High Court rejecting their petition for quashing of the FIR/Chargesheet. Having regard to these peculiar facts, writ petition has also been entertained. In any case, once we hold that FIR needs to be quashed, order of cognizance would automatically stands vitiated."

CONSEQUENCES:

16. In *Shakuntala Sawhney v. Kaushalya Sawhney*, (1979) 3 SCR 639, at p 642, *Hon'ble* Supreme Court observed as follows:

> "The finest hour of Justice arise propitiously when parties, despite falling apart, bury the hatchet and weave a sense of fellowship or reunion."

17. Consequently, this petition is allowed and the F.I.R. No. 231/18 dated 03-11-2018, registered at Police Station Dhalli, District Shimla (H.P.) for the commission of offences punishable under Sections 279 & 337 of the Indian Penal Code, is quashed. Since FIR has been quashed, all the consequential proceedings, if any, are also quashed and set aside.

18. The bail bonds are accordingly discharged.

19. Petition is allowed. All pending application(s), if any, also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Chattar Singh ... Petitioner.
Versus
State of Himachal Pradesh ...Respondent

Cr.MP(M) No.969 of 2019
Reserved on : 10-06-2019
Date of decision : 21st June,2019

Narcotic Drugs and Psychotropic Substances Act, 1985 (Act) – Sections 20, 29 & 37 - Regular bail – Rigors of Section 37 of Act- Applicability- Petitioner allegedly supplied charas (3 kg 961 grams) to another accused from whom Police recovered it- Petitioner praying that there is no material except confession of co-accused that he had purchased charas from him (petitioner)- Further, pure resin contents bring recovered material in to less than commercial quantity and rigors of Section 37 of Act not attracted- Held, there is material in shape of CDRS of relevant period between petitioner and person from whom recovery of charas was effected- Also entire recovered substance is to be taken into consideration for determining quantity of substance- Recovered stuff prima-facie falls in commercial quantity- Rigors of Section 37 of Act apply- Petition dismissed. (Paras 13, 17 & 18)

Case referred:
State of H.P. vs. Mehboon Khan (FB), 2014 (2) RCR (Criminal) 447

For the Petitioner : Mr. N.K.Thakur, Senior Counsel with
Mr. Divya Raj Singh, Advocate.
For the Respondent : Ms. Ritta Goswami, Additional Advocate General,
Ms. Divya Sood, Deputy Advocate General
and Mr. Manoj Bagga, Assistant Advocate General.

The following judgment of the Court was delivered:

Anoop Chitkara, Judge

The present petition is under Section 439 of the Code of Criminal Procedure for grant of bail in case FIR No. 53/18, dated 12-05-2018, registered under Sections 20 & 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 at Police Station Tissa, District- Chamba, HP.

2. This Court had issued notice to respondent vide order dated 27-05-2019 and on 17-06-2019 the State had filed the status report.

3. I have heard learned counsel for the petitioner as well as respondent and have also gone through the status report.

Facts

4. The gist of the case of the prosecution is as under:

a) On 11-05-2018, S.I. Madan Lal alongwith S.I. Manoj Kumar, HC Rupinder Singh, HC Deepak Kumar, HHC Raj Kumar and C. Rocky were on patrolling duty in the personal vehicle. They were also carrying investigating kit and patrolling was with a view to detect and get some information about intoxication substances.

b) That around 7:30 p.m. when the police party was returning and had stopped their vehicle at place Pritmas Narwad link road and were talking to each other at that time one person was walking on road from Narvad to Pritmas. He was carrying a white colour plastic bag in his right hand. The police got suspicious due to his demeanor suspecting that he was possessing some contraband or narcotic substance, he was asked to stop, on this, he became nervous.

c) Sub Inspector Madan Lal revealed him his identity and asked him what was he carrying in plastic bag. On this the said person could not give any satisfactory reply. On inquiry, he told his name as Rajesh Kumar, resident of Chamba and aged 21 years.

d) The spot was isolated and unhabitated. Despite this I.O. directed HHC Raj Kumar to bring some independent witnesses to the spot. After 15-20 minutes HHC Raj Kumar return to the spot and told that no independent person could be found.

e) Subsequently, the police party itself conducted the search of said Rajesh Kumar. Police detected the charas in the bag. The weight of the charas was found to be 3kg 961 grams.

f) As per the status report, after completion of the procedural requirements, Rajesh Kumar was arrested.

g) Later on when the alleged charas was sent for testing to Forensic Science Laboratory, Junga, substance was tested as cannabis. The quantity of purified resin in the charas was found 32.95% in the charas.

5. During custodial investigation of Rajesh Kumar, he confessed before the police that he has obtained this charas from Chattar Singh, the present petitioner. Thereafter, the Investigating Officer conducted investigation to gather evidence about the involvement of Chattar Singh, the present bail petitioner. As per the status report the Investigating Officer has found following evidence regarding involvement of Chattar Singh:

a) the confession of Rajesh Kumar to the police wherein he told the police that he had obtained this charas from petitioner.

b) It was further stated by Rajesh Kumar that Chattar Singh told him that one person would contact him near Pritmas and he would recognize him and to handover this bag to such person.

c) It was further confessed that said person would give him Rs. 1,60,000/-.

d) Chattar Singh further told him that in lieu of this job he would give him money.

6. The police also took in possession the call details of mobile of Rajesh Kumar as well as mobile of Chattar Singh. It also came in evidence that mobile Sim number issued to Rajesh Kumar is 78076-50054 and sim number issued to Chattar Singh is 98165-68830.

7. As per the investigating Officer, on 11-05-2018 at around 5:49 p.m. they had talked to each other for 149 seconds. Thereafter, there was a telephonic conversation on four occasions between them. Further on 11-05-2018 at 6:14 p.m. they again spoke for one minute. Therefore, according to the Investigating Officer they were in contact with each other just prior to time Rajesh Kumar was apprehended by the police.

Contentions

8. The contentions of the learned counsel for the petitioner are two fold. Firstly, he says that the confession of co-accused before police cannot read in evidence against the present bail petitioner. To substantiate this contention he has placed reliance on judgment of *Supreme Court AIR 2018 SC 3574 titled Surinder Kumar Khanna Vs. Intelligence Office Directorate* and judgments of this court: *2016(4) Him LR 2134 titled as Kans Raj Vs. State of HP, 2018 (2) Him LR 897 titled as Yashpal Vs. Narcotics Control Bureau* and *2018 (1) HIM L.R. 252 Pawan Dixit Vs. State of HP.* The Second contention of Sh. N.K.Thakur, Senior Advocate for the petitioner is that resin contained in contraband is to be considered. He has also mentioned in paragraph 8 & 9 of bail petition, specifically that resin content in contraband, as per RFSL, is 32.95%.

9. I have also heard Ms. Reeta Goswamin, Additional Advocate General who has stated that the evidence against the accused, is just only the statement of confession, and even if the confession before police is ignored, there is other evidence, which is conclusive in nature. There is evidence of call details between the petitioner and the main accused. Her second contention is that regarding the resin, the matter is already referred to larger Bench in Cr.MP. (M) No. 613/2019, Cr.MP(M) No. 1818/2018, Cr.MP(M) No. 1819/2018 and Cr.MP(M) No. 1771/2018.

Reasoning:

10. In the status report, the reference has been made to report of Regional Forensic Science Laboratory, Junga. Expert after conducting Scientific Chemical Test, gave his opinion as follows: "The Quantity of purified of resin as found in the exhibit stated as Charas is 32.95% w/w. The exhibit is extract of cannabis and sample of charas". Thus the net weight of purified resin comes to 1300 grams (approximately).

11. *In State of H.P. v. Mehboon Khan (FB), 2014 (2) RCR (Criminal) 447*, holds as follows,

> "Para 55.
>
> 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 less 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 less 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."

12. In view of this pronouncement of full bench, the controversy is no more res-integra. The definition of charas as per mandate of Section 2 (iii) of the NDPS Act is :-

" 2 (iii) "cannabis (hemp)" means:-

(a) charas, that is, the separated resin, in whatever form, whether crude or purified, obtained from the cannabis plant and also includes concentrated preparation and resin known as hashish oil or liquid hashish;

(b) Ganja, that is, the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops),

(c) any mixture , with or without any natural material, of any of the above forms of cannabis or any drink prepared therefrom;

(iv) "cannabis plant" means any plant of the genus cannabis;"

13. It is clear that as per Section 2(iii) (a) of the NDPS charas is the resin in whatever form whether crude or purified, provided such resin has been obtained from the canabis plant. It is common knowledge that charas is made when resin is separated from flowering tops/ leaves of cannabis plant. That is why, Legislature, used the word "separated resin". Now when resin is separated from the flowering tops as well as leaves of the cannabis plant, it would be crude or purified, depending upon the procedure adopted for such process. If the process for separating resin is scientific and done in good chemical laboratory or done by experts using modern instruments, then the resin so separated would be very purified. To the contrary when the resin is separated from the leaves and flowers of cannabis plants by using old age traditions or manual process, like rubbing of body or hands or by splashing on wooden logs or through leather, then such resin would be in crude form. The legislature did not differentiate between the charas whether crude or purified. Therefore, the percentage of resin in cannabis alone is not charas and prima facie the entire cannabis irrespective of percentage of resin is charas.

14. Be that as it may, the matter is subject matter of adjudication before the larger bench and it is for the larger bench to adjudicate upon this issue.

15. The prosecution did not say that the statement of accused is under Section 67 of the Narcotic Drugs and Psychotropic Substances Act

"67. Power to call for information, etc.

Any officer referred to in Section 42 who is authorised in this behalf by the Central Government or a State Government may, during the course of any enquiry in connection with the contravention of any provisions of this Act-

(a) Call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provisions of this Act or any Rule or order made thereunder;

(b) require any person to produce or deliver any documents or thing useful or relevant to the enquiry;

(c) examine any person acquainted with the facts and circumstances of the case."

16. Therefore, this statement is prima facie hit by Sections 25 and 26 of Indian Evidence Act. At this stage of bail no finding is required on this score. However, the statement of co-accused should not be considered as evidence to curtail the liberty.

17. Another evidence is of proximity. The evidence of call details, collected by the Investigating Officer prima facie points to the facts that accused Rajesh Kumar and present petitioner Chattar Singh were in contact each other on phone just prior to 7:30 p.m., when Rajesh Kumar was apprehended by the police. The initial evidence is they had contacted with each other on phone on four occasions. This piece of evidence, for the purpose of bail is material evidence. The quantity of contraband is commercial. The rigors of the Section 37 of Narcotic drugs and Psychotropic Substances Act, would restrict the entitlement of bail.

18. As on date, the petitioner has no case for bail because bulk quantity involved is greater than 1 kg and resin alone cannot be taken to determine the quantity.

19. Therefore, it shall be open for the petitioner to file a bail petition, on the ground of percentage of resin, if the findings in the above referred matter are given in his favour by larger bench.

20. In view of the entire discussions, the petitioner is not entitled to bail, at this stage. Resultantly, the bail petition is dismissed.

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

COPC No. 1 of 2018, along with COPC No. 235 of 2017, COPC No. 88 of 2018, COPC No.257 of 2018, COPC No.78 of 2018 and COPC No.67 of 2018.
Reserved on : 26th April, 2019 and, 21st May, 2019.
Decided on : 30th May, 2019.

1. COPC No. 1 of 2018.

Chhavinder Kumar Shandil .....Petitioner.
Versus
Shri Anil Khachhi, Addl. Chief. Secretary ....Respondent.

2. COPC No. 235 of 2017.

Vinod Kumar Negi & Anr. .....Petitioners.
Versus
Anuradha Thakur and Anr. ....Respondents.

3. COPC No. 88 of 2018.

Narinder Singh Naik .....Petitioner.
Versus
Shri Anil Khachhi and Anr. ....Respondents.

4. COPC No. 257 of 2018.

Parveen Gupta .....Petitioner.
Versus
Devesh Kumar and Anr. ....Respondents.

5. COPC No. 78 of 2018.

Jagdish Chand .....Petitioner.
Versus
Anil Khachi and Anr. ....Respondents.

6. COPC No. 67 of 2018.

Prem Chand .....Petitioner.
Versus
Shri Anil Khachhi and Anr. ....Respondents.

Constitution of India, 1950 – Article 215 – Contempt of court orders- Proof- Held, mere purported disobedience of an order would not per se tantamount to an act of contempt nor any penal action can be initiated against purported contemnors unless orders are actually infringed- When order is amenable to two interpretations and there is no intentional infringement, no contempt is made out- In earlier litigation, High Court directing counting of period spent by petitioner while working on contract basis for all consequential benefits including seniority- Pursuant to subsequent orders of Hon'ble Supreme Court and of High Court in litigation commenced at instance of other affected officials, department prepared seniority list- Subsequent judgment diluted impact of earlier verdict giving consequential benefits to petitioner- No case of contempt of earlier judgment made out- Petition dismissed. (Paras 5 to 9)

Cases referred:

A.P. SRTC and others vs. G. Srinivas Reddy and others, (2006)3 SCC 674

Anil Ratan Sarkar vs. Hirak Ghosh, 2002 AIR (SC) 1405

C. Shakunthala and others v. H.P. Udayakumar and another, (2012)2 SCC 294

For the Petitioner(s): Mr. Ramakant Sharma, Sr. Advocate with Mr. T.S. Chauhan, Advocate in COPC No.1 of 2018, Ms. Ranjana Parmar, Sr. Advocate with Mr. Karan Parmar, Advocate in COPC No.88 of 2018, and, 235 of 2017, and, in COPC No.67 and 78 of 2018.

Mr. C.N. Singh, Advocate, in COPC No.257 of 2018.

For the Respondents: Mr. Vivek Sharma, and, Mr. Vijay Kumar, Verma, in COPC Nos. 1 of 2018, 235 of 2017, 88 of 2018 and 257 of 2018.

Mr. Hemant Vaid, Addl. A.G. with Mr. Y.S. Thakur, and, Mr. Vikrant Chandel, Dy. A.Gs., in COPC No.78 of 2018 and 67 of 2018.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Since, all the afore contempt petitions, stand, directed against, the order(s) borne in Annexure A-1, and, when therefrom, rather it is contended, that, the afore Annexure rather intentionally and willfully, hence, disobeying the mandate, recorded by this Court, upon, CWP No.497 of 2013-J, tiled as Shri Chhavinder Kumar Shandil vs. State of H.P., decided on 14th May, 2013, hence, all the contempt petitions, are, amenable, for, rendition(s) thereon, of, hence a common order.

2. The decision rendered, upon, CWP No. 497 of 2013, titled as Chhavinder Kumar Shandil vs. State of H.P., was, anvilled, upon, a decision prior thereto, hence, rendered by a co-ordinate Bench, of, this Court, upon, CWP(T) No. 6785 of 2008, titled as Narender Singh Niak vs. State of H.P., and, the afore verdict also acquired the requisite conclusivity, and, binding force, given, the afore rendition made, by the Hon'ble Single Judge of this Court, also coming to be affirmed, in, a verdict made, on LPA No.271 of 2010, titled as State of H.P. vs. Narender Singh Niak, and, others. The benefits/reliefs, as stood bestowed therethrough, upon, the petitioner(s), in CWP No. 497 of 2013, stand(s) extracted hereinafter:-

> "3. It is seen that the issue in question is squarely covered by the decision dated 14.9.2010, rendered by learned Single Judge of

> this Court in CWP(T) No.6785/2008, titled as Narender Singh Naik vs. State of H.P. and others as affirmed in judgment dated 9.4.2013, rendered in LPA No.271 of 2011, titled as State of Himachal Pradesh and others vs. Narender Singh Naik, wherein benefits, in view of ratio of law laid down in Direct Recruits Class II Engineering Officers' Association Vs. State of Maharashtra and others (1990)2 SCC 715, were accorded to the petitioner. The said judgment has attained finality. As such, office order dated 16.5.2012 (Annexure P-6) is quashed. Respondents are directed to consider the case of the petitioner for counting the period he has worked on contract basis with effect from his initial date of joining till regularization, with all consequential benefits. Needful be done within a period of three months from the date of production of certified copy of the judgment."

3. Be that as it may, the afore verdict rendered, in CWP No. 497 of 2013, titled as Shri Chhavinder Kumar Shandil vs. State of H.P. and others, and, upon, CWP (T) No.6785 of 2008, titled as Narender Singh Naik vs. State of H.P. and others, came to be assailed by the aggrieved therefrom, before the Hon'ble Apex Court. However, during the pendency of the afore apposite SLPs, before the Hon'ble Apex Court, one Ravi Shankar, and, one Rakesh Sharma, who stood recruited, to the post of Junior Engineers, rather in consonance with the requisite R&P Rules, hence, therein filed an application seeking therethrough, rather their impleadment in the afore SLP(s). The apposite SLP(s), including the afore intervener's applications, preferred therebefore, by Ravi Shankar, and, by Rakesh Kumar, were all under a common verdict, rendered thereon, on 26.04.2017, rather came to be disposed of/dismissed, with, the hereinafter extracted observations:-

> "Heard learned counsel for the parties.
>
> We do not find any ground to interfere with the impugned order. However, we find that the interveners have a grievance that they were not heard and their seniority is affected by the impugned order. If it is so, it will be open to them to move the High Court and the High Court may consider the matter on merits in accordance with law.
>
> The special leave petition is disposed of. The application for intervention also stand disposed of.
>
> Pending applications, if any, are also stand disposed of."

A reading of the afore extracted, common verdict, made by the Hon'ble Apex Court, upon, the apposite SLPs, and, upon the afore application(s), makes apparent, the trite factum (a) that the Hon'ble Apex Court rather dismissing the SLPs preferred therebefore, by the aggrieved, and, directed against, the pronouncement, rendered by this Court in verdicts supra, (b) and, when, hence, conclusivity, is, assumed by the verdicts, rendered by this Court, in Narender Singh Naik's case supra, (c) thereupon, the learned counsel appearing for the petitioner(s) hence made a vehement submission, before this Court, that the order, borne in Annexure A-1, being contemptuous, as it intentionally or willfully disobeys, the conclusive verdicts rendered, by this Court, in Narender Singh Naik's case (supra), and, in Chhavinder Kumar Shandil's case (supra).

4. However, before proceeding to render findings, in the affirmative, vis-a-vis, the afore contention, reared before this Court, by the learned counsel for the petitioners, (i) it is also necessary, to, bear in mind, the afore extracted portion, of the verdict, rendered by

the Hon'ble Apex Court, upon, the apposite SLPs, wherein, the interveners therein, who carried, the, capacity of direct recruitees, vis-a-vis, the post, of, Junior Engineers, upon, prior thereto strict compliance, being meted by the recruiting agency, vis-a-vis, the governing mandate thereto, (ii) embodied in the apposite R&P Rules, and, wherein echoings, are, existing, qua liberty being preserved qua the afore, by the Hon'ble Apex Court, by it, rather relegating them to redress their grievance, vis-a-vis, their seniority, being rather affected, upon, strictest compliance, being meted by the respondents/contemners, vis-a-vis, the mandate (supra), recorded by this Court, (iii) and, whereas, for the reasons aforestated, the afore verdicts rather acquiring conclusivity and binding effect, qua hence, in the face, of the, requisite liberty being reserved, qua the direct recruits qua theirs redressing their grievance, qua their seniority being affected, upon, strictest compliance being meted by the respondents, vis-a-vis, the verdicts (supra), rather conspicuously before this Court (iv) rather qua wheher intentional, and, deliberate disobedience(s) thereof, hence, therefrom, generating against the contemners, and, theirs hence inviting action, under, the Contempts of Courts Act. The preservation, of, availments, of, remedy(ies), vis-a-vis, the direct recruits, to the post of JE, for hence theirs espousing therein claim(s) qua their seniority being affected, upon, the strictest compliance insisted to be meted, vis-a-vis, the mandate encapsulated in verdicts (supra), (v) hence, constrained the direct recruits, to the post of JE, to motion this Court, through, CWP No. 1205 of 2017, titled as Ravi Shankar and another vs. State of H.P., CWP whereof stood decided by this Court on 2.6.2017, and, the relevant paragraph No.10 and 11 whereof, stand(s) extracted hereinafter:-

> "10. To a specific query, we are informed that as on date no seniority list stands prepared, in terms of directions issued by this Court.
>
> 11. Procedurally, first provisional seniority list is prepared, which obviously is to be finalized after receiving objection, if any, thereto, at which stage petitioners can take resort to remedies in accordance with law."

A perusal thereof, disclose qua a direction being made upon the respondents, to, in accordance with, the relevant procedures, hence, prepare a provisional seniority list, after inviting objections, and, thereafter the aggrieved therefrom, being permitted, to, recourse the legally available, vis-a-vis, them hence all remedies. It appears that in pursuance, to, the afore directions rendered by this Court, in, CWP No.1205 of 2017, hence, upon, the respondents, they rather proceeded to make the afore annexures.

5. The learned counsel appearing for the petitioners have contended with much vigour before this Court, that, the conclusive, and, bindings orders recorded, by this Court, in Narender Singh Naik's case (supra), and, in Chhavinder Kumar Shandil's case (supra), though rather contain directions "to consider", the case of the petitioners, for counting the period they, worked on contract basis, with effect from their initial date of joining till regularization, with all consequential benefits, hence, thereupon, the afore consideration order, being readable as a peremptory diktat, and, also it operating, as, a mandamus, upon, the respondents, (i) and, the making of Annexure A-1 by the respondents, echoing qua the respondents rather intentionally and, willfully disobeying, the afore verdicts, rendered by this Court. In making the afore submission, the learned counsel appearing for the petitioners, places reliance, upon, a verdict of the Hon'ble Apex Court, rendered in a case titled as ***A.P. SRTC and others vs. G. Srinivas Reddy and others***, reported in ***(2006)3 SCC 674,*** the relevant paragraphs Nos. 16 and 27 stand extracted hereinafter:-

> "15. Where an order or action of the State or an authority is found to be illegal, or in contravention of prescribed procedure, or

> in breach of the rules of natural justice, or arbitrary/unreasonable/ irrational, or prompted by mala fides or extraneous consideration, or the result of abuse of power, such action is open to judicial review. When the High Court finds that the order or action requires interference and exercises the power of judicial review, thereby resulting in the action/order of the State or authority being quashed, the High Court will not proceed to substitute its own decision in the matter, as that will amount to exercising appellate power, but require the authority to 'consider' and decide the matter again. The power of judicial review under Article 226 concentrates and lays emphasis on the decision making process, rather than the decision itself.
>
> 16. The High Courts also direct authorities to 'consider', in a different category of cases. Where an authority vested with the power to decide a matter, fails to do so in spite of a request, the person aggrieved approaches the High Court, which in exercise of power of judicial review, directs the authority to 'consider' and decide the matter. In such cases, while exercising the power of judicial review, the High Court directs 'consideration' without examining the facts or the legal question(s) involved and without recording any findings on the issues. The High Court may also direct the authority to 'consider' afresh, where the authority had decided a matter without considering the relevant facts and circumstances, or by taking extraneous or irrelevant matters into consideration. In such cases also, High Court may not examine the validity or tenability of the claim on merits, but require the authority to do so."

Further thereonwards, the learned counsel appearing for the petitioners, have also placed reliance, upon, a decision of the Hon'ble Apex Court, rendered in a case titled as ***C. Shakunthala and others v. H.P. Udayakumar and another,*** reported in ***(2012)2 SCC 294,*** the relevant paragraph No.21 whereof stands extracted hereinafter:-

> "21. We have already referred to the stand of the complainant, his specific assertion with reference to earlier orders and the defence of the respondent-accused as well as the prima facie conclusion by the Division Bench that the complainant has made out a case against the accused to proceed further and adjourned the matter for two weeks for framing charges. When such is the position, it is not understandable how another coordinate Bench after two years without any discussion and adverting to the relevant materials relied on by earlier coordinate Bench passed a cryptic order by dismissing the contempt petition. We are satisfied that when the coordinate Bench on earlier occasion, that is, on 9.6.2006, based on the acceptable materials prima facie concluded that charges have to be framed, it is but proper by the present Bench to arrive at and take a final decision in the light of the material formulated by the earlier Bench. We are not saying that the complainant has made out a case for guilty of contempt of courts but the prima facie conclusion arrived at by the earlier Bench in the year 2006, based on the acceptable materials, cannot be ignored by another Bench at the time of the

> passing of the final order as if it is an appellate court. In view of the same, we have not other option except setting aside the impugned order and remitting the matter to the High Court for passing a fresh order."

On the afore anvil, they make submission, that the rendition made by this Court, upon, CWP No. 1205 of 2017, untenably, and, unjustifiably making interferences, and, also scuttling the effect of the conclusive, and, binding verdicts prior thereto rendered in Chhavinder Kumar Shandil's case, and, in Narender Singh Naik's case (supra), (i) and, thereupon, a vociferous submission, is made before this Court, that, yet, the afore intentional and willful disobedience(s), vis-a-vis, the afore conclusive, and, binding verdicts recorded by this court, making loud emergences, and, thereupon, the conscience of this Court, being stirred, to initiate penal action, against, the respondents, under, the Contempt of Courts Act.

6. However, for the reasons to be assigned hereinafter, the afore submission(s) is/are straightway rejected, (a) as, the learned counsel for the petitioners, are, grossly unmindful, to the directions rendered, by this Court, in CWP No. 1205 of 2017, upon, the respondents, (b) wherethrough, a mandate was cast, upon, them, to prepare the provisional seniority list, and, after inviting objections, from, the aggrieved therefrom, hence, thereafter draw a final seniority list. The afore writ petition being constituted, before this Court, by the writ petitioners therein, in pursuance to the apt liberty being preserved qua them by the Hon'ble Apex Court, through orders rendered on 26.4.2017, in the apposite SLPs, and, also upon, their application(s) filed therebefore, wherein, they strived, for, theirs being impleaded therebefore as interveners, given their seniority coming to be likely to be affected, in case strict compliance, is, insisted to be meted by the respondents, vis-a-vis, the decisions, rendered in Narender Singh Naik's case (supra), and, in Chhavinder Kumar Shandil's case (supra), (c) thereupon, when in pursuance, to the afore liberty, preserved, vis-a-vis, them, by the Hon'ble Apex Court, this Court in CWP No. 1205 of 2017, hence, proceeded to render the afore extracted directions, upon, the respondents, (d) thereupon, it can be concluded, that, the subsequent judgement, rendered by this Court CWP No. 1205 of 2017, hence permissibly, and, vindicably rather diluting the impact, of, the prior thereto verdicts, recorded by this Court in Narender Singh Naik's case (supra), and, in Chhavinder Singh Shandil's case (supra), (e) also reiteratedly when the afore dilution, is, permitted by the Hon'ble Apex Court, while making renditions, upon, the apposite SLPS on 26.4.2017. (f) AND when visibly, the earlier verdicts rendered by this Court, in, Chhavinder Kumar Shandil's case (supra), and, Narender Singh Naik's case (supra), were made, upon, the interveners, being left outside the array, of, the legal contestants, rather in the afore earlier verdicts, (g) whereas, with theirs, being recruited directly to the apposite post of JE and, after strict compliance being meted, vis-a-vis, the apposite R&P Rules rather governing recruitments thereto, (h) and, when the petitioners herein, were, contrarily therewith, were, initially recruited, on a contractual basis, against the post of JE, and, though the period w.e.f. initial date of their joining in service, even on a contractual basis, till regularization, (i) were, both, in the Narender Singh Naik's case (supra), and, in Chhavinder Kumar Shandil's case (supra), rather stood directed to be reckoned, and, computed, vis-a-vis, for all consequential benefits, (j) thereupon, the order for consideration, rendered in the afore verdicts, does, in view of the afore preserved rights, vis-a-vis, the direct recruits by the Hon'ble Apex Court, vis-a-vis, their afore rights/grievances being redressable, by theirs filing writ petition(s), (k) and, whereafter, the direct recruits, in pursuance thereto, constituted hence writ petition CWP No.1205 of 2017, (l) wherein directions, were rendered, for preparation of a provisional seniority list, and, upon objections thereto being invited, from the aggrieved therefrom, rather a further direction stood rendered hence for

preparation, of a final seniority list. (m) Naturally, and, reemphassisingly, hence, render, the, order borne in Annexure A-1, rather being construable, to be neither willfully and intentionally disobeying, the verdicts rendered in Narender Singh Naik's case (supra), and, in Chhavinder Kumar Shandil's case (supra).

7. Be that as it may, the decision, hence purportedly contemptuous, as, borne in Annexure A-1, when reiteratedly stands generated, by the orders recorded by this Court, in CWP No. 1205 of 2017, and, with the afore orders, being rendered in pursuance, to the directions rendered by the Hon'ble Apex Court, and, also when they are rendered in consonance, with the requisite R&P Rules, (i) thereupon, the orders for consideration, rendered in Chhavinder's case (supra), and, Narender Singh Naik's case (supra), vis-a-vis, all the consequential benefits, arising, from counting of the period, of, service of the petitioners, rendered on a contractual basis, with effect from their initial date of joining till regularization, (ii) is/are not readable, as, working towards hence any inference qua rather, the, respondents/contemners, concomitantly also proceeding to infringe, the purported seniority, of, direct recruits, vis-a-vis, the contractual appointees, and, appertaining, to, the contentious post, (iii) and, conspicuously when the afore right is/ maybe preserved, through, the apposite rules, vis-a-vis, the afore direct recruitees, vis-a-vis, the post of JE, and, nor is readable, as purveying to the petitioners, any indefeasible right, to beyond the ambit of the relevant rules, governing, the incidental thereto, pecuniary benefits, rather stake any claim, for theirs being bestowed, all the afore claims, (iv) and, obviously when hence the afore renditions, would bring infractions of rules, and, of rights preserved, vis-a-vis, the direct recruitees, in the contentious seniority list, conspicuously rather by the Hon'ble Apex Court, (vi) hence, the respondents/contemners, cannot be inferred, to, in the making, of, Annexure A-1, hence, intentionally or willfully hence disobey the orders rendered by this Court. Contrarily, a right is vested in the petitioners herein, to, through a newly constituted writ petition, hence challenge the afore Anexure A-1.

8. Dehors the above, the mere purported disobedience of an order rendered by this Court, would not, per se tantamount, to an act of contempt nor any penal action can be initiated against the purported contemners, unless, the orders contended, to be purportedly infringed, is/are not amenable, for, two interpretations being made thereon, and, when hereat the purportedly willfully or intentionally infringed order(s), are, rather open, for, two interpretations, (i) thereupon, when, one, of, the interpretation, as, made thereon by the purported contemners, is/are both a justifiable, and, a vindicable interpretation, hence, thereof, (ii) thereupon, the respondents/ contemners, would not invite any penal action, for, contempt, rather being initiated against them. In taking the afore view, this Court finds support from a verdict rendered by the Hon'ble Apex Court in a case titled as ***Anil Ratan Sarkar vs. Hirak Ghosh, reported in 2002 AIR (SC) 1405.*** Furthermore, a reading of the Annexure A-1 also bolsters, an inference that prima facie, it is within the domain of law, and, the rules governing the rights, of all the affected, hence, the conscience of this Court is not stirred, to hence initiate, any penal action for contempt, against, the respondents.

9. For the foregoing reasons, the instant contempt petitions are dismissed, and, the respondents herein are discharged. All pending applications also stand disposed of.

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

Dalip Kumar ....Petitioner

Versus
State of Himachal Pradesh …Respondent

Cr.MP(M) No. 1059 of 2019
Decided on: 25th June, 2019

Narcotic Drugs & Psychotropic Substances Act, 1988 – Sections 21, 29 & 37– Recovery of heroine (101.72 grams)- Regular bail – Grant of - Held, charge sheet stands filed in Court- Other accused on bail- Accused not in position to tamper with evidence or flee away from justice- Petitioner cannot be kept behind bars for unlimited period- Petitioner ordered to be released on conditional bail.(Para 7)

For the petitioner:	Mr. Yashveer Singh Thakur and Mr. Prashant Sharma, Advocates.
For the respondent/State:	Mr. P.K. Bhatti, Additional Advocate General with Ms. Svaneel Jaswal, Deputy Advocate General. SI Karan Singh, Police Station Sadar Bilaspur, District Bilaspur, H.P.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge. *(oral).*

The present bail application has been maintained by the petitioner under Section 439 of the Code of Criminal Procedure seeking his release in case FIR No. 99 of 2019, dated 24.04.2019, under Sections 21 and 29 of the ND&PS Act, registered in Police Station Sadar Bilaspur, District Bilaspur, H.P.

2. As per the averments made in the petition, the petitioner is innocent and has been falsely implicated in the present case. He is resident of the place neither in a position to tamper with the prosecution evidence nor in a position to flee from justice. No fruitful purpose will be served by keeping him behind the bars for an unlimited period, so he be released on bail.

3. Police report stands filed. As per the prosecution story, on 24.04.2019, at about 06:20 a.m., a police team laid a *nakka* at place Nauni Chowk and stopped a taxi, bearing registration No. HP01A-4615, for checking. There were three occupants in the said taxi. The driver disclosed his name as Chaman Sharma (co-accused) and other two occupants divulged their names as Dalip Kumar (petitioner herein) and Ram Pal (co-accused). The petitioner and other accused could not give any satisfactory reply when they were asked about the First Aid Kit, which was kept the front passenger seat. Police associated independent witnesses and checked the said First Aid Kit, which contained some substance, which was Heroine. On weighment, the contraband was found to be 101.72 grams. Therafter, the police completed all the codal formalities. The petitioner and the accused persons were arrested. Statements of the witnesses were recorded. The accused persons and the petitioner were medically examined. The petitioner disclosed to the police that he purchased the contraband from one Negro. On scientific analysis report revealed that the sample is that of Heroine. As per the police, the contraband has been purchased by the accused and the petitioner from some unknown Negro. On 07.06.2019 *challan* stands presented in the Court. The co-accused persons were enlarged on bail by the learned Trial

Court. During the course of investigation, it was unearthed that the petitioner is also involved in four other offences and FIRs have been registered against him. As per the police, the petitioner is very clever person and in case at this stage he is enlarged on bail, he may flee from justice and may also tamper with the prosecution evidence. Lastly, it is prayed that the bail application of the petitioner be dismissed, as the petitioner was involved in a serious offence.

4. I have heard the learned Counsel for the petitioner, learned Additional Advocate General for the State and gone through the record, including the police report, carefully.

5. The learned Counsel for the petitioner has argued that the petitioner has been falsely implicated in the present case. He has further argued that the petitioner is resident of the place and neither in a position to tamper with the prosecution evidence nor in a position to flee from justice. He has argued that co-accused have been enlarged on bail, so the petition be allowed and the petitioner be also enlarged on bail. Conversely, the learned Additional Advocate General has argued that the petitioner was found involved in a serious offence and his involvement was also found in other serious offences. He has further argued that in case the petitioner is enlarged on bail, he may tamper with the prosecution evidence and may also flee from justice. It has been argued that the bail application of the petitioner may be dismissed.

6. In rebuttal the learned Counsel for the petitioner has argued that the petitioner cannot be kept behind the bars for an unlimited period, especially when the other accused persons have been enlarged on bail, so the petition be allowed and the petitioner be enlarged on bail.

7. At this stage, after taking into consideration the manner in which the offence is alleged to have been committed, the fact that other accused persons have been enlarged on bail by the learned Trial Court, investigation in the case is complete, *challan* stands presented in the Court, the petitioner is neither in a position to tamper with the prosecution evidence nor in a position to flee from justice, as he is resident of the place, the quantity of the recovered contraband and all other facts, which have come on record, and without discussing the same at this stage, this Court finds that the petitioner cannot be kept behind the bars for an unlimited period and the ends of justice would only be met in case the petitioner is released on bail. Accordingly, the petition is allowed and it is ordered that the petitioner, who has been arrested by the police, in case FIR No. 99 of 2019, dated 24.04.2019, under Sections 21 and 29 of the ND&PS Act, registered in Police Station Sadar Bilaspur, District Bilaspur, H.P., shall be released on bail forthwith in this case, subject to his furnishing personal bond in the sum of `20,000/- (rupees twenty thousand) with one surety in the like amount to the satisfaction of the learned Trial Court. The bail is granted subject to the following conditions:

(i) That the petitioner will appear before the learned Trial Court/Police/authorities as and when required.

(ii) That the petitioner will not leave India without prior permission of the Court.

(iii) That the petitioner will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Investigating Officer or Court.

8. In view of the above, the petition is disposed of.

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

Darshana Devi and another ....Appellants.

Versus

State of Himachal Pradesh ...Respondent.

RSA No.: 48 of 2019.
Decided on: 18.06.2019.

Specific Relief Act, 1963 – Section 38 – Permanent prohibitory injunction- Grant of- Essential requirements- Held, person has to prove two things, he is in lawful possession of disputed land and second defendant tried to interfere or disturb such possession- On facts, suit land vacant on spot and taken care by Municipal Body- During settlement it is recorded in possession of 'bartandarans'- Plaintiff not in possession and not entitled for injunction. (Paras 11 to 13)

Abadi-deh- Possession- Inference as to- Held, in case of abadi-deh land, possession follows title. (Para 8)

For the appellants : Mr. Rahul Mahajan, Advocate.

For the respondent : Mr. Dinesh Thakur, Additional Advocate General with M/s R.P. Singh and Amit Kumar Dhumal, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this appeal, appellants have challenged the judgment and decree passed by the Court of learned Civil Judge (Sr. Divn.), Court No. 1, Nurpur, District Kangra, HP, dated 23.07.2014, vide which a suit filed by the appellants/ plaintiffs for declaration qua the suit land as also for possession of the same with consequential relief of permanent injunction, restraining the defendants permanently from interfering in any manner over the peaceful possession of the plaintiffs over the suit land, was dismissed and also the judgment and decree passed by the learned Additional District Judge-1, Kangra at Dharmshala, Circuit Court at Nurpur, District Kangra, HP, in Civil Appeal No. 27-N/XIII/2014, vide which their appeal against the judgment and decree passed by the learned trial Court stands rejected.

2. Learned Counsel for the parties have been heard today for admission purpose.

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

Appellants herein (hereinafter referred to as the 'plaintiffs') filed a suit for declaration that they were owners in possession of the land comprised in Khata No. 752

min, Khatauni No. 962 min, Khasra Nos. 3202, 3204 and 3208, plots 3 (old Khasra Nos. 837 min, 837 min, 837 min), land measuring 424.79 sq meters, situated in Up-Mohal Rampuri, Nurpur town, Tehsil Nurpur, District Kangra, HP (hereinafter referred to as the 'suit land') and that they were entitled to remain as owners in possession in future also of the suit land and entries reflecting the defendants as owners in the ownership column and *Table Hakuk Bartandaran* in the possessory column in revenue record were wrong, null and void and against law and facts as defendants never remained in possession in any capacity over the suit land and were having no right, title and interest over the suit land. According to the plaintiffs, the suit land was coming in their possession since the time of their ancestors. The *abadi* came to plaintiffs from the original owner Laxman. After the death of Laxman, suit land was inherited by Bhago and after Bhago by Kalu. The suit land was inherited by predecessor-in-interest of the plaintiffs Mangat Singh from Kalu and after the death of Mangat Singh, the same was inherited by the plaintiffs on the basis of Will dated 18.12.1999 executed by Mangat Singh in favour of the plaintiffs. As per the plaintiffs settlement staff of the State had done great illegality at the back and without the consent of the plaintiffs by making entries in favour of the defendants which entries were wrong, illegal, null and void and not binding upon the plaintiffs.

4. The suit was resisted by the defendants. It was denied that there was any ancestral house of plaintiffs over the suit land or that plaintiffs were in the possession of the land since the time of their ancestors. As per the defendants, during settlement, suit land was found vacant and the local inhabitants were using the same as '*Chargah Bila Darkhatan*'. Accordingly, entries were made in this regard as per the instructions of the Financial Commissioner. No objection was raised at the time of settlement by the plaintiffs or their ancestors. Said land was presently being managed and maintained by the Municipal Committee, Nurpur, and record of constructed area was duly prepared and maintained by the Municipal Committee, Nurpur and plaintiffs had no right, title or interest over the same.

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 entries appearing in the record of rights showing the defendant as owner of the suit land and 'Tabe Kahuk Bartandaran' in the possession of the same are wrong, null and void and not binding on the rights of the plaintiffs? OPP*
>
> *3. Whether the plaintiff is entitled for the consequential relief of permanent injunction, as prayed for? OPP*
>
> *4. Whether the suit is not maintainable? OPD*
>
> *5. Whether this Court has no jurisdiction to tray and entertain the present suit? OPD*
>
> *6. Whether the plaintiff has no cause of action to file the present suit? OPD*
>
> *7. Whether the suit is bad for non-joinder of necessary parties? OPD*
>
> *8. Whether the suit is time barred? OPD*
>
> *9. Whether the suit is not properly valued for the purposes of court fee and jurisdiction? OPD*
>
> *10. Whether the plaintiff is estopped to file and maintain the suit due to her own act and conduct? OPD*
>
> *11. Relief."*

6. On the basis of pleadings and evidence led by the parties in support of their respective cases, the issues so framed were answered by the learned trial Court as under:-

"Issue No.1 : No.
Issue No. 2 : No.
Issue No. 3 : No.
Issue No.4 : Yes.
Issue No. 5 : Yes.
Issue No. 6 : Yes.
Issue No. 7 :No.
Issue No. 8 :Yes
Issue No. 9 :No.
Issue No. 10 :No.
Final Order : The instant suit is dismissed as per the operative portion of this judgment."

7. Learned trial Court dismissed the suit by holding that in a suit for permanent injunction, plaintiff has to demonstrate that he is in possession of the suit land and as on the date of the suit, he was in lawful possession of the suit property and defendant tried to interfere or disturb such lawful possession. Learned trial Court also held that where the property is a building or building with appurtenant land, there may not be much difficulty in establishing possession. But if the property is a vacant site, which is not physically possessed, used or enjoyed, then the principle is that possession follows title. It held that if two persons claim to be in possession of a vacant site, one who is able to establish title will be considered to be in possession as against who is not able to establish title. Learned trial Court thereafter held that the suit land comprised of three plots measuring 424.79 sq meters and as per *jamabandi* for the year 2002-03, the suit land was owned by the State and was shown to be in the possession of *Bartan Daran*. It further held that the suit land was described as '*charagah*'. There was no tax receipt, water connection receipt or other document to show that plaintiffs were still having *abadi* over the suit land. Plaintiffs' witnesses had stated that the suit land was vacant and Municipal Committee was taking care of that land. Learned trial Court held that claim of the plaintiffs that they still had *abadi* over the suit land was devoid of any evidence. Learned trial Court also held that as revenue entries could be assailed before a revenue Court, the Civil Court had no jurisdiction to try the suit and the suit was not maintainable under the garb of declaration. It also held that it stood established that plaintiffs were not having proprietary rights over the suit land, thus, plaintiffs had no cause of action to file and maintain the suit. On these bases, learned trial Court dismissed the suit.

8. Learned Appellate Court upheld the findings returned by the learned Trial Court. It held that Ext. P-9 to Ext. P-12, which were *Jamabandi*s pertaining to the suit land demonstrated that the suit land was abIadi, owned and possessed by the proprietor of Tikka. The suit land had been carved out from Khasra No. 837, measuring 218 Kanals 6 *Marlas*. Large part of the land was '*gair mumkin abadi*'. *Jamabandi*s categorically demonstrated that the suit land was originally part of a big chunk of land. It held that as far as *abadi deh* is concerned, possession follows the title and to substantiate their possession, plaintiff Ravinder Singh, who entered the witness box as PW1, in his cross examination, could not tell as to whose land was situated towards southern and western side of the suit land. He had not preferred any appeal qua entries made during settlement. He had denied that *Bartandaran* were in possession of the suit land. Learned Appellate Court also held

that PW2 Harbans Singh and PW3 Chamaru Ram, who were examined as plaintiffs' witnesses, feigned ignorance to the fact that as to in which Ward the suit land was situated and Chamaru Ram, in fact, admitted that he was resident of Bharmour and had no landed property in Nurpur. Learned Appellate Court also held that during settlement in Municipal area, entry of *abadi deh* in government notification were changed in the names of individual owners, who were found in possession on the spot and during settlement operation, the land, which was found vacant on the spot by the Settlement Collector, was recorded to be owned by the State of H.P. and in possession of *Kabza Swayam Tabe Hakuk Bartandaran* as reflected in the copy of *Misal Haquiat Bandobast Jadid* Ext. P-5. Learned Appellate Court also held that plaintiffs miserably failed to substantiate that they were proprietors of Mahal Lagore wherein the suit land was situated within the *Lal Lakeer.* Learned Appellate Court thus while concurring with the findings returned by the learned Trial Court, dismissed the appeal.

9. Feeling aggrieved, the appellants have filed the present appeal.

10. I have heard learned Counsel for the parties for the purpose of admission.

11. There are concurrent findings returned by both the learned Courts below that the plaintiffs were not in possession of the *abadi* land/suit land. These findings have been returned by the learned Courts below on the basis of record. Learned Counsel for the appellants during the course of arguments could not demonstrate that said findings were perverse and not borne out from the record of the case. Similarly, both the learned Courts below have concurrently returned the findings that at the time of settlement, the suit land was found vacant and accordingly, it was entered into the name of the State as per procedure. During the course of arguments, it could not be substantiated by the appellants that the said findings returned by both the learned Courts below were either perverse or not borne out from the record of the case.

12. As has been held by the learned Courts below, in a suit for injunction, the party has to prove that it is in possession of the suit land. In the present case, appellants herein have not been able to prove their possession over the suit land. Whereas plaintiff Ravinder Singh in the witness box could not state as to whose land was contiguous to the suit land on the southern and western side of the same, PW2 Harbans Singh could not state as to in which Ward, the suit land was situated. PW3 was not even a resident of Nurpur, where the suit land was situated. Thus, there is no infirmity with the findings returned by both the learned Courts below to the effect that plaintiffs failed to demonstrate that they were in possession of the suit land.

13. The findings returned by the learned Courts below that the suit land was '*abadi deh*' and was in possession of *Tabe Hakuk Bartandaran* behind the back of the plaintiffs have been elaborately explained by both the learned Courts below on the basis of evidence on record. The suit was filed by the plaintiffs. Onus was upon them to have had proved their ownership and possession over the suit land, which they miserably failed to prove. Thus, in view of concurrent findings having been returned against the plaintiffs that they were not owners in possession of the suit land and the suit land, in fact, was owned by the State of Himachal Pradesh and was being looked after by the Municipal Committee, Nurpur, the judgments and decrees passed by the learned Courts below do not call for interference as during the course of arguments, appellants could not substantiate that any substantial question of law was involved in this appeal. Accordingly, this appeal being devoid of any merit is dismissed at the stage of admission itself. Pending miscellaneous application(s), if any also stand disposed of. No orders as to costs.

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BEFORE HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Sh. Dhanbir Singh ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Cr.MP(M) No. : 1021/2019
Order reserved on : 11-06-2019
Date of Decision : June 12th , 2019

Code of Criminal Procedure, 1973 - Section 438 –Pre-arrest bail- Grant of- Prosecutrix, a divorced wife of accused alleged him of having raped her and also subjected her to unnatural offence(s)- Also alleged that accused having divorced her under conspiracy hatched by him with his relatives and perforce marrying her to one 'AS'- Held, bare reading of complaint does not inspire truthfulness or credibility of victim- On such allegations, liberty of individual cannot be curtailed- Accusd permanent resident of Himachal Pradesh- His presence can be ensured- Petition allowed- Conditional bail granted. (Paras 6 & 7)

For the petitioner : Mr. Atul Sood, Advocate, for the petitioner.
For the respondent : Ms. Ritta Goswami, Additional Advocate General, Ms. Divya Sood, Deputy Advocate General and Mr. Manoj Bagga, Assistant Advocate General for the respondent/State.

The following judgment of the Court was delivered:

Anoop Chitkara, Judge.

Inspector Mast Ram, of Woman Police Station-Nahan, Distt. Sirmour, HP was present at the time of hearing. He had filed status report and had also brought the police file. I have seen the status report as well as the police file to the extent it was necessary for the purpose of the present petition and the same stands returned to the police official. Status report is also taken on record.

2. Ld. Counsel for the petitioner states that the petitioner was serving in the Indian Army and had joined the investigation as and when the Investigating Officer so directed him. Ld. Additional Advocate General did not dispute this averment.

3. I have heard the counsel for the parties.

4. The present petition is under Section 438 of the Code of Criminal Procedure, seeking anticipatory bail in FIR No.38/18 dated 29-12-2018, registered at Women Police Station, Nahan, District Sirmour, Himachal Pradesh, under Sections 420, 376, 377, 90, 120-B, 328, 406, 344, 504 and 506 read with Section 34 of the Indian Penal Code.

5. The gist of the First Information Report and the investigation is as follows:

a) The victim (prosecutrix) made a written complaint to Superintendent of Police Nahan, District- Sirmour, HP requesting that FIR be registered for

commission of offences punishable under Sections 420, 376, 377, 90, 190-B, 328, 192, 34, 344, 504 and 506 of IPC as well as appropriate Sections of Information Technology Act.

b) She states that she was married to the petitioner Sh. Dhanvir Singh on 16th October, 2007 and she continued to live in her matrimonial home and a son was born to the couple. She further states that other relations of her husband also resides in the vicinity of her matrimonial home.

c) Out of these relatives Mahima Singh, Balvinder Kaur and Charanjeet Singh were keeping inimical relations with her because one marriage proposal recommended by her had failed and ended in the divorce.

d) She further states that her father-in-law was a ward member of Patlion Panchayat for last 20 and 25 years and is a very influential person. When seat of ward members was reserved for ladies she was made to contest elections and her signatures were also obtained by pressure on some papers. She further states that she did not receive any remuneration to this post and everything was done by her father-in-law and she hardly went to Gram Sabha meetings for 3-4 times and all the documents were got singed by her father-in-law.

e) Another set of allegations is against her husband (the present petitioner) in which she states had married her due to family pressure and want to divorce her. To meet his objective, her husband alongwith other relatives, hatched criminal conspiracy against her. In the year 2017, some time before September, 2017 her brother-in-law would take phone of the victim on the pretext of calling and he started sending immoral messages from her phone to one Amanpreet Singh who was also related to her husband.

f) At that time, her husband who is serving in Indian Army was posted at Jalandhar and when he returned to home, he took up this issue. She further says in fact her husband, the present petitioner, conspired sending these messages.

g) The next set of her allegations is that around one or two years before 2018, all these relatives mixed some poisonous substance in her tea and made immoral nude video of her. Video was secretly kept in the mobile phone of Charanjeet Singh. She was threatened that in case she does not agree to give divorce to her husband then the video will be made public and messages will be sent to her father.

h) Another set of her allegations is that all these people further threatened her that if she does not agree to give divorce to present petitioner, her son would be killed. On these grounds she was also beaten up by her husband, who not only spitted on her but also passed urine on her face.

I) Another allegation is that some time in February, 2018 she was held in captivity for 15-20 days and was locked inside a room. During this she was never allowed to meet any person of the village nor was allowed to talk to her parents or family members.

J) She further stated that she was so frightened due to these coercive acts and threats that eventually she succumbed to the pressure tactics of her husband and she applied for mutual divorce as her husband pointed gun towards her son and threatened her that he would kill her son. She says that all members of her in-laws have guns and they threatened her by firing.

K) She further says that her statement was recorded in the Court under fear, coercion, compulsion and fear of death or death of her son. She did not bring all these facts to the notice of the Ld. Court because life of her son was at risk.

l) She admits that her husband had deposited amount of alimony in her account.

m) That even after obtaining divorce her husband (the present petitioner) kept her in his house and did not allow talking to her parents or others. During this period the husband committed forceful sexual intercourse with her and also forced unnatural sex upon her which totally shattered her.

n) That on dated 08-12-2018 again under a similar account forced me to write on blank paper everything which they have kept to be used at appropriate time. Her certificates were also forcibly taken away. She further states that her Jewellery items were further taken away.

o) The next set of evidence is that on 10th of December, 2018 all these persons using similar threats forced her to perform marriage with Sh. Amanpreet Singh at Gurudwara and SDM Court Poanta Sahib and get it scribed and entered in the Gurudwara marriage register and Sh. Jagdeep Singh has falsely represented himself as her father in marriage certificate.

p) She says that she went to SDM Court Poanta Sahib where marriage was registered.

q) She says that thereafter at the same time, she got herself rescued from the clutches of the petitioner and visited his father and told him the entire story. She alleges that these peoples are criminal and they have harassed her and tortured her and fabricated false evidence against her and she requested for appropriate action.

6. A bare reading of this complaint does not convince, about the truthfulness and credibility of the victim. On these kind of allegations to deprive liberty of a person may amount to doing injustice to him at this stage. On such type of allegations the sentencing cannot be preponed, which ultimately commences after the guilt is proved.

7. In the status report, there is no mention of previous criminal history of the bail petitioner. The petitioner is a native and permanent resident of Himachal. Therefore, his presence can always be secured.

8. In the result the present petition is allowed. In the event of arrest of the petitioner, he shall be released on bail, in connection with the FIR mentioned above, on his furnishing personal bond in the sum of Rs.5,000/- with one surety in the like amount to the satisfaction of the Arresting Officer.

9. This Court is granting the protection subject to the conditions mentioned in this order. The petitioner undertakes to comply with all directions given in this order and the furnishing of bail bonds by the petitioner is acceptance of all such conditions:

10. The petitioner is directed to join the investigation as and when called by the Investigating Officer. It shall be open for the Investigating Officer to call him as and when he feels such a necessity. The petitioner undertakes to appear before Investigating Officer as and when directed to do so.

11. The Petitioner shall neither influence nor try to control the investigating officer, in any manner whatsoever.

12. The petitioner undertakes not to contact the complainant, to threaten or browbeat him or to use any pressure tactics.

13. The Petitioner undertakes not to make any inducement threat or promise, directly or indirectly, to the investigating officer or any person acquainted with the facts of

the case to dissuade him from disclosing such facts to the Court or any Police Officer or tamper with the evidence.

14. The Petitioner shall not hamper the investigation.

15. The Petitioner undertakes not to commit any offence. However, this condition shall not include strict liability offences. It is expected that the petitioner shall live like a good citizen.

16. In case the of the launching of the prosecution, the petitioner undertakes to attend the trial and to appear before the Court which issues the summons or warrants and shall furnish fresh bail bonds to the satisfaction of such Court.

17. Petition is disposed of in the aforesaid terms.

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

Dr. Neeru Shabnam .....Petitioner

Versus

Manoj Kumar .....Respondent

Cr.MMO No. 438 of 2018

Date of Decision:12th June, 2019

Code of Criminal Procedure, 1973 (Code) – Section 216(1) – Alteration of charges- Duty of Trial Court- Emphasis on- Held, in exercise of powers conferred by Section 216(1) of Code though Court can alter charge/notice of accusation at any stage of case, yet it should be more careful in using legal phraseology while passing orders qua framing of charges since words if not used properly may lead to confusion and consequent multiplicity of litigation- Order of Trial Court rectifying its mistake and framing notice of accusation for offence of defamation instead of proceeding with said case as a warrant case upheld. (Paras 4 to 6)

For the Petitioner: Mr. Atul Jhingan, Advocate.
For the Respondent: Mr. Vishal Bindra, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of instant petition filed under Section 482 of the Code of Criminal Procedure, challenge has been laid to orders dated 2.4.2018 and 31.7.2018, passed by learned Judicial Magistrate, 1st Class, Court No. III, Shimla, District Shimla, Himachal Pradesh, in complaint case No.52/2 of 2017/14, titled as ***Manoj Kumar vs. Dr. Neeru Shabnam***, whereby learned Court below while dismissing the plea for discharge having been made by the petitioner/accused, fixed the matter for framing additional charge.

2. Precisely, the case of the petitioner as projected in the petition at hand and also argued by Mr. Atul Jhingan, Advocate, is that in view of the averments contained in the complaint having been filed by the respondent ***(hereinafter referred to as the***

complainant'), learned Court below ought to have proceeded with the matter as a "Summons case" not as a "warrant case" and as such, impugned orders, as referred hereinabove, are required to be quashed and set-aside. Perusal of the averments contained in the complaint ***(Annexure P-1)*** under Section 500 of IPC, clearly suggest that there was no occasion for the Court below to frame charge and subsequently allow the application having been filed by the complainant under Section 216 Cr.P.C for alteration of charge. Undoubtedly, perusal of order dated 2.4.2018 passed by learned Court below suggests that learned Court below initially proceeded to decide the case as a "warrant case" and wrongly stated in the order that there are sufficient grounds to frame charge against the accused.

3. Mr. Vishal Bindra, learned counsel representing the complainant while referring to order dated 28.4.2018, contended that since notice of accusation has been put to the petitioner-accused, there is no force in the arguments of learned counsel representing the petitioner that Court has proceeded to decide the case at hand as a "warrant case".

4. Having perused the material available on record, this Court finds that on 2.4.2018 Court below held consideration on charge, whereas complaint filed under Section 500 of IPC ought to have been decided as "Summons case" and there was no requirement, if any, for consideration on charge. Since matter came to be listed for consideration on charge on the aforesaid date, petitioner/accused also raised plea for discharge, which was ultimately turned down. Subsequently, on 28.4.2018 learned Court below put notice of accusation to the accused for having committed the offence punishable under Section 501 of IPC and thereafter complainant moved an application under Section 216 of the Code of Criminal Procedure for alteration of charge. Vide order dated 31st July, 2018 learned trial Court partly allowed the application under Section 216 Cr.P.C. filed by the complainant and listed the matter for framing of additional charge on 25.8.2018.

5. Though, having perused order dated 2.4.2018, this Court has no hesitation to conclude that learned Court below initially wrongly proceeded to decide the case as a "Warrant case", but as has been noticed hereinabove, subsequently, Court below vide order dated 24.8.2018 rectified its mistake and put notice of accusation to the accused. Since there is no specific provision contained in Criminal Procedure Code, which provides for alteration of notice of accusation in "Summons case", court can alter notice of accusation while exercising power under Section 216 Cr.P.C, which empowers court to alter charge. There is no significant difference between "charge" and "notice of accusation", save and except that charge is framed in "warrants case" and notice of accusation is put in a "summons case". Needless to say, charge can be altered at any stage before pronouncement of judgment, as has been enshrined under Section 216 Cr.P.C and as such, there appears to be no force in the arguments of learned counsel representing the petitioner that learned Court below erred while passing impugned order dated 31st July, 2018 accepting prayer of the complainant for alteration of charge.

6. Consequently, in view of the above, this Court finds no merit in the present petition and same is accordingly dismissed. However, before parting, this Court wish to observe that learned Courts below should be more careful in using legal phraseology while passing orders because words/ language, if not used properly may lead to certain confusions, which ultimately result in multiplicity of litigation. Interim order dated 3.10.2018 passed by this Court is vacated. Pending application(s), if any, also stands disposed of.

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

Gulab Singh and others ....Petitioners.

Versus

Mahender Singh and others ... Respondents.

CMPMO No 20 of 2019
Decided on: 17.4.2019

Code of Civil Procedure, 1908- Order XXI Rules 26 & 29- Execution- Stay of- Circumstances- Decree of possession of Trial Court attaining finality consequent upon dismissal of appeal(s) of defendants by First Appellate Court and High Court- Decree holder seeking its execution- Judgment debtor filing application for stay of execution on ground of his having filed fresh suit with respect to same land against decree holder- Held, execution of decree cannot be stayed merely on ground of institution of fresh suit- Subsequent suit is to be decided on its own merits- Petition dismissed- Order of Executing Court dismissing stay application, upheld. (Paras 8 & 9)

For petitioners. : Mr. Surinder Saklani, Advocate.
For respondents : R.L. Chaudhary, Advocate.

The following Judgment of the Court was delivered:

Ajay Mohan Goel, J *(Oral)*

By way of this petition, petitioners/judgment debtors have prayed for setting aside order dated 26.9.2018 (Annexure P-6) vide which an application filed by them under Order 21 Rule 26 read with Rule 29 of the CPC for stay of execution petition stands dismissed by the learned Executing Court.

2. Brief facts necessary for adjudication of the petition are that mother of respondent-decree holder filed Civil Suit No. 2/1975 in the Court of learned Civil Judge (Senior Division), Mandi for declaration that Will dated 26.12.1973 was null and void, purportedly executed by her husband late Rottu in favour of Jeetu and Smt. Bhimi Devi and also for possession of the suit land. Said suit stood decreed on 22.1.1987. Defendants therein assailed the judgment and decree passed by learned trial Court unsuccessfully before learned first appellate Court as also before this Court by way of Regular Second Appeal.

3. Smt. Kali Devi died on 19.12.1985. The decree holder succeeded to her property after her death and after he attained the age of majority, he filed Execution proceedings for possession of the suit land. In these execution proceedings, present petitioners i.e., the JDs. Filed an application under Order 21 Rule 26 read with Rule 29 of the CPC with the prayer that the execution of the judgment be stayed till the adjudication of Civil Suit No. 66/2017 filed by them in the Court of learned Civil Judge, Court No.III, Mandi, H.P. against the decree holder.

4. Vide impugned order, the application filed by petitioners/JDs has been dismissed.

5. Learned Executing Court rejected the application filed by present petitioners by holding that after the civil suit filed by Smt. Kali Devi stood decreed, both the first

appellate Court as also the High Court in Regular Second Appeal had upheld the said judgment and decree. Learned Executing Court held that in this background, execution proceedings could not be stayed on the plea of the judgment debtor that he had raised the issue of paternity of the decree holder by way of a fresh civil suit.

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

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

8. It is a matter of record that the suit for declaration and possession filed by the predecessor-in-interest of the present respondent/decree holder stood decreed by the Court of learned Senior Sub Judge, Mandi on 22.1.1987. It is also a matter of record that appeal filed against the said judgment and decree was dismissed by learned first appellate Court. It is also a matter of record that the second appeal filed against the judgment and decree stood dismissed by this Court i.e., RSA No. 56 of 1981 titled as Jeetu and another Vs,. Smt. Kali as far back as on 19.12.1990. That being the case, learned Executing Court has rightly rejected the application filed by the petitioner for stay of execution proceedings because once the judgment and decree passed in favour of the predecessor-in-interest of present decree holder has attained finality, execution of the same cannot be stayed simply because another civil suit stands filed now by present petitioners for declaration and injunction against the respondent/decree holder. The decree holder has filed execution petition on the strength of the judgment and decree which was passed in favour of his mother, namely, Smt. Kali Devi. A perusal of the fresh suit filed by present petitioners demonstrates that in the said suit, again the issue of Will dated 26.12.1973 stands agitated which issue already stands decided in favour of Smt. Kali Devi in the previous suit. In other words, the filing of the suit apparently is a mean adopted by present petitioners to throttle the execution of the decree passed in favour of Kali Devi.

9. Be that as it may, the suit so filed has to be decided and shall be decided by learned trial Court on the basis of pleadings as also the evidence which will be led by respective parties before it, but simply on account of filing of the suit by present petitioners, the execution of the decree passed in favour of Kali Devi, cannot be stalled. It is, however, clarified that the observations which have been made by this Court in the present judgment are only for the purpose of adjudication of the present petition and shall have no bearing on the civil suit which has been filed by the petitioners which shall be decided by learned trial Court on its own merit.

Accordingly, as there is no merit in the present petition, the same is dismissed. Pending miscellaneous applications, if any, also stand disposed of.

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

Gurbaksh Singh ....Petitioner.

Vs.

Rakesh Kumari and others .....Respondents.

CMPMO No.: 85 of 2019
Date of Decision: 24.06.2019

Code of Civil Procedure, 1908 - Sections 148 and 151- Order VIII Rule 1 – Written statement- Filing of- Time limitation and extension thereof- Held, there is statutory limit prescribed within which written statement has to be filed- Court must record reasons for accepting written statement after expiry of statutory period- Such acceptance may be by imposing costs. (Paras 4 & 5)

For the petitioner: Mr. R.P. Singh, Advocate.
For the respondents: Mr. Sunny Modgil, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

Petitioner herein, who is plaintiff before the learned Trial Court, is aggrieved by the act of the learned Trial Court, whereby it allowed the written statement filed by the respondents herein before the learned Trial Court on 03.10.2017 to be taken on record, ignoring the fact that after service, the respondents, who are the defendants before the learned Trial Court, appeared before it for the first time on 07.06.2017 and despite grant of time, neither filed the written statement between the statutory period of 90 days, nor filed any application under Sections 148 or 151 of the Code of Civil Procedure for extension of time when the written statement was submitted by them on 03.10.2017.

2. Learned counsel for the petitioner has argued that once the statutory period for filing the written statement was over, learned Trial Court could not have taken the same on record in the absence of there being any application filed by the defendants therein explaining as to why the written statement could not be filed within the statutory period. Mr. Singh has argued that there is a rationale as to why the time frame has been fixed for filing the written statement and the rationale is that the litigation has to be decided within a time bound period and if the Trial Courts do not adhere to the same and allow the pleadings to be taken on record at their whims and fancies, then the very purpose of fixing the said limitation shall be frustrated.

3. On the other hand, learned counsel for the respondents has argued that there is no perversity with the order which stands impugned by way of present petition, because there was no inordinate delay in filing the written statement and taking the same on record by the learned Trial Court advances the cause of justice, because no fruitful purpose would be achieved by denying the present respondents' right to file the written statement.

4. Having heard learned counsel for the parties, in my considered view, there is some merit in the contention of learned counsel for the petitioner, because once there is a statutory limit prescribed within which written statement has to be filed, then if learned Trial Court is accepting the written statement beyond the said period, there has to be some explanation why the same has been done. In other words, when a party does not file a written statement within the statutory period, then the least which is expected from the party is that it shall file an appropriate application for extension of time mentioning therein the reasons as to why the written statement could not be filed within the statutory period and in case the Court concerned comes to the conclusion that there was justification as to why the written statement could not be filed within the statutory period, the same can be allowed by the learned Trial Court by imposing costs, but if to the contrary, learned Trial Court comes to the conclusion that the justification so given does not inspire confidence, appropriate orders can be passed.

5. Coming to the facts of this case, as learned Trial Court has already ordered the written statement so filed by the respondents herein to be taken on record, this Court in the interest of justice is not interfering with the said order, however, taking on record of the written statement filed by the respondents is qualified with the rider that the same shall be read as part of the pleadings only if by the next date of hearing, respondents pay cost to the tune of Rs.10,000/- to the petitioner by way of a Bank Draft. It is clarified that in case no cost is paid, as has been ordered by this Court, then the written statement filed by the respondents, which has been ordered to be taken on record by the learned Trial Court, shall not be permitted to be a part of the pleadings. Parties are directed to appear before the learned Trial Court on ***22nd July, 2019.***

Petition stands disposed of in above terms, so also pending miscellaneous applications, if any.

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

Hans Raj & others .....Petitioners/Plaintiffs.

Versus

State of H.P. & others ...Respondents/defendants.

CMPMO No. 509 of 2018.
Reserved on : 2nd May, 2019.
Date of Decision: 30th May, 2019.

Code of Civil Procedure, 1908 (Code) –Order XXXIX- Rule 1 & 2 – Temporary injunction- Grant of- Plaintiff claiming easementary right of passage through land by prescription and custom and seeking temporary injunction- Trial Court dismissing stay application- Appellate Court upholding order- Petition against- Held, land vested in State 'free from all encumbrances' under provisions of Punjab Village Common Lands (Regulation) Act, 1961- Vestment of land in State not challenged- Suit land recorded as 'Gair Mumkin Khud'- Prima-facie, user of land as passage as claimed by plaintiff cannot be inferred- Petition dismissed.(Para 3)

For the Petitioners: Mr. Sanjeev Kujthiala, Sr. Advocate with Ms. Kamlesh Kumari, Advocate.

For Respondent No.1: Mr. Hemant Vaid, Addl. A.G. with Mr. Y.S. Thakur, Dy. A.G.

For Respondents No.2 & 3 : Mr. Malay Kaushal, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant petition, is, directed against the concurrent verdicts recorded by both the learned Courts below, upon, the plaintiffs' application cast under the provisions of Order 39, Rules 1 and 2 of the CPC, wherethrough, they strived, for, rendition, of, an affirmative verdict thereon.

2. The afore application was constituted before the learned trial Court, during, the pendency, of, the plaintiffs' suit, wherethrough, they sought rendition of a decree, for declaration, and, had also strived, for, rendition of a decree for permanent prohibitory injunction, vis-a-vis, the suit khasra numbers. The afore renditions were espoused, on anvil, of the plaintiffs' claiming, the, exercising(s), of, an easementary right of passage, upon, the suit khasra number. The afore pleaded easement of right of passage, upon, the suit khasra number(s), and, passage whereof, holds, a, dimension of 18 feet wide, and, 175 feet long, (i) was anchored, upon, the afore passage being used continuously, uninterruptedly, and, to the knowledge of all concerned, since the time, of, the predecessors-in-interest of the plaintiffs/petitioners, and, uptill now, (ii) thereupon, reiteratedly, the afore claim was rested, upon, a right of easement, hence, being sparked, by prescription, and, custom, and, it being exerciseable, vis-a-vis, the suit passage, as, stands embodied in the apposite suit kahsra numbers. Consequently, the plaintiffs/applicants, claim that, if, during the pendency of the afore civil suit, the espoused ad interim injunction, is declined, and, hence, construction, if any, as proposed to be raised, upon, the suit passage, embodied in the suit khasra numbers, is permitted to be raised, upon, the suit khasra numbers, (iii) thereupon, hence irreparable loss or injury rather would be encumbered, upon, them, and, balance of convenience which otherwise stands loaded in their favour, rather would be disturbed, despite, theirs having a prima facie good, and, arguable case in their favour.

3. However, the afore averred claim, of the plaintiffs/petitioners, does lose its vigour, (a) given the classification made, vis-a-vis, the suit khasra numbers in the apposite jamabandi appertaining therewith, hence, making a clear reflection(s) qua it therein being entered as “gair mumkin Khad”. Even if, the afore classification, donned by the apposite suit kahsra numbers, may not beget, any inference qua thereupon, the plaintiffs' espousal, being benumbed, (b) yet the entire vigour of the afore submission addressed before this Court, by the learned counsel appearing for the aggrieved plaintiffs, is, aptly underwhelmed, rather by the more emphatic factum, qua the vestment of the suit khasra numbers, rather being made, vis-a-vis, the State of Himachal Pradesh, (c) importantly within the ambit, of, the mandate, of the Punjab Village Comm on Lands (Vestings and Utilization) Act, 1961, (d) and, when the afore vestment hence statutorily occurs rather free from all encumbrances, (e) thereupon, the effect, of, vestment of the suit khasra numbers, inclusive of the suit passage, in, the government of Himachal Pradesh, through, the apposite mandate encapsulated in the Punjab Village Comm on Lands (Vestings and Utilization) Act, 1961, is, concomitantly construable hence to be free from all encumbrances, (f) inclusive of the suit khasra numbers being free from any fetter, qua theirs serving, as, servient heritage, (g) nor hence, it can be concluded qua the espousal of the plaintiffs qua theirs, since, the time of their ancestors upto now, hence, exercising any right of easement of passage, upon, the suit khasra number, garners any weight or vigour. Conspicuously, also when no declaration, is strived in the plaintiffs/petitioners' suit, that, the afore order of vestment is nonest, and, hence therefrom onwards, it can also, be concluded, that qua the plaintiffs/petitioners acquiescing, vis-a-vis, the order vesting the suit khasra number, in the State of Himachal Pradesh, (h) wherefrom, the concomitant inference is sparked qua theirs visibly not resisting or raising objections, at the appropriate stage, vis-a-vis, the vestment of the suit khasra numbers, in, the State of Himachal Pradesh, preeminently, on anvil, of theirs, holding a right of passage, vis-a-vis, the suit khasra numbers. In aftermath, want of afore endeavours, being made, by the plaintiffs/petitioners, rather begets a firm,and, formidable conclusion from this Court, that, the plaintiffs, are, estopped to raise the afore espousal before this Court, (g) thereupon, it is concluded that all the relevant afore triplicates tests, hence, governing the granting, of, relief of ad interim injunction, vis-a-vis, the petitioners/plaintiffs, rather remaining unsatiated by them, hence, this Court is constrained to uphold the orders recorded, upon, CMA No. 102/6 of 2016, by the learned trial Court,

and, subsequently, upon, Civil Misc. Appeal No. 11-NL/14 of 2018, by the learned Addl. District Judge-I, Solan.

4. For the foregoing reasons, there is no merit in the instant petition, and, it is dismissed accordingly. In sequel, the order impugned before this Court are affirmed and maintained. The parties are directed to appear before the learned trial Court on 11th June, 2019. However, it is made clear that the findings recorded hereinabove shall have no bearing, upon, the merits of the case. All pending applications also stand disposed of.

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

FAO No. 161 of 2019 along
with FAO No. 225 of 2016.
Reserved on: 2nd May, 2019.
Decided on : 30th May, 2019

1. FAO No. 161 of 2019.

HDFC ERGO General Insurance Company Ltd. .....Appellant.
Versus
Smt. Kaushalya Saini & Others ....Respondents.

1. FAO No.225 of 2016.

Smt. Kaushalya Saini & Anr. .....Appellants.
Versus
Subhash Chand & Anr. ....Respondents.

Motor Vehicles Act, 1988 – Section 166 – Motor accident – Death of child- Claim application- Compensation- Determination- Held, in case of death of child falling in age group of 5-10 years, claimants are entitled to consolidated sum of Rs.2.00 lakh- Lata Wadhwa vs. State of Bihar, (2001)8 SCC 197, referred to and relied upon. (Para 4)

Motor Vehicles Act, 1988 – Sections 166 – Motor accident – Death of child- Claim application- Compensation under conventional heads- Held, parents are entitled to receive compensation of Rs.80,000/- (Rs.40,000/- each) under head "loss of filial consortium"- Magma General Insurance Co. Ltd. vs. Nanu Ram alias Chuhru Ram & Others, Civil Appeal No.9581 of 2018, referred to and relied upon. (Para 5)

Cases referred:

Kishan Gopal and another vs. Lata and others, (2014)1 SCC 244
Lata Wadhwa vs. State of Bihar, (2001)8 SCC 197
Magma General Insurance Co. Ltd. vs. Nanu Ram Alias Chuhru Ram & others, Civil Appeal No.9581 of 2018

For the Appellant(s): Mr. Jagdish Thaur, Advocate, in FAO No. 161 of 2019 and Mr. J.L. Bhardwaj, Advocate, in FAO No. 225 of 2016.

For Respondents No. 1 & 2: Mr. J. L. Bhardwaj Advocate, in FAO No. 161 of 2019.
Nemo for respondent No.3 in FAO No. 161 of 2019.

Mr. Jagdish Thakur, Advocate, for respondent No.2 in FAO No. 225 of 2016.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The insurer of the offending vehilce, and, also the claimants, respectively through FAO No. 161 of 2019, and, though FAO No. 225 of 2016, hence, direct an onslaught, vis-a-vis, the award rendered by the learned Motor Accident Claims Tribunal-1, Solan, H.P., upon, MAC Petition No. 34-S/2 of 2013/11, whereunder, compensation amount, borne in a sum of Rs. 8 lakhs, stood awarded, vis-a-vis, the claimants/parents of deceased Master Mithlesh Saini, aged eight years, at the time of relevant mishap, and, thereon stood levied interest, at, the rate of 7% per annum, and, was ordered to commence from the date of petition, and, till realization, of, the afore compensation amount. The apposite indemnificatory liability thereof, stood fastened, upon, insurer of the offending vehicle.

2. The learned counsel appearing, for, the insurer of the offending vehicle, does not, contest the validity of findings, rendered, upon issue No.1, appertaining to the relevant mishap, hence, sequelling the demise, of, afore Master Mithlesh Saini, rather arising from, the rash and negligent manner of driving, of, the offending vehicle by its driver, one Subhash Chand, nor he contests the validity of the findings, rendered upon issue No.4.

3. However, the learned counsel for the insurer, has contended, with much vigour before this Court, that, the learned tribunal (i) in gauging the monetary contribution of deceased Master Mithlesh Saini, aged 8 years, at the relevant time, conspicuously, vis-a-vis, his estate, in a consolidated sum of Rs.8,00,000/-, has, wandered astray from, the verdict rendered by the Hon'ble Apex Court, in a case titled, as ***Kishan Gopal and another vs. Lata and others,*** reported in ***(2014)1 SCC 244***. Contrarily, the learned counsel appearing for the aggrieved claimants, in FAO No. 225 of 2016, has, contended with vigour (ii) that the expostulation of law, borne in the afore judgement, rather warranting apart, from, a strict deference thereto, also meteings, of, deference, vis-a-vis, the, further postulation borne therein, qua, the currency (ies), since, the date of occurrence, inasmuch as on 25.8.2010, uptonow, rather begetting devaluation(s) hence, warranting, levying thereon, of interest @ 9% interest per annum, (iii) rather, therethrough, concomitantly, hence, an espousal, is, made before this Court, qua hence, the surviving parents of the deceased, being entitled, to, compensation in a sum higher than, the, sums as assessed, in the impugned award.

4. Be that as it may, obviously this Court, is, for answering the afore contra espousals, made before this Court, by the learned counsel, appearing for the contesting litigants, hence, eNjoined, to, delve deep into the afore referred verdict(s), rendered by the Hon'ble Apex Court, and, thereafter cull therefrom, the expostulation of law, borne therein, and, thereafter accept or reject, the, afore contentions addressed before this Court, by the learned counsel, respectively appearing for the contesting litigants. In the afore endeavour, the, significant date of the ill-fated mishap qua wherewith, a, pronouncement, is, made by the Hon'ble Apex Court, in Kishan Gopal's case (supra), is, 19.7.1992, and, reiteratedly the afore date, is, of utmost significance, (i) and, visibly, the, afore judgment, the Hon'ble Apex Court, also, vindicated the contemplations, borne in ***Lata Wadhwa vs. State of Bihar,*** reported in ***(2001)8 SCC 197***, verdict whereof stood rendered, vis-a-vis, an occurrence which happened in the year 1989, and, wherein, vis-a-vis, occurrence, of, demise of a child, in, a motor vehicle accident, and, his/her being thereat, rather aged 5 to 10 years, (ii) and,

evidently, when, in the afore group(s), rather the deceased child of the hereat claimants ex-facie fell, hence, computed, a consolidated compensation amount borne in a sum of Rs.1.5 lakhs, and, thereto added, a, conventional figure of Rs.50,000/-, adding(s) whereof hence totalled Rs.2 lacs. As afore stated, the afore expostulation of law, vis-a-vis, the defrayable comepnsation amount, upon, occurrence, of, demise of a child in a motor vehicle accident, and, his/her thereat, hence, visibly falling within the afore age group, in group whereof, evidently, the deceased Master Mithlesh Saini, hence, ex-facie fell, did come, to be also revered by the Hon'ble Apex Court, even, in Kishan Gopal's case (supra). Alike the age of the deceased, in Lata Wadhwa's case (supra), also, the deceased child's age in Kishan Gopal's case (supra), is/was 10 years, and, the Hon'ble Apex Court, in the latter case meted deference, vis-a-vis, the occurrence, of, devaluation(s) in currency(ies), hence since the time, of, demise of the deceased, in the afore case, and, upto the decision being pronounced thereon, (iii) and, hence thereafter proceeded, vis-a-vis, the hitherto expostulation, as, made in Lata Wadhwa's case, qua the apposite monetary contribution, of, the deceased child, upon, being aged between 10 to 15 years, rather, to, make addition(s) thereto, from, Rs.24,000/- to Rs.30,000/-, and thereafter proceeded, to upon, reckoning the age of the mother, hence, apply the appropriate multiplier thereon. The factual emphatic stand point, which, emerges hereat, and, also the marked distinction, as upsurges, vis-a-vis, the facts borne therein, and, the facts hereat, (i) is, rather the afore accretions, as, made in Kishan Gopal's case (supra), vis-a-vis, the hitherto judicially pronounced apposite monetary contribution(s), of the deceased child, vis-a-vis, his estate, upon, his being at the relevant stage, aged between 10 to 15 years, hence, therethrough(s) rather standing manifestly, and, visibly being spurred, (ii) reiteratedly rather by apt occurrence(s), of, devaluation(s) in the currency, hence happening, and, thereupon, the afore apt sum(s) being computed, at, Rs.30,000/-. Hereat, the age of the deceased Master Mithlesh Saini, at the relevant time is ex-facie, and, evidently in the age group of 5 to 10 years, (iii) and, given at the relevant time, his being aged 8 years, and, obviously, when he was neither aged 10 or beyond 10, and, when there, is, a emphatic pronouncement in Lata Wadhwa's case, qua upon, the deceased child hence falling in the afore age group, (iv) thereupon, his surviving parents, being, entitled to, a consolidated compensation of Rs.2 lacs, (v) thereupon, with the afore expostulation, standing, reiterated by the Hon'ble Apex Court in Kishan Gopal's case (supra), (v)conspicuously, vis-a-vis a deceased child, hence, falling in the age group of 8 to 10 years, thereupon, the striving(s), of the learned counsel, for the, claimants, for, making the afore addition(s), given the occurrence, of, devaluation(s) in currency(ies), since the pronouncement in Lata Wadhwa's case (supra), upto, the decision being recorded, vis, the instant appeal, is, rather a gross misadventure, and, is liable to be rejected.

5. However, in consonance with the verdict rendered by the Hon'ble Apex Court in ***Civil Appeal No.9581 of 2018, Magma General Insurance Co. Ltd. vs. Nanu Ram Alias Chuhru Ram & others,*** wherein the parents were held entitled, under, the head "Loss of Filial consortium" hence, to, a sum of Rs.80,000/-(Rs.40,000/- payable to each of them), consequently, the afore sums are awarded under the afore head qua the claimants, besides they are also entitled to a sum of Rs.15,000/- on account of funeral expenses. Consequently, the claimants are entitled, to, a total compensation of Rs.2,95,000/-. Moreover, the surviving parents of the deceased, are also, entitled to interest, upon, the afore sum, at the rate of 9% per annum, commencing from the date of petition, till realization, as, thereupon, it would beget concurrence with the verdict, of, the Hon'ble Apex Court, pronounced in Kishan Gopal's case (supra).

5. For the foregoing reasons, the appeal filed by the insurer bearing FAO No. 161 of 2019 is allowed, whereas, the appeal filed by the claimants, bearing FAO No. 225 of 2016, is also partly allowed, and, the impugned award, is, modified in the afore manner.

Consequently, the claimants/parents, of, the deceased child, are held entitled to a compensation, borne in a sum of Rs.2,95,000/- along with interest @ 9% per annum, commencing from the date of petition, till realization. The indemnificatory liability, vis-a-vis, the afore compensation amount, is, saddled, upon, the insurer of the offending vehicle. The amount of interim compensation, if awarded, be adjusted in the aforesaid compensation amount, at the time of final payment. The aforesaid amount of compensation be apportioned in the manner as ordered by the learned tribunal. All pending applications also stand disposed of. Records be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Himesh Sharma ...Petitioner.
Versus
State of Himachal Pradesh ...Respondent.

Cr.MP(M) No. 1044 of 2019
Order reserved on : 18.6.2019
Date of Decision : June 24, 2019

Code of Criminal Procedure, 1973 – Section 438 – Pre-arrest bail in rape case- Availability- Circumstances- Held, accused serving in police department- Prosecutrix working in Court and aged 31 years- It cannot be said that she did not know consequences of what she was doing- FIR seems to be tactics on her part to force accused to marry her- Question of her vitiated consent is to be established during trial- Custodial interrogation of accused not necessary and he having already joined investigation- Application allowed- Bail granted subject to conditions. (Paras 5 to 12)

Cases referred:

Baldev Raj vs. State of H.P.,Cr.MP(M) No. 1144 of 2015, decided on 6.8.2015

Deepak vs. State of H.P., Cr.MP(M) No. 1408 of 2014, decided on 29.12.2014

Dr. Dhruvaram Murlidhar Sonar vs. State of Maharashtra & others, Criminal Appeal No. 1443 of 2018 (Arising out of SLP (Criminal) No. 6532 of 2018), (Division Bench), decided on 22.11.2018

Lalit Manta vs. State of H.P., Cr.MP(M) No. 1069 of 2011, decided on 28.12.2011

For the petitioner	:	Mr. Ajay Kochhar, Advocate, for the petitioner.
For the respondent	:	Ms. Ritta Goswami, Additional Advocate General, Ms. Divya Sood, Deputy Advocate General and Mr. Manoj Bagga, Assistant Advocate General for the respondent/State.
For the complainant	:	Mr. Nitin Thakur, Advocate, for the complainant.

The following judgment of the Court was delivered:

Anoop Chitkara, Judge.

The present petition is under Section 438 of the Code of Criminal Procedure, seeking anticipatory bail in F.I.R. No. 128/2019, dated 4.6.2019, registered at Police Station West, Distt. Shimla, H.P., under Sections 376 of the Indian Penal Code.

2. ASI Amender Singh, I.O. Police Station West, Shimla, H.P., was present on the last date, when the matter was heard. He had brought the police file. I have seen the status report(s) as well as the police file to the extent it was necessary for the purpose of deciding the present petition and the same stands returned to the police official. Status report was also taken on record.

3. The gist of the First Information Report and the investigation is as follows:

(a) On 3.6.2019, the Superintendent of Police Shimla, received a complaint through post, which was sent by the victim (name withheld). This was addressed to the Director General of Police, H.P., Shimla as well as to the Superintendent of Police, Shimla, regarding cheating and sexual exploitation against a police official HC – Himesh Sharma, P.S. Sadar, Shimla.

(b) The victim stated that she works as Junior Steno in the District Courts, Chakkar, Shimla and mentioned her age as 31 years.

(c) She stated that the accused met her sometime in the month of March, 2018 in the course of her employment. He disclosed to her that he is posted in Police Station Sadar and is unmarried. He would meet her in the working place of her office and would continue to sit for long hours.

(d) She further stated that they would meet each other two or three times every week and they talked to each other daily for hours together, mostly during night.

(e) She further stated that they would watch movies, visit lonely places like Advance Studies, Jakhoo Temple etc. and during such dates she would object to his sexual advances but every time the would assure her that they would get married.

(f) She stated that on one occasion when they were returning from SRS Cinema ISBT Shimla at about 9.20 p.m., then after reaching home, when she called him on his phone then it was busy for more than twenty minutes. It raised suspicion in her mind and she questioned him as to with whom was he talking for so long, on which he revealed that he was talking to his former girl friend.

(g) She further stated that they would go together to take dinner in various restaurants.

(h) She further stated that in the month of September, after watching movie, petitioner dropped her at her home at Dhanda at 9 p.m. Then on reaching home, after taking tea, he insisted to have sexual intercourse on the pretext that very soon they are going to tie the nuptial knot. She stated that she strongly objected to his advances and conveyed that such relationship prior to marriage was not justified in their culture and since they were going to get married, so he should wait for some time. However, he started an emotional talk regarding their relationship and then she, for the first time had sexual intercourse with him.

(i) After this coitus, she was remorseful and repentant because she had succumbed to his pressures. She conveyed to the accused in very strong terms that he will have to fulfil his promise of marriage because she accepted to have sexual intercourse with him only on such terms.

(j) Thereafter, every evening he would call her and then they would go to Advance Studies, where they would sit till 10.30 p.m.

(k) Later on, she came to know that the accused had physical relationship even with his previous girlfriend. This estranged her and she raised her grouse that he should not have established sexual relationship with her before marriage.

(l) Later on, he started threatening the victim that since he works in police he can do anything. After this the victim disclosed everything to her parents and brothers who visited the parents of the petitioner. On 25.2.2019, the mother of the petitioner very bluntly conveyed to the family of the victim that they would marry the petitioner only with a girl of their area.

(m) She has also made general type of allegations which are not relevant to be considered at the time of bail application and one of such allegation is that the petitioner was only spending time with her and whatever she wanted to do, she was free to do.

(n) Hence, F.I.R. under Sections 376 of the Indian Penal Code was registered.

4. I have heard Mr. Ajay Kochhar, learned counsel for the bail petitioner and Ms. Ritta Goswami, learned Additional Advocate General for the respondent/State as well as Mr. Nitin Thakur, learned counsel for the complainant. Written objections to the bail petition have also been handed over to the Court Master of this Court which are taken on record. In these written objections, reference has been made to the judgment dated 15th April, 2019 of the Hon'ble Supreme Court which states that sex on the pretext of marriage amounts to rape. Learned counsel for the petitioner states that the accused had joined the investigation as and when the Investigating Officer so directed him. Learned Additional Advocate General did not dispute this averment.

5. After giving careful consideration to the entire evidence, facts and circumstances, I am satisfied that no purpose will be served if the bail petitioner is sent to judicial custody.

6. I am inclined to grant bail to the petitioner on the following grounds:

(a) In the status report as well as the affidavit filed by the bail petitioner, there is no mention of any previous criminal history.

(b) The petitioner, is a government servant in the police department and is a native and permanent resident of Himachal. Therefore, his presence can always be secured.

(c) The complainant is working in Courts and she was 31 years of age. By no stretch of imagination it can be believed that she did not know the consequences of what she was doing.

(e) *Prima facie*, it appears that this F.I.R. is a pressure tactics to force the petitioner to marry her.

(f) If the sexual intercourse was under misconception of the fact, under Section 90 of the Indian Penal Code, then it shall be during trial to establish guilt of the petitioner and the incarceration of the petitioner cannot be pre-poned at this stage.

(g) I am of the considered view that, *prima facie*, petitioner has made out a case for grant of bail. His custodial interrogation is not required at all

7. I am also placing reliance on the following judicial precedent which relates to the holdings of the Hon'ble Supreme Court on somewhat similar circumstances :

(a) In *Dr. Dhruvaram Murlidhar Sonar vs. State of Maharashtra & others,* Criminal Appeal No. 1443 of 2018 (Arising out of SLP (Criminal) No. 6532 of 2018), (Division Bench), decided on 22.11.2018, the Hon'ble Supreme Court holds that:

> "24. … … She had taken a conscious decision after active application of mind to the things that had happened. It is not a case of a passive submission in the face of any psychological pressure exerted and there was a tacit consent and the tacit consent given by her was not the result of a misconception created in her mind. We are of the view that, even if the allegations made in the complaint are taken at their face value and accepted in their entirety, they do not make out a case against the appellant. We are also of the view that since complainant has failed to prima facie show the commission of rape, the complaint registered under Section 376(2)(b) cannot be sustained."

8. A Co-ordinate Bench of this Court in Cr.MP(M) No. 1069 of 2011, titled as Lalit Manta vs. State of H.P., decided on 28.12.2011, has held as under:

> "10. … … The prosecutrix of her own went with the petitioner and took tea in a dhaba thereafter she stayed voluntarily with the petitioner in the hotel where room was booked by the petitioner. The prosecutrix was studying in +2 class and she cannot be equated with a rustic girl. She knew what she was doing. The possibility cannot be ruled out that out of emotions, desire and both of them being young, the prosecutrix participated in the sexual act." ...

9. Further, a Co-ordinate Bench of this Court in Cr.MP(M) No. 1408 of 2014, titled as Deepak vs. State of H.P., decided on 29.12.2014, has held as under:

> "2. … … In other words, in case after the initial sexual encounter inter se her as well as the bail applicant, the bail applicant refused to marry her, in the event of hers having insisted upon him, his tying of a marital knot with her, she ought not to have then continued to have sexual intercourses with him. Her repeated sexual indulgences thereafter with the bail applicant wanes the effect, if any, of the pretext under which she initially succumbed to the sexual overtures of the bail applicant. Consequently, this Court holds with formidability that the prosecutrix is prima facie constituting false allegations against the bail applicant." …

10. Also, a Co-ordinate Bench of this Court in Cr.MP(M) No. 1144 of 2015, titled as Baldev Raj vs. State of H.P., decided on 6.8.2015, has held as under:

> "8. … … But then it is ultimately the woman herself who is the protector of her own body and therefore, her prime responsibility to ensure that in the relationship, protects her own dignity and modesty. A woman is not expected to throw herself to a man and indulge him promiscuity thereby becoming a source of hilarity. It is for her to maintain her purity, chastity and virtues."

11. In the result the present petition is allowed. In the event of arrest of the petitioner, he shall be released on bail, in connection with the FIR mentioned above, on his furnishing personal bond in the sum of `50,000/- (rupees fifty thousand only) with one surety in the like amount to the satisfaction of the Arresting Officer.

12. This Court is granting the protection subject to the conditions mentioned in this order. The petitioner undertakes to comply with all directions given in this order and the furnishing of bail bonds by the petitioner is acceptance of all such conditions:

a) The petitioner is directed to join the investigation as and when called by the Investigating Officer. It shall be open for the Investigating Officer to call him as and when he feels such a necessity. The petitioner undertakes to appear before the Investigating Officer as and when directed to do so. However, whenever the investigation takes place within the boundaries of the Police Station or Police Post, then the petitioner shall not be called before 9 A.M and shall be let off before 5 p.m.

b) The petitioner shall neither influence nor try to control the investigating officer, in any manner whatsoever.

c) The petitioner undertakes not to contact the complainant, to threaten or browbeat her or to use any pressure tactics.

d) Keeping in view the fact that the petitioner is working in the police department, therefore, it is clarified that if the petitioner tries to threaten, browbeat or put any kind of pressure tactics on the complainant, then it shall be open her to file a petition for cancellation of the bail under Section 439(2) Cr.P.C. before this Court.

e) The Petitioner undertakes not to make any inducement threat or promise, directly or indirectly, to the investigating officer or any person acquainted with the facts of the case to dissuade him from disclosing such facts to the Court or any Police Officer or tamper with the evidence.

f) The Petitioner shall not hamper the investigation.

g) In case the of the launching of the prosecution, the petitioner undertakes to attend the trial and to appear before the Court which issues the summons or warrants and shall furnish fresh bail bonds to the satisfaction of such Court.

13. It is clarified that the present bail order is only with respect to the above mentioned FIR. It shall not be construed to be a blanket order of bail in all other cases, if any, against the petitioner.

14. Any observation made herein above shall not be taken as an expression of opinion on the merits of the case and the trial Court shall decide the matter uninfluenced by any observation made herein above.

Petition stands allowed in the aforesaid terms.

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

ICICI Lombard General Insurance Company Ltd. .....Appellant.

Versus

Smt. Kala Devi and others ....Respondents.

FAO No. 9 of 2019.
Reserved on : 1st May, 2019.
Decided on : 30th May, 2019

Motor Vehicles Act, 1989– Sections 166– Motor accident – Death case- Claim application by legal representative- Income of deceased who was agriculturist-cum-shephered- Determination- Held, income of deceased cannot be computed on surmises- Where no documentary evidence regarding income of deceased is available, Government notification prescribing minimum wages can be considered- Tribunal can take judicial notice of such notification. (Para 5)

Motor Vehicles Act, 1989– Section 166– Motor accident – Death case- Claim application- Necessary parties- Held, daughters who were already married prior to demise of deceased in motor accident, not being his dependents cannot be arrayed as claimants. (Para 6)

Case referred:
National Insurance Co. Ltd. vs. Pranay Sethi and others, 2017 ACJ 2700

For the Appellant:	Mr. Jagdish Thakur, Advocate.
For Respondents No. 1 to 6:	Mr. J. L. Bhardwaj, Advocate.
For Respondent No.10:	Mr. Raj Kumar Negi, Advocate.
For Respondent No.7 to 10:	Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The Insurer of the offending vehicle, has, instituted the instant appeal before this Court, wherethrough, it, casts, a, challenge, upon, the award pronounced by the learned Motor Accident Claims Tribunal-II, Kullu, District Kullu, H.P., upon, Claim Petition No. 54 of 2016, (i) whereunder compensation amount embodied in a sum of Rs.12,60,000/- alongwith interest accrued thereon, at the rate of 9% per annum, and, commencing from, the date of petition till realization thereof, stood, assessed, vis-a-vis, claimants No.1 to 6, (ii) and, the apposite indemnificatory liability thereof, was, fastened upon the insurer/appellant herein.

2. The afore claim petition, whereon, the impugned award stood rendered, was a sequel, of, occurrence of demise of one Chande Ram, in, a motor vehicle accident, involving the offending vehicle, driven, at the relevant time, by its deceased driver, one Khursheed.

3. The learned counsel appearing, for the insurer/appellant herein, does not contest, the validity of affirmative findings recorded, upon, the issue appertaining to the relevant mishap, being a sequel of rash, and, negligent manner of driving of the offending vehicle, by its deceased driver, one Khursheed. However, the learned counsel appearing, for, the appellant/insurer, of, the offending vehicle concerned, has, contended with much vigour (a) that though, the learned tribunal had aptly dispelled the vigour, of, the evidence adduced, vis-a-vis, the pleaded factum of the deceased, from his, avocation as an agriculturist, (b) and, as a shepherd, hence, rearing an income of Rs.10,000/- therefrom, (c)

yet it proceeded to commit, a, gross error, in, its thereafter proceeding, to, compute his per diem daily wages, in a sum of Rs.500/-, (d) and, thereafter he contends that it also committed, a sequeling error, in computing his income at Rs.15,000/- per mensem. He further contends, that, the further computation of sums, of, annual dependency, of, his dependents, upon, his afore income, and, the resultant thereto quantification, of, compensation, vis-a-vis, the respondents/claimants, is also ridden with a gross error. In succoring, the afore submissions, he has placed reliance, upon, the factum that (e) with the government of Himachal Pradesh, hence, notifying the minimum wages drawable, by various categories, of workmen, and, the afore notification, coming into force with effect from May 1, 2015, (f) and, whereunder the per diem wages of a "mazdoor" is computed in a sum, of Rs.180/-, (g) thereupon, when in contemporaneity thereof, hence, the accident occurred on 4.11.2015, thereupon, rather judicial notice, is, enjoined to be taken by this court, vis-a-vis, the afore notification, and, he proceeds to contend that in consonance therewith, rather sweeping reduction(s), in the compensation amount, as, determined by the learned tribunal, is also, required to be made by this Court.

4. Though, the counsel for the claimants/respondents, contests the vigour of the afore submission, and, has rested his submission, qua dehors the afore notification, rather with evidence existing, on record, in exemplification, vis-a-vis, the pleaded income, of the deceased Chande Ram, hence being reared, from, his avocation as a shepherd, and, as an agriculturist, rather standing borne in a sum of Rs.20,000/- per mensem, thereupon, the afore per mensem income of the deceased, is, enjoined to be meted credence.

5. However, for the reasons to be recorded hereinafter, this Court accepts the submission made, by the learned counsel for the insurer/appellant herein, and, discountenances, the contention contra therewith, as, addressed before this Court, by the learned counsel for the claimants/respondents, (a) for accepting the submission addressed before this Court, by the learned counsel for the respondents/claimants, there was an enjoined necessity, vis-a-vis, existence on record, of, documentary evidence, vis-a-vis, the landholdings, of, the deceased, wherefrom, it was alone gaugeble qua his therefrom, hence, drawing an income bearing commensuration with the afore pleaded income, (b) and, also grazing permits issued, vis-a-vis, deceased with explicit and specific enumeration therein, vis-a-vis, the number, of, livestock maintained by the deceased, were/was required hence to be hence adduced into evidence. However, the afore evidence is amiss hereat. Therefore, this Court is constrained to reject the afore submission addressed before this Court, by the learned counsel appearing, for the respondents/claimants. Contrarily, with the afore notification rather not being contested to emanate, from, the records maintained by the department concerned, and, when hence judicial notice is to be meted thereto, (i) thereupon, in consonance therewith, and, when in contemporaneity inter se its issuance, vis-a-vis, the ill-fated accident occurring, rather the per diem wages of a daily waged causal labour, rather stand echoed therein, to be borne in a sum of Rs.180/-, (ii) thereupon, the computation of per diem wages of the deceased, by the learned tribunal, in a sum of Rs.500/- per day, is, surmisal and imaginative, besides, is in departure of the afore notification, thereupon, this Court proceeds, to compute the per diem wages of the deceased, in a sum of Rs.180/-.

6. Though, the number of claimants arrayed, in the afore capacity in the claim petition hence are nine. However, (a) with the learned tribunal in the impugned award, upon, meteing credence to the testification rendered, by his surviving widow, arrayed as co-claimant No.1, with voicings therein, rather qua co-claimants No.7 to 9, being married prior to the occurrence, of, demise of the afore deceased Chande Ram, in the ill-fated mishap, (b) and, thereupon, it taking the number of dependents, upon, the income of the afore deceased being six, and, when the apt legal therewith legal expostulation, makes postulation(s) qua,

upon, the afore per diem income of the deceased, hence, ¼ deduction(s) being meteable, towards, the personal expenses of the deceased, thereupon, the, afore method, employed by the learned tribunal,is creditworthy. Consequently, taking the afore per diem income of the deceased, from his avocation, as a daily wager, thereupon, his per mensem income, is calculated, in a sum of Rs.5400/-. Significantly, the number of dependents, of, the deceased, are, 6, hence, 1/4th deduction is to be visited, upon, a sum of Rs.5400/-, hence, after making, the, apt aforesaid deduction vis-a-vis Rs.5400/-, the per mensem, dependency hence comes to Rs.4050/-. In sequel whereto, the annual dependency, of the dependents, upon, the income of the deceased is computed, at Rs.4050x12=48,600/-. Since, the age of the accused at the time, of, the ill-fated accident was 60 years, hence, upon applying, the, apposite multiplier of 9, upon, the, afore annual dependency, the total compensation amount, is assessed in a sum of Rs.48,600 x 9=Rs.4,37,400/- (Rs. Four lakhs, thirty seven thousand, four hundred only).

7. Lastly, the learned counsel for the aggrieved insurer has made a vehement espousal, before this Court that, the fastening of the apposite indemnificatory liability, upon, the appellant, though, being within the domain, of, the, apt expostulation of law, comprised in, a, verdict of the Hon'ble Apex Court, rendered in a case tilted as Bajaj Alliance General Insurance Company vs. Rambha Devi, and, others, (i) yet when the afore decision is referred to a larger bench, of the Hon'ble Apex Court, hence, thereupto the afore decision, as stood relied upon, by the learned tribunal for fastening, the apposite indemnificatory liability, upon, the aggrieved insurer, is unbefitting. However, the afore submission is not accepted, as till the larger Bench, of, the Hon'ble Apex Court, whereto, the afore decision is referred for adjudication, hence, makes a decision adversarial, vis-a-vis, the afore expostulation of law, as, borne rather therein, hence thereupto, the mandate rendered in the afore decision, made by the Hon'ble Apex Court, enjoins meteing, of deference thereto. Consequently, the fastening of the apposite indemnificatory liability, hence, in consonance therewith, by the learned tribunal, upon, the insurer, of the offending vehicle, does not, suffer from any fallibility.

8. Furthermore, in consonance with the decision rendered by the Hon'ble Apex Court in a case titled as ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** reported in ***2017 ACJ 2700***, the claimants are entitled for the quantification, of damages, under conventional heads, namely, loss to estate, loss of consortium, vis-a-vis, the widow of the deceased, and, funeral expenses being quantified only upto Rs.15,000/-, Rs.40,000/-, and Rs.15,000/- respectively. Accordingly, in addition to the aforesaid amount of Rs.4,37,400/-, the claimants/respondents No.1 and 6, are, entitled under conventional heads, namely, loss to estate, loss of consortium (only vis-a-vis the widow of the deceased), and, funeral expenses, sums of Rs.15,000/-, Rs.40,000/- and Rs.15,000/- respectively, as such, the total compensation to which the claimants/respondents No.1 to 6 are entitled comes to Rs.4,37,400/-+ Rs.15,000/- + Rs.40,000/- + Rs.15,000/-= Rs.5,07,400/-(Rs. Five lakhs, seven thousand, four hundred only).

9. For the foregoing reasons, the appeal filed by the insurer is partly allowed, and, the impugned award, is, in the aforesaid manner, hence modified. Accordingly, the petitioners, are, held entitled to a total compensation of Rs.5,07,400/-(Rs. Five lakhs, seven thousand, four hundred only) along with interest @ 9 % per annum, from, the date of petition till the date, of, deposit, of the compensation amount. The indemnificatory liability, vis-a-vis, compensation amount shall be of the insurer of the offending vehicle, i.e. appellant herein. The afore amount of compensation be apportioned amongst the claimants/respondents No.1 to 6 in the manner as ordered by the learned tribunal. The amount of interim compensation, if awarded, be adjusted in the aforesaid compensation

amount, at the time of final payment. The shares of the minor children, shall remain invested, in FDRs, upto, the stage of theirs attaining majority. However, interest accrued thereon, shall be releasable vis-a-vis their mother, only when she explains, of, its being required, for, the upkeep and benefit of her minor children. All pending applications also stand disposed of. Records be sent back forthwith.

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

LPA No. 173 of 2015
a/w LPA No. 174 of 2015..
Decided on: 25.4.2019.

1. **LPA No. 173 of 2015**.
Jai Singh .....Appellant.
Versus
State of H.P. & ors. .....Respondents.

2. **LPA No. 174 of 2015.**
Jeet Ram & anr. .....Appellants.
Versus
State of H.P. & ors. .....Respondents.

Constitution of India, 1950 – Articles 14 & 16– Appointment against public posts- Mode of- Whether these can be contrary to Recruitment and Promotion Rules? In earlier writ, State was directed to re-engage petitioners as DDT Beldars in next season strictly as per their seniority as existed before disengagement- No direction given to regularize them- Petitioners filing second writ and praying for regularization against Class-IV posts- Petition allowed but similar direction issued regarding their re-engagement- LPA- Held, appointment against public posts are governed by Recruitment and Promotion Rules- Petitioners though figure in seniority list of DDT Beldars, but not eligible under Rules for want of requisite qualification- Petitioners cannot be regularized against class-IV posts- LPA dismissed. (Paras 9 & 10)

For the appellant(s): Mr. Sanjeev Bhushan, Sr. Advocate with Mrs. Abhilasha Kaundal, Advocate, for the appellant(s).

For the respondent: Mr. Vikas Rathore and Mr. Narinder Guleria, Addl. AGs with Mr. Kunal Thakur, Dy. AG and Mr. Sunny Dhatwalia, Asstt. AG.

The following judgment of the Court was delivered:

Justice Dharam Chand Chaudhary, J (Oral).

This judgment shall dispose of both the appeals involving identical questions of law and facts.

2. Appellants herein (the writ petitioners) remained working as DDT Helpers in the Department of Health and Family Welfare to the Government of Himachal Pradesh, Shimla. They continued to be engaged on daily waged basis as DDT Beldars by respondents No. 2 & 3 in Mandi District during the period from 1987-1994. They were disengaged in the month of September, 1994. The appellants-petitioners in LPA No. 174 of 2015 preferred CWP No. 719 of 1995 titled Jeet Ram & ors. Vs. State of H.P. & ors in this Court. The same was disposed of vide judgment dated 14.11.1995 with the following directions:

> "(i) That Secretary (Health) to the Government of Himachal Pradesh shall issue instructions to all concerned more particularly Chief Medical Officers of the Districts and Block Development Officers to maintain a seniority list of DDT Beldars.
>
> (ii) That said seniority list shall be duly published in the notice board of the Block Development Officer and also at the office of Chief Medical Officer of the District and appropriate publicity shall also be given in the neighbouring places where such Beldars are working.
>
> (iii) That whenever the season starts appointments shall be offered according to the seniority."

3. It is thus seen that in the previously instituted writ petition, a direction was issued to respondents to prepare seniority list of DDT Beldars, give due publicity to the same with an idea that the petitioners come to know about their place in the seniority and that whenever the season starts next, the appointments of DDT Beldars be offered according to their seniority.

4. It seems that the directions so issued by this Court were not complied with by the respondents. Therefore, the appellant-writ petitioner Jai Singh in LPA No. 173 of 2015 has preferred CWP No. 2728 of 2012 whereas appellants-petitioners Jeet Singh and Tilak Raj in connected appeal preferred CWP No. 3006 of 2012. Both the writ petitions came to be decided by learned Single Judge, though on 10.9.2014, however, by separate judgments. Learned Single Judge has again reiterated the directions hereinabove of this Court in previously instituted writ petition No. 719 of 1995 in verbatim. However, the claim of the petitioners qua their appointment against Class-IV posts on regular basis was declined on the ground that the appointments against public posts are governed by Recruitment and Promotion Rules.

5. Both the sets of appellants-petitioners had preferred review petitions also seeking modification of the judgments under challenge in these appeals, however, learned Single Judge has dismissed the review petitions also vide judgment Annexure A-2 to these appeals.

6. The grounds of challenge to the impugned judgment in the present appeals are that the claim of the appellants-writ petitioners for their regularization against Class-IV posts has erroneously been rejected by learned Single Judge. The findings so recorded, according to them are contrary to the judgment passed by this Court in previously instituted writ petition. Once the respondents in the reply have admitted regularization of the services of the DDT Helpers by them, on seniority, such benefit could have not been denied to the writ petitioners. The impugned judgment, therefore, has been sought to be quashed and set aside being violative of Article 14 and 16 of the Constitution of India.

7. On 30.10.2018, while hearing these appeals, the following orders came to be passed:

> "In the instant case, we are concerned with the issue as to whether the writ petitioner, namely, Jeet Ram son of Shri Mani Ram and Tilak Raj son of Shri Shiv Ram were senior to Shri Ram Dass and Tek Chand, particulars, whereof are mentioned in para-1 of the review petition or not.
>
> Let the seniority list prepared in terms of directions contained in judgment dated 14th November, 1995, rendered in **CWP No. 719 of 1995 titled Jeet Ram and others versus State of HP and others,** be made available on 20.11.2018.
>
> List on 20.11.2018."

8. Consequently written instructions were placed on record by learned Addl. Advocate General and when the matter heard further on 8.1.2019, the following orders came to be passed on that day:

> "On hearing this matter for sometime, it transpired that in the seniority list enclosed to the written instruction, the date(s) of engagement of DDT beldars, as such, has not been reflected. Learned Deputy Advocate General has produced the register containing the date of engagement. Let the date showing the engagement of each beldar in the seniority list be prepared separately under the signature of the competent authority and placed on record within three weeks. List on 27.02.2019."

9. Learned Addl. Advocate General has accordingly placed on record further written instructions highlighting therein that the dates of engagement of DDT beldars were neither available in the office of Block Medical Officers in the State nor in the office of Chief Medical Officer Mandi District at Mandi. We have, therefore, considered the matter in the light of the written instructions dated 29.12.2018 and the seniority list of beldars annexed thereto placed on record by learned Addl. Advocate General on 1.1.2019. It has rightly been pointed out that in the judgment dated 14.11.1995 passed in previously instituted writ petition No. 719 of 1995, no directions were issued to the respondents to regularize the services of the DDT beldars because only directions were to prepare their seniority, give due publicity to the same and during next season reengage them strictly in accordance with their seniority. Admittedly, the season to spray DDT in the area used to commence in April, every year and end in the month of September. In the written instructions, there is reference of some judgment passed by this Court in CWP No. 1864 of 1995 on 20.11.1995 directing thereby the respondents to consider the DDT helpers for appointment against Class-IV posts as per Rules. The seniority list annexed to the written instructions reveals that the respondents had maintained the seniority of DDT helpers, 71 in number. Out of them, only 18 beldars were eligible to be considered against the post of Class-IV as per the then existing and prevailing R & P Rules. The name of Ram Dass, appointed against Class-IV post figures at Sr. No. 2 in the seniority list whereas that of the appellants-writ petitioners Jai Singh at Sr. No. 43, Jeet Ram at 47 and Tilak Raj at 57. They all were even not eligible also under the rules having educational qualification only up to 5th standard and 4th standard. Whereas, Sh. Ram Dass, their senior was eligible for being considered against the post of Class-IV.

10. Thus, in view of the position so highlighted by the respondents in the written instructions, no case to interfere with the judgment(s) under challenge in these appeals is made out. Learned Single Judge rather has applied its mind twice; firstly at the time of disposal of the writ petitions and secondly when the review petitions preferred by both sets of appellants-writ petitioners were dismissed. The judgment(s) under challenge, therefore,

cannot be said to be legally and factually unsustainable. The same rather are upheld and these appeals being devoid of merit are dismissed.

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

Jasdeep Singh .....Petitioner
Versus
State of Himachal Pradesh ...Respondent

Cr.MP(M) No. 988 of 2019
Decided on : 14.06.2019

Code of Criminal Procedure, 1973- Section 439– Regular bail- Grant of- Parameters- Held, object of bail is to secure attendance of accused during trial- Nature of accusation, nature of evidence in support thereof, severity of punishment which conviction will entail, character of accused and circumstances which are peculiar to him, are also relevant. (Paras 10 & 12)

Cases referred:
Dataram Singh vs. State of Uttar Pradesh & Anr., Criminal Appeal No. 227/2018, decided on 6.2.2018
Prasanta Kumar Sarkar vs. Ashis Chatterjee and Another, (2010) 14 SCC 496
Sanjay Chandra vs. Central Bureau of Investigation, (2012)1 SCC 49

For the Petitioner : N.S. Chandel, Senior Advocate with Mr. Vinod Gupta, Advocate.
For the Respondent: M/s Ashwani Sharma & Sanjeev Sood, Additional Advocate Generals.
ASI Raj Kumar I.O., P.S. Sadar Hamirpur present in person.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge *(oral)*

By way of the present petition filed under Section 439 of the Code of Criminal Procedure, prayer has been made on behalf of the bail petitioner for grant of regular bail in case 17/2019, dated 06.01.2019, under Sections 341, 323, 324 & 307 of the Indian Penal Code, registered at Police Station, Sadar Hamirpur.

2. Sequel to order dated 29.5.2019, ASI Raj Kumar has come present alongwith the record. Mr. Ashwani Sharma, learned Additional Advocate General, has also placed on record status report, prepared on the basis of the investigation carried out by the Investigating Agency. Record perused and returned.

3. Mr. Ashwani Sharma, learned Additional Advocate General, fairly contended that investigation in the present case is complete and nothing is required to be recovered from the bail petitioner. He also contended that in case this Court intends to enlarge the

petitioner on bail, he may be directed to make himself available for investigation/trial, as and when called for.

4. Perusal of the record/status report reveals that on 5th January, 2019, complainant Aditya Bagga got recorded his statement under Section 154 of the Code of Criminal Procedure, alleging therein that the present bail petitioner gave beatings to his elder brother, namely, Nikhil Bagga, as a consequence of which, he suffered serious injuries.

5. Pursuant to the aforesaid statement made by the complainant, formal FIR, as detailed above, came to be lodged against the present bail petitioner, who is behind the bars since 28th January, 2019. Though, the medical evidence adduced on record reveals that one injury alleged to have been caused by the petitioner, is grievous in nature, but the fact remains that guilt, if any, of the petitioner is yet to be proved, in accordance with law. Needless to say, one is deemed to be innocent till the time his/her guilt is not proved. In the case, at hand, though, the material adduced on record by the Investigating Agency, *prima-facie,* suggests that on the date of the alleged incident, beatings were given by the bail petitioner to the victim, namely, Nikhil Bagga, but as has been taken note of the above, factum with regard to infliction of injuries by the petitioner, if any, is yet to be proved and as such, this Court sees no reasons to keep him behind the bars for an indefinite period, especially when he has already suffered imprisonment of more than four months.

6. Though, the address given in the record/status report reveals that the bail petitioner resides at Hamirpur, but apprehension expressed by learned Additional Advocate General that in the event of petitioner's being enlarged on bail, he may flee from justice, can be best met by putting bail petitioner to stringent conditions, as has been fairly stated by Mr. N.S. Chandel, learned Senior Counsel representing the bail petitioner.

7. Hon'ble Apex Court as well as this Court in catena of cases have held that freedom of an individual cannot be curtailed for indefinite period during the pendency of the trial because one is deemed to be innocent until his/her guilt, is not proved in accordance with law. In the case at hand, guilt, if any, of the bail petitioner is yet to be proved in accordance with law by leading cogent and convincing evidence.

8 Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, ***Dataram Singh vs. State of Uttar Pradesh & Anr***.,decided on 6.2.2018, has categorically held that a fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby, that a person is believed to be innocent until found guilty. Hon'ble Apex Court further held that while considering prayer for grant of bail, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Hon'ble Apex Court further held that if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimized, it would be a factor that a judge would need to consider in an appropriate case. The relevant paras of the aforesaid judgment are reproduced as under:

> ***2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of***

bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.

3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons

9. The Hon'ble Apex Court in ***Sanjay Chandra versus Central Bureau of Investigation*** (2012)1 Supreme Court Cases 49; held as under:-

> ***" The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."***

10. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise, bail is not to be withheld as a punishment. Otherwise also, normal rule is of bail and not jail. Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

11. The Hon'ble Apex Court in ***Prasanta Kumar Sarkar v. Ashis Chatterjee and Another*** (2010) 14 SCC 496, has laid down the following principles to be kept in mind, while deciding petition for bail:

- ***whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;***
- ***nature and gravity of the accusation;***
- ***severity of the punishment in the event of conviction;***
- ***danger of the accused absconding or fleeing, if released on bail;***
- ***character, behaviour, means, position and standing of the accused;***
- ***likelihood of the offence being repeated;***

- ***reasonable apprehension of the witnesses being influenced; and***
- ***danger, of course, of justice being thwarted by grant of bail.***

12. Consequently, in view of the above, present bail petition is allowed. Petitioner is ordered to be enlarged on bail subject to his furnishing personal bond in the sum of `1,00,000/- (rupees one lac only) with one surety in the like amount each, to the satisfaction of the learned trial Court, with following conditions:

- ***He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;***
- ***He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;***
- ***He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade her from disclosing such facts to the Court or the Police Officer; and***
- ***He shall not leave the territory of India without the prior permission of the Court.***

13. 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.

14. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this application alone.

The bail petition stands disposed of accordingly.

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

Jiwan alias Sarjivan and others ....Petitioners.

Versus

Ram Pal and others ... Respondents.

CMPMO No 87 of 2015
Decided on: 12.06.2019

Code of Civil Procedure, 1908 – Order XXII - Rules 4 and 9- Abatement of suit- Application for setting aside of – Whether notice to proposed legal representatives necessary before passing orders on such application?- Held, Court must issue notice to proposed legal representatives of deceased party before passing any order on application filed for setting aside abatement of suit/appeal. (Para 8)

For the petitioners. : Mr. N.K. Thakur, Sr. Advocate with Mr. Divya Raj Singh, Advocate.

For the respondent No.1 : Mr. Ajay Sharma, Sr. Advocate, with Mr. Rakesh Chaudhary, Advocate.

For respondents No. 2, 4, 5, 7 to 11 : Ex-parte.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J *(Oral)*

By way of this petition, the petitioners have prayed for following reliefs:

> "That this petition may kindly be allowed and the impugned order dated 23.2.2015 passed by learned Additional District Judge (1), Una, on C.M.A. No.60 of 2015 in Civil Appeal No.60 of 2010 may kindly be quashed and set-aside or the Hon'ble Court may please to pass any such or further order which may be deemed just and proper in the facts and circumstances of the case in the interest of justice and fair play".

2. Brief facts necessary for adjudication of the present petition are that a suit for mandatory injunction and in the alternative for specific performance of contract was filed by respondent Ram Pal against the defendants before the Court of learned Civil Judge (Sr. Division), Una, District Una, H.P. i.e. Civil Suit No.10 of 1996, which was dismissed by the learned trial Court on 1.9.2007.

3. In appeal, the judgment and decree so passed by the learned trial Court were affirmed by the learned Appellate Court vide judgment and decree dated 21.1.2013.

4. Feeling aggrieved, respondent/plaintiff preferred a Regular Second Appeal. During the pendency of the said appeal before this Court, it transpired that Shri Mukhtiar Singh, one of the defendants, had died during pendency of the appeal before the learned First Appellate Court. On this short ground, the Regular Second Appeal was allowed and judgment dated 9.7.2014, passed by the learned Appellate Court was set aside and the matter was remanded back to the learned Appellate Court. After the said remand, an application was filed by respondent/plaintiff under Order 22, Rules 4, 9 read with Section 151 CPC to bring on record the legal representatives of deceased Mukhtiar Singh. Record demonstrates that this application was filed on 16.1.2015 and the same stood allowed by the learned Appellate Court vide order dated 23.2.2015 without serving to the proposed legal representatives.

5. Learned counsel for the petitioner has vehemently argued that the impugned order is not sustainable in the eyes of law as learned Appellate Court could not have had allowed the application to bring on record the legal representatives of deceased respondent No.4 without affording an opportunity of being heard to the proposed legal representatives. According to Mr. N.K.Thakur, learned Senior Counsel for the petitioners, the said omission on the part of the learned Appellate Court has caused great prejudice to all the parties, because there was a probability that the proposed legal representatives along with other respondents might have satisfied the learned Appellate Court that the application so filed could not have been allowed.

6. On the other hand, Mr. Ajay Sharma, learned Senior Counsel appearing for respondent No.1 has argued that no perversity is there in the impugned order, because when the matter stood remanded back in Regular Second Appeal by this Court, it was incumbent upon the learned First Appellate court to have had allowed the application to bring on record the legal representatives of deceased respondent No.4.

7. I have heard learned counsel for the parties and have also gone through the impugned order.

8. In my considered view, there is merit in the submissions of learned senior counsel for the petitioners. Once the application stood filed under Order 22, Rule 4, read with Rule 9 of the CPC to bring on record the legal representatives of deceased Mukhtiar Singh with the prayer of setting aside the abatement as admittedly the application was filed beyond the period of limitation, it was incumbent upon the learned Appellate Court to have had heard the proposed legal representatives before passing any order in the said application. Record demonstrates that on 22.1.2015, notices were issued on the application to the proposed legal representatives. Record further demonstrates that there was a report on the summons issued to the proposed legal representatives that they could not be served for want of correct address. In this factual background, in my considered view, learned Appellate Court erred in allowing the application to bring on record the legal legal representatives of deceased Mukhtiar Singh without (a) the proposed legal representatives of deceased Mukhtiar Singh being properly served and (b) without affording them an opportunity of being heard, on the application.

9. Accordingly, on this short count, this petition is allowed. The impugned order is set aside with direction to the learned Appellate Court to revive the application filed under Order 22, Rule 4 read with Rule 9 of the CPC to bring on record the legal representatives of deceased Mukhtiar Singh and adjudicate the same afresh after issuance of notice to the proposed legal representatives and after hearing the all parties. The represented parties through their learned counsel are directed to appear before the learned Court Below on 22.7.2019. Learned Appellate Court shall decide the application filed under Order 22, Rule 4 read with Rule 9 of the CPC as expeditiously as possible, and preferably before 31.10.2019. It is clarified that this Court has not made any observation on the merits of the case and the application shall be decided by the learned Appellate Court upon its own merits and thereafter, the learned Court Below shall proceed with the matter in accordance with law without being influenced of any observation made by this Court in the present order.

10. The petition stands disposed of in above terms, so also pending miscellaneous application(s), if any.

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

Kamal Kishore ...Appellant.

Versus

State of H.P. & Others ....Respondent.

LPA No. 41 of 2017.
Reserved on : 23rd May, 2019.
Decided on : 30th May, 2019.

Constitution of India, 1950- Articles 14 & 16- Appointment of teacher in Government School by PTA- Government notification dated 27.5.2008- Whether said notification can be applied retrospectively to cancel selections/appointments made prior to that date?- Petitioner selected and appointed in Government School by PTA in 2007- On complaint of

unsuccessful candidate (R4), Inquiry Committee finding that selection of petitioner was not in accordance with instructions contained in notification dated 27.5.2008- Appeal of petitioner dismissed by Deputy Commissioner- Civil Writ also dismissed by Hon'ble Single Bench-LPA- Held, Notification dated 27.5.2008 could not have been applied retrospectively to selection made prior to that i.e. in 2007- Inquiry Committee could not have redetermined merit of candidates including petitioner and (R4) on basis of criteria laid down in Government notification dated 27.5.2008- Selection Committee had assessed all aspirants including petitioner and R4 on same yardstick and petitioner since found more meritorious amongst them, he was selected by it- Committee had adopted reasonable and objective criterion for assessing candidates, then fresh criteria cannot be applied to set aside valid selection- Appointment upheld with all consequential benefits- LPA allowed. (Paras 9 to 13)

Cases referred:

Koyal Kumar vs. State of H.P. and others, CWP No. 2632 of 2008, decided on 28.7.2009

Ravinder Singh vs. State of H.P. and others, CWP No. 525/2009, decided on 4.8.2009

For the Appellant: Mr. Shayam Singh Chauhan, Advocate.

For Respondents No.1 to 3: Mr. Adarsh Sharma, Addl. A.G. with Mr. Y.S. Thakur, Dy. A.G.

Respondent No.4 proceeded against ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Through, the instant Letters Patent Appeal, the appellant herein, casts, a challengen, upon, a verdict rendered by the learned Single Judge, upon, CWP No.11020 of 2011, on 1.4.2017, wherethrough, he dismissed the petition preferred therebefore, by the appellant herein.

2. The facts necessary, for, adjudication of the instant appeal, are, that the appellant was selected by the PTA, as Drawing Master at Government Middle School, Dhuma Devi, Tehsil Sadar, District Mandi, H.P. However, respondent No.4, namely, Nirmala Devi being aggrieved, with the, selection of the appellant, hence, preferred a complaint before the Inquiry Committee. On the aforesaid complaint, made by respondent No.4, an enquiry was conducted by the Committee constituted, for the disposal of such complainants. On inquiry, the committee ,came to the conclusion, that the proper procedure, to select, the candidate(s), for the post of Drawing Master, was not adopted by the PTA, and, the appointment of the appellant, as a Drawing Master in GMS, Dhuma Devi, made by the PTA is not in accordance with law and instruction contained in Para-11 of the guidelines of the Notification No. EDN-A(Kha)7-3/20067, of 27th May, 2008. The appellant being aggrieved therefrom, preferred an appeal before the Deputy Commissioner, Mandi, under PTA Rules, which was also dismissed. Being aggrieved, with the aforesaid order recorded by inquiry committee, and, further upheld, by the appellate authority, the appellant herein, preferred CWP No.11-1 of 2009 before this Court. Aforesaid writ petition came to be disposed of by the Division Bench of this Court vide order of 18th March, 2010, with the following directions:-

> "**"The issue raised in these Writ Petitions pertains to the selection and appointment of teachers by the Parents Teacher Association. Learned counsel appearing on both sides point**

that the Director, Higher Education, Himachal Pradesh has issued a communication dated 24th September, 2009, and the cases require fresh consideration in the light of the said communication. . The relevant portion of the communication of the Director, Higher Education, Himachal Pradesh reads as follows:

> **"Refer to letter No. EDN-kha(7)3706-1 dated 3-9-2009 from the Principal Secretary (Education) to the Govt. of Himachal Pradesh addressed to this directorate and copy endorsed to you and others vide which the government has asked to move an application immediate before the chairman of the concerned enquiry committee in view of the decision of CWP No. 525/2009 titled as Ravinder Singh vs. State and CWP No. 632/2009 titled as Koyal Kumar vs. State wherein the Hon'ble High Court of Himachal Pradesh while setting aside the orders of the committee has directed that Committee after giving adequate opportunity of hearing to the petitioner as well as the other respondents can look into the matter and decide whether the appointment of the petitioner was valid or not. The committee while deciding the issue will keep into consideration the observation of the Hon'ble High Court made in CWPs. The copy of the judgment/orders passed by the Hon'ble High Court CWP No. 2632/2009 titled as Koyal Kumar vs. State is also being sent to all the Deputy Directors.**
>
> **Therefore, you are directed to comply with the directions of the Government and take action in the matter accordingly.**
>
> **In view of the above clarification issued by the Director of Higher Education, Himachal Pradesh, the impugned orders are liable to be set aside. Ordered accordingly. However, we make it clear that it will be open to the Enquiry Committee to consider the matters afresh in the light of the instruction referred to above....."**

3. A perusal of the, afore, hence reflects qua in sequel to the afore-referred judgment, as, rendered by Divisional Bench, of this Court, an inquiry committee considered the matter afresh. The Inquiry Committee, with a view to comply with the orders, rendered by this Court on 4.8.2009, and, on 28.7.2009, in CWP No. 525/2009, titled **Ravinder Singh** versus **State of H.P. and others** and CWP No. 2632 of 2008 titled **Koyal Kumar** versus **State of H.P. and others**, assessed, the, merit of the candidates, upon, taking into consideration, the, marks obtained by them in matriculation, plus two examination, B.A./M.A. and Diploma. The Interview Committee, on the basis of merit, drawn by it, took into consideration, the academic qualifications, referred to above, and, prepared the merit list, wherein, the appellant Kamal Kishore figured at Sr. No.8, and, hence concluded that, since, the appellant herein rather secured 8th position, though, he was not a meritorious candidate, for the aforesaid post, and, the committee also concluded qua respondent No.4 herein, who secured 6th position in the merit list, being also not, a meritorious candidate, for the aforesaid post, and, further came to the conclusion, that, with merit being ignored, by the then PTA, while appointing appellant herein, as Drawing Master at GMS, Dhuma Devi.

Consequently, appointment of appellant herein, Kamal Kishore, as Drawing Master at Government Middle School, Dhuma Devi, made by the PTA, on 5.10.2007, was rather declared invalid.

4. The appellant herein, being aggrieved with the aforesaid order, rendered by committee concerned, approached this Court, by instituting CWP No. 11020 of 2011. The learned Single Judge, taking into consideration, pleadings, and, material adduced on record by the respective parties, as well as orders rendered, by the interviewing committee, affirmed the order of 30.8.2011, as, rendered by the inquiry committee.

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

6. It is not disputed that CWP No. 1047 of 2009, earlier instituted by the appellant herein, stood, disposed of with a direction, to the inquiry committee, to consider, the matter afresh, in light of instructions referred, to in the judgment. The Division Bench, of this Court, while dealing with bunch matters including CWP No. 1047 of 2009, specifically took cognizance, of, a communication dated 24.9.2009, whereby a clarification, was issued by Director, Higher Education, Himachal Pradesh, for, taking note of letter No. EDN-kha(7)3706-1, dated 3.9.2009, issued by Principal Secretary (Education), to the Government of Himachal Pradesh, and, whereby a direction, was made, upon, the inquiry committee, to consider, the, matter afresh, in light of the instructions, contained in the letter referred to herein above. It would be profitable to take note, of, the communication dated 24.9.2009 as under:

> "Refer to letter No. EDN-kha(7)3706-1 dated 3-9-2009 from the Principal Secretary (Education) to the Govt. of Himachal Pradesh addressed to this directorate and copy endorsed to you and others vide which the government has asked to move an application immediate before the chairman of the concerned enquiry committee in view of the decision of CWP No. 525/2009 titled as Ravinder Singh vs. State and CWP No. 632/2009 titled as Koyal Kumar vs. State wherein the Hon'ble High Court of Himachal Pradesh while setting aside the orders of the committee has directed that Committee after giving adequate opportunity of hearing to the petitioner as well as the other respondents can look into the matter and decide whether the appointment of the petitioner was valid or not. The committee while deciding the issue will keep into consideration the observation of the Hon'ble High Court made in CWPs. The copy of the judgment/orders passed by the Hon'ble High Court CWP No. 2632/2009 titled as Koyal Kumar vs. State is also being sent to all the Deputy Directors.
>
> Therefore, you are direct ed to comply with the directions of the Government and take action in the matter accordingly."

7. A perusal of aforesaid communication, makes, a display, that, the inquiry committee, while deciding the matter afresh hence was required to take into consideration, the, observations made by this Court, in CWP No. 525/2009, and, in CWP No. 2632/2008. At this stage, this Court, deems it necessary, to take note of the following observations, made by a Division Bench of this Court, in CWP No. 525/2009, titled **Ravinder Singh** versus **State of H.P. and others**:

> "The notification, dated 27th May, 2008 talks about the committees constituted in April, 2008. It provides that all complaints should be made latest by 20th June, 2008. It lays down the parameters which the Committees can inquire into. These are:- Adequate publicity not made; Interviews not held; All the eligible applicants not invited for interview; Merit ignored; and or any other issue brought to the notice of the Committee. The notification also lays down that the complaints against ignoring of the merit shall be evaluated based on the evaluation criteria in Annexure-A attached to the notification. We are of the considered view that this criteria cannot be applied retrospectively. If the PTA has followed a rational criteria this substituted criteria cannot be applied retrospectively to cases where interviews were held and selections made even before this criteria had been thought about by any person. It is a well settled principle of law that the State by executive instructions cannot take away the vested right of any person with retrospective effect. We may make it clear that we are not saying that if the PTA has not at all followed any objective criteria and has totally ignored merit, the Committee should not interfere. If, however, the PTA has followed some reasonable criteria then the fresh thought of criteria cannot be applied to set aside a valid selection.
>
> Therefore, the criteria laid down in the notification dated 27.5.2008 could not have been applied retrospectively."

8. The Division Bench of this Court, while dealing with CWP No. 525/2009, categorically held that the criteria, laid down, in Notification dated 27.5.2008, could not have been applied retrospectively. The Division Bench, of, this Court, in the aforesaid case, while setting aside orders of the D.C., as well as, order(s) of the Committee, rendered hence directions, that, the Committee, after giving, an, adequate opportunity of hearing, to the petitioner, as well as, to the respondent, can look into the matter, and, decide whether, the, appointment, of, the petitioner was valid or not.

9. After going through the relevant material available on record, vis-à-vis, impugned judgment, rendered by the learned Single Judge, we find that the inquiry committee, while carrying out a fresh exercise, in terms of the judgment rendered, by the Division Bench, on 18.3.2010, in CWP No. 1047 of 2009, re-determined the merit of the candidates, in terms of criteria laid down, in Notification dated 27.5.2008. At this stage, it may be reiterated, that, vide the aforesaid judgment rendered on 18.3.2010, rather a direction was issued to the inquiry committee, to decide case of the petitioner afresh in terms of instructions, contained in communication dated 24.9.2009, wherein admittedly, the inquiry committees were directed to decide the issue with regard to appointments of PTA teachers, upon, theirs, taking into consideration, the, observations of this Court made in CWP No. 525/2009. In the aforesaid facts, the Division Bench had specifically, held that, the criteria laid down in Notification dated 27.5.2008, could not be applied retrospectively. This Court, does not, find any force, in, the arguments addressed before this Court, by the learned Additional Advocate General, that, the order rendered, on, 30.8.2011 hence by the inquiry committee, is strictly in accordance with judgment, rendered by the Division Bench of this Court, on 18.3.2010, in CWP No. 1047 of 2009. Since, the Committee was required to decide the case of the petitioner/appellant herein, in view of observations made by this Court, in aforesaid case, there was no occasion, as such, for the inquiry committee, to re-

determine, the merit of candidates, including the petitioner/appellant herein, and, of respondent No.4, on the basis of criteria laid down vide Notification dated 27.5.2008, rather, the Committee, while considering complaint, if any, of unsuccessful candidate, rather ought to have examined, whether PTA had followed some 'reasonable' criteria, at the time of making selection, to the apposite post or not.

10. The learned Additional Advocate General, was unable to point out discussion, if any, existing in the order dated 30.08.2011, rendered by the inquiry committee, with regard to the criteria, adopted by the selection committee, in the interview, held on 5.10.2007. However, a perusal of order of 5.10.2007, unveils, qua the merit of candidates, being, determined by the Committee by applying, a, uniform criteria, and, it also taking into consideration, various relevant factors, including educational qualifications possessed, by the candidates, and, their experience etc. There is nothing in the order 30.8.2011, from where it could be inferred, that the selection committee, while appointing, the petitioner/appellant herein, hence, adopted, an, unreasonable and arbitrary criteria, to accommodate him, rather, this Court, after having carefully perused record, finds that all the aspirants, including the petitioner/appellant herein, and, respondent No.4, were assessed, on the same yard stick, and, since the petitioner/appellant herein, was found to be more, meritorious amongst them, thereupon, he was aptly offered appointment, to the post of Drawing Master, in, Government Middle School, Dhuma Devi.

11. At this stage, this Court, reiteratedly, may again refer to judgment 4.8.2009 passed by this Court in CWP No. 525/2009, titled **Ravinder Singh** versus **State of H.P. and others**, wherein, the Division Bench of this Court, while testing the validity, of, a notification dated 27.5.2008, it specifically held, that, the criteria laid down in the afore notification being not applicable retrospectively, and, if PTA has not at all followed, any objective criteria, and, has totally ignored merit, thereupon, the Committee can interfere. If, however, the PTA has followed, a, reasonable criteria than, a, fresh criteria cannot be applied, to set aside, a valid selection. Since, a reasonable criteria has been adopted, thereupon, the impugned verdict cannot be upheld.

12. Furthermore, the learned Additional Advocate General, was unable to show, from, the records, that the inquiry committee while examining the merit afresh in terms, of, judgment of 18.3.2010, hence not examining, the case of the candidates, who had appeared in the initial selection process, and, in terms of criteria, laid down in notification dated 27.5.2008, rather, it set aside, the selection of the appellant herein, upon it, taking note of the fact, that, PTA did not follow some reasonable criteria.

13. Since, the learned Additional Advocate General was unable to point out that the authorities concerned, while appointing the appellant herein as Drawing Master in Government Middle School, Dhuma, on 5.10.2007, theirs adopting hence a arbitrary criteria, thereupon, this Court is constrained to conclude, that the learned Single Judge, has committed a grave error in rejecting the claim of the appellant herein, conspicuously, since it was not open for the selection committee, to redraw the merit, that too, on the basis of criteria laid down, in Notification dated 27.5.2008. Admittedly, there is nothing on record hence suggestive, of, the fact that, the criteria adopted by the selection committee, at the time of initial interview, held on 5.10.2007, was not in vogue, as such, matter, if any, could be re-considered, by the inquiry committee, and, in terms of judgment passed by this Court, upon, its taking into consideration, the, criteria prevalent at the time of selection, made, in the year 2006, and, not as per criteria laid down, vide notification dated 27.5.2008. In order of 30.08.2011, though the Committee has observed, that, the selection committee, while selecting the appellant herein, hence, ignored the merit but there is no discussion as such, that in what manner, merit was ignored by the selection committee, in the year 2007. It

clearly emerges, from, the merit drawn, by selection committee in the year 2007, that the candidates, who had appeared in the interview, were also awarded hence marks in the interview.

14. For the foregoing reasons, the instant appeal is allowed, and, judgment rendered, upon, CWP No. 11020 of 2011, on 1.4.2017 by the learned Single Judge of this Court, is set aside. Consequently, order of 30.8.2011 rendered by enquiry committee is quashed and set aside, and, the appointment of the appellant herein, made against, the post of Drawing Master, pursuant to the selection made, on 5.10.2007 is upheld, with all consequential benefits. All pending applications also stand disposed of.

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

Kamla Devi and another .....Appellants/Plaintiffs.

Versus

Madan Singh ....Respondent/defendant.

RSA No. 509 of 2018.
Reserved on : 15th May, 2019.
Decided on : 30th May, 2019.

Code of Civil Procedure, 1908 (Code) – Order XXVI- Rules 9 & 10(2)- Report of Local Commissioner- Relevancy- Lower Courts dismissing plaintiffs suit for possession by placing reliance on report of Local Commissioner- RSA- Plaintiffs contending report of Local Commissioner not in accordance with established procedure- On facts, plaintiffs remained present throughout during demarcation- Their statements were also recorded by Local Commissioner that demarcation was correctly done- Nothing emerged out during cross-examination of Commissioner that demarcation was not done on basis of Musabi- Held, report of Local Commissioner cannot said to be not in accordance with established procedure- RSA dismissed . (Paras 7 to 9)

For the Appellants: Mr. Ajay Sharma, Senior Advocate with
Mr. Rakesh Chaudhary, Advocate.

For the Respondent : Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed by the appellants/plaintiffs, against, the concurrently recorded verdicts, initially by the learned trial Court, and, subsequently by the learned First Appellate Court, respectively, upon Civil Suit RBT No. 23/16/98, and, upon Civil Appeal No. 99 of 2016, wherethrough(s), the plaintiffs' suit for rendition of a decree for possession, vis-a-vis, the suit khasra number(s) hence stood dismissed.

2. Briefly stated the facts of the case are that the suit land as detailed in the plaint, is, owned and possessed by the plaintiffs, and, the defendant is very headstrong person, while plaintiff No.1 is a widow, and, plaintiff No.2 is a minor. The defendant has taken illegal possession of the suit land marked by letters ABCDEF taking the benefit of the

helplessness of the plaintiffs for the last two months. The defendant has absolutely no right or connection with the suit land and their possession is that of a trespasser. The defendants wsere requested to handover the vacant possession of the suit land by they have refused to do so. Hence the suit.

3. The defendant contested the suit and filed written statement, wherein, he has taken preliminary objections, qua, maintainability, as the plaintiffs are neither owners or in possession of the suit land, cause of action, estoppel etc. It is submitted that the partition took place inter se the parties in partition proceedings bearing No. 76/T/97, decided on 7.8.1997, titled as Surjit Singh vs. Kamla Devi by Assistant Collector 1st Grade, Una, in respect of Khewat No.188 and has not come to the court with clean hands. It is submitted that land measuring 0-05-73 hectares bearing Khasra No. 427 was previously owned and possessed by plaintiffs and deceased Surjit Singh. The plaintiffs acquired the land to the extent of 0-10 marlas given by Amin Chand, the father-in-law of plaintiff No.1 and grand father of plaintiff No.2 through gift deed registered in the office of Sub Registrar, Una. In this way, plaintiffs became joint owner in possession in Khewat No.188 min. Said Surjit Singh filed application for partition of land before the Assistant Collector 1st Grade, Una on 6.10.1994 and Khewat No.188 min was partitioned by the orders of the Assistant Collector 1st Grade, Una, on 7.8.1997. The separate Kuras of the parties were carved out in partition proceedings and in the partition, Assistant Collector 1st Grade, Una, had given excess land to the plaintiffs more than their share. It is averred that land measuring 0-03-52 hectares by carving out separate Khasra No.427/2/2 was allotted to Surjit Singh and land measuring 0-02-21 hectares by carving out separate Khasra No.427/1 and 427/2/1 was allotted to plaintiffs by Assistant Collector 1st Grade in case No.76/T/97 titled as Surjit Singh vs. Kamla Devi. After final partition, said Surjit Singh applied for possession of the same before the Assistant Collector 1st Grade, and, possession was delivered on 29.9.1997 on the spot in the presence of the plaintiffs to deceased Surjit Singh by the revenue authorities. It is averred that the plaintiffs came in possession over khasra No. 427/a and 427/2 whereas said Surjit Singh came in possession as owner of Khasra No. 427/2/2/. Further it is averred that answering defendants purchased land measuring 0-03-52 hectares bearing Khasra No.427/2//2/ from Surjit Singh through registered sale deed duly registered in the office of Sub Registrar, Una, and, the answering defendant is in possession of the above mentioned land on the basis of sale deed on spot. The land marked by letters ABCDEF is not part of Khasra No. 427/1 and 427/2/1 whereas the same is part and parcel of Khasra No. 427/2/2/ which is owned and possessed by the defendant. It is further submitted that there exists five trees which are planted by defendant and same is managed and enjoyed by the defendant after the purchase of land and plaintiffs have nothing to do with it.

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 relief of possession as alleged? OPP.
2. Whether the suit is not maintainable in the present form?OPD.
3. Whether the plaintiff has no cause of action to file the suit?OPD.
4. Whether the plaintiff is estopped from filing the suit by her own acts, deed and conduct?OPD.
5. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the plaintiffs' suit. In an appeal, preferred therefrom, by, the plaintiffs/appellants herein before the learned First Appellate Court, the latter Court dismissed, the, appeal, and, affirmed the findings recorded by the learned trial Court.

6. Now the plaintiffs/appellant(s) herein, have instituted the instant Regular Second Appeal, before, this Court, wherein, they hence assail the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court.

7. The dismissal of the plaintiff's suit, was, anvilled upon a report of the local commissioner, embodied in Ex.OW1/A, prepared by Shri Rajinder Kumar, Naib Tehsildar. The author of the demarcation report, had stepped into the witness box, and, had successfully withstood, the rigor of an exacting cross-examination, in course whereof, suggestions were meted to him, for hence belying the tenacity of the report prepared by him. Suggestions whereof, (a) appertain to his not fixing three permanent points, prior to his preceding to hold the relevant demarcation, (b) his not adopting, the, triangular system; (c) his not carrying along with him, to the relevant site, the latha, and, the musabi. Reiteratedly, all the afore suggestions were denied by him. Moreover, he had also testified on oath, that the fixation of permanent points, being, a sequel, to his obtaining the consent, of the contesting litigant(s), and, has further stated, that, he had with the help of jareb, verified every point, and, at the afore stage, the plaintiff had reared no objection, (i) thereupon, it is to be concluded qua the demarcation report borne in Ex.OW1/A standing proven, to be a sequel, of, efficacious conducting, of, demarcation, by the demarcating officer, and, also obviously, it bearing concurrence with the relevant rules.

8. Be that as it may, the learned counsel appearing for the aggrieved plaintiff, has contended with much vigour before this Court, that mere rendition, of, a testification on oath, by the demarcating officer concerned, (i) that at the relevant time he was carrying along with him the apposite musabi, rather not carrying any tenacity, given, his, admitting in his cross-examination, that, he has not appended, the musabi, with the relevant report. However, the afore contention pales into insignificance, as, a wholesome reading of the testification, rendered by OW-1 (ii) rather unveils, that, a suggestion, hence, was put to him, by the counsel for the plaintiff, upon, the latter subjecting him, to cross-examination, with, a clear echoing therein, qua his not applying the relevant “paimana”, upon, the musabi. The afore suggestion, however, stood denied by him. The afore suggestion, couched in an affirmative phraseology, does render open an inference, qua the plaintiffs, acquiescing qua the demarcating officer rather at the relevant site, and, importantly in contemporaneity with his holding, the, relevant demarcation proceedings, his hence carrying alongwith him, the, musabi, (iii) dehors his not appending, the, musabi with his report, thereupon, no capitalization can be derived by the plaintiffs, that, he omitted, to, at the relevant time, hence, carry the musabi, appertaining to the suit khasra number.

9. The above discussion, unfolds, that the conclusions as arrived by both the learned Courts below, being based, upon a proper and mature appreciation of evidence on record. While rendering the findings, both the learned Courts below have not excluded germane and apposite material from consideration. Consequently, no substantial question of law much less a substantial question of law hence arises for determination in this appeal.

10. In view of the above discussion, there is no merit in the instant appeal, and, it is dismissed accordingly. In sequel, the judgments and decrees impugned before this Court are affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

Smt. Kavita Devi ....Petitioner.

Versus

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

CWP No.: 2788 of 2016 &
CMP No. 5123 of 2019
Decided on: 17.06.2019.

Constitution of India, 1950 – Articles 14 and 16– Appointment to post of Anganwari worker- Determination of income of candidate- Whether income of individual or aggregate of family is to be considered?- Petitioner appointed as Anganwari worker- Appointment set aside by Competent Authority on representation of another candidate (R4) that income certificate as furnished by petitioner was incorrect as on cut off date i.e. 1.10.2004 - Appellate Authority upholding order of Competent Authority- Challenge thereto by way of writ jurisdiction- Held, as per petitioner's own case, she separated from family on 7.1.2007- On cut of date, she was residing jointly with other members of family- For appointment of Anganwari worker while ascertaining annual income of candidate, it is not solitary income but total income of applicant's family is to be taken into consideration- Certificate furnished by petitioner disclosed only her income and not the aggregate income of her family- Such income certificate was not worth reliance recorded by Authorities- Findings duly borne out from record- Petition dismissed. (Paras 9 & 11)

Constitution of India, 1950 – Article 226- Court jurisdiction- Quasi-judicial order- Scope of interference- Held, while exercising writ jurisdiction, High Court cannot upset findings returned by quasi-judicial authorities until unless some perversity on face of record is demonstrated. (Para 10)

For the petitioner	:	Mr. B. N. Mehta, Advocate.
For the respondents	:	Mr. Dinesh Thakur, Additional Advocate General with M/s R.P. Singh and Amit Kumar Dhumal, Deputy Advocate Generals for respondent-State.
	:	Mr. Devender K. Sharma, Advocate vice Mr. C.N. Singh, Advocate for respondent No. 4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

CMP No. 5123 of 2019

No order is required to be passed in this application as the petition is being disposed of today itself. The application stands disposed of accordingly.

2. By way of this petition, petitioner has *inter alia* prayed for the following substantive relief:-

"(1)). That the petitioner in the facts and circumstances prays that the Civil Writ Petition may very kindly be allowed and this Hon'ble Court may very kindly be pleased to set aside and quashed Annexure P/1, P/2 and P/3 after summoning the relevant record concerning the case before ADC Sirmour and Divisional Commission Shimla and further direction to appoint present petitioner on the post of Anganbari workers in place of Respondent No. 4 who has only joined on 14-10-2016 by the order of Respondent No. 3, otherwise the present Petitioner was working on the post for the last 10 years till 14.-10-2016.

(2) That any other orders just and proper in the facts and circumstances of the case may also kindly be passed in favour of the petitioner and against the respondents in the interest of justice, equity and fair play."

3. Brief facts necessary for adjudication of the present petition are that the petitioner was appointed as an Anganwari Worker at Anganwari Centre Bhajyana-tutab, Tehsil and ICDS Block Pachhad, District Sirmaur, HP, on 14.08.2007. Her appointment as such was assailed by Smt. Anita, present respondent No. 4, *inter alia* on the ground that income certificate submitted by the petitioner was incorrect as on 01.10.2004, i.e. the cut of date envisaged in the Policy issued by respondent-State for the purpose of making appointment to the post of Anganwari Worker.

4. As per respondent No. 4 petitioner was residing in a joint family, headed by Sh. Moti Ram and in the said joint family, Sh. Som Dutt, elder brother of the husband of the present petitioner was also residing and his wife, i.e. wife of Som Dutt, was serving as Tailoring Teacher and her income besides income of other family members, was not disclosed by the petitioner while gaining the appointment as Anganwari Worker.

5. Vide order dated 14.01.2014, the appeal so filed by respondent No. 4 was allowed by the Appellate Authority and the appointment of present petitioner was quashed and set aside by further directing the Child Development Project Officer, ICDS Block, Pachhad, to appoint next eligible person, whose name appeared in the merit list.

6. Feeling aggrieved, the petitioner filed an appeal, i.e. Appeal No. 10 of 2014. Same was rejected by the Second Appellate Authority. By way of a reasoned and speaking order, said Authority upheld the order passed by the Additional District Magistrate, District Sirmaur, at Nahan, dated 14.01.2014, vide which the services of the petitioner were dismissed.

7. Feeling aggrieved, petitioner filed this petition seeking for reliefs already quoted herein-above.

8. I have heard learned Counsel for the parties and gone through the impugned orders as also the record of the case.

9. It is not in dispute that as on 01.01.2004, i.e. the cut of date notified by the Government, the petitioner was residing in a joint family, headed by Moti Ram. It is also not in dispute that wife of elder brother of the husband of the petitioner, who were also residing in the joint family, was working as Tailoring Teacher and her monthly wages were `700/-. While ascertaining the annual income of an applicant, who applies for the post of Anganwari Worker, it is not as if the solitary income of the applicant has to be taken into consideration. It is the total income of the family of the applicant, which has to be taken into consideration. It is the admitted case of the petitioner that her family had separated as per the provisions of H.P. Panchayati Raj Act, on 07.01.2007. Meaning thereby that as on the cut of date, the family of the petitioner was joint and not separated and in this view of the matter, the annual

income certificate submitted by the petitioner was not worthy of reliance as the entire income of the family of the petitioner as on 01.01.2004 was not disclosed by her. This is exactly what was held by the first Appellate Authority while accepting the appeal filed by respondent No. 4 and thereafter by Second Appellate Authority while rejecting the appeal filed by the present petitioner by the Second Appellate Authority.

10. During the course of arguments, learned Counsel for the petitioner could not demonstrate that there was any procedural infirmity with the orders passed by the said Authorities. In other words, it is not the case of the petitioner that principles of natural justice were not followed by the Authorities. Petitioner could also not point out any perversity with the orders passed by the Authorities on the basis of record. In my considered view, while exercising powers under Article 226 of the Constitution of India, in the case of judicial review, this Court cannot upset the findings returned by the quasi-judicial Authorities until and unless some perversity on the face of record is demonstrated. Petitioner has failed to demonstrate the same in this case.

11. A perusal of the orders passed by the quasi-Judicial Authorities demonstrates that the same are reasoned and speaking orders. Said Authorities have taken into consideration the respective contentions of the parties. Not only this, the findings returned are duly substantiated from the material on record. Meaning thereby that the findings are not returned on conjectures and surmises. The factum of the family of Som Dutt having been separated on 07.01.2007 in the meeting of Gram Sabha and entry of the family of the husband of the petitioner in the family Register on 20.08.2007 as separate family has been ascertained by the Authorities from the report of the Panchayat Secretary concerned. The Authorities have also held that there was not even an iota of doubt that till 07.01.2007, families of brothers of husband of the petitioner were living in a joint family, headed by Sh. Moti Ram and the separation of the family of husband of the petitioner from the joint family was only on 07.01.2007, whereas the cut of date was 01.01.2004. These findings, as already mentioned above, are duly borne out from the record of the case, and therefore, the same cannot be said to be perverse at all.

12. In this view of the matter, as this Court does not finds any perversity with the impugned orders, i.e. Order dated 14.01.2014, passed by Additional District Magistrate, District Sirmaur, Nahan (Annexure P/1), Order dated 23.6.2016, passed by Divisional Commissioner, Shimla Division, Shimla-02, (Annexure P/2), and Office Order dated 14.10.2016, passed by Child Development Project Officer, Pachhad, District Sirmaur, HP, (Annexure P/3), the petition is accordingly dismissed. Pending miscellaneous application(s), if any, also stand disposed of.

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BEFORE HON'BLE MS. JYOTSNA REWAL DUA, J.

Kehar Singh and others ...Petitioner

Versus

The State of Himachal Pradesh & others ...Respondent

CWP No. 566 of 2013
Decided on: 24.06.2019

Land Acquisition Act, 1894 – Section 16– Taking over of possession of acquired land- Relevancy- Held, acquired land vests in government only on taking of its possession- Till

that point of time, land continues to be with original owner and he is free to deal with it as he likes. (Paras 7[a])

Land Acquisition Act, 1894 – Sections 11 & 16– Government can take possession of acquired land only after award of compensation is passed by Collector. (Paras 7[a])

Cases referred:

Parsinni (dead) by LRs and Others vs. Sukhi and others, (1993) 4 SCC 375

Special Land Acquisition Officer, Bombay and Others vs. M/S Godrej and Boyce, (1988) 1 SCC 50

Visakhapatnam Urban Development Authority vs. S.S. Naidu and Others, (2016) 13 SCC 180

For the petitioners: Mr. Naveen K. Bhardwaj, Advocate.

For the respondent/

State : Mr.Anil Jaswal, Mr. Desh Raj Thakur and
Ms. Rameeta Rahi, Additional Advocate Generals.

For the respondent No.6: Mr. C.N. Singh, Advocate.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, Judge *(Oral)*

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

2. The factual position emerging from the pleadings of the parties can be summed up as under:-

a.) Vide letter dated 19.10.2000, respondent No.6 requested the Public Works Department to widen the Largi Sainj Road. On the request and such requisition of respondent No.6/ NHPC, the Public Works Department started the process for widening of Largi Sainj Road. For this purpose, the acquisition proceeding were also initiated by the department. The notifications under Sections 4, 6, 7 and 9 of the Land Acquisition Act were issued in respect of 17-12-06 bighas of land with effect from 19th December, 2006, which is the date of issuance of notification under Section 4 of the Act. The area included private land as well as about 15 private houses.

b.) Road was widened to the extent of 5/7 metres in width on vacant land. At that stage, matter was taken up with respondent No.6/ NHPC for acquisition of land and houses. On 16th February, 2010, vide Annexure P-11, respondent No.6/NHPC informed the State Public Works Department as under:-

"Kindly refer to your letter No.PW/BSD/C- 15/2009-4664-67 dated 06.01.2010 on the above cited subject. After going through the same, it is found that the matter is mainly related to construction of Adit for Parbati H.E. Project stage-III.

There is no doubt that HPPWD had been asked to accelerate the widening of road. But land/houses acquisition processes were to be taken on priority i.e. before widening of road. As the road width of HPPWD road in this reach is sufficient to meet out ongoing construction activities of Parbati HE Project Stage-II, as on date, the acquisition of any houses is not required.

In view of the above, it is requested to take up the issue of acquisition of houses with Parbati H.E. Project Stage-III, in case any acquisition is required due to their construction activities". (Emphases supplied)

c.) Due to refusal of NHPC/respondent No.6 to acquire and pay compensation for total proposed land inclusive of houses, further widening work was stopped. The notifications issued under Sections 4, 6, 7 and 9 of Land Acquisition Act lapsed.

3. Aggrieved against this action of the respondents in not acquiring the total land measuring 17-19-7 bighas of land, situated in village Phati Kanon, Tehsil Sainj, District Kullu, H.P., the petitioners have preferred the present Writ Petition with following prayers:-

"a. Issue a writ of mandamous directing the respondents to acquire the land and houses of the petitioners as mentioned in the notification under Sections 4, 6 and 9 of the Land Acquisition Act and pass the compensation award in favour of the petitioners for the value of their land and houses which they have suffered due to widening of the Largi Sainj Road.

b. to issue any order or direction as this Hon'ble Court deem fit in the peculiar circumstances of this case".

4. The stand taken by respondents No.1 to 5, in their reply is that:-

a) On the requisition of respondent No.6/NHPC Authority, the land/houses of the petitioners were to be acquired for widening of the road. However, later on, when the Department widened the road to the extent of 5/7 metres in the width on vacant land, the NHPC intimated them that acquisition of houses is not required. Whereafter further widening work was stopped.

b) It is further stated in the reply that houses of the petitioners have neither been disturbed nor damaged. The houses of the petitioners are not required for widening of the road.

c) It was further informed in the reply that the Public Works Department was going to initiate fresh proceedings for acquisition of the land, which had actually been used for widening of the road. Paras 2 and 4 of preliminary submission of the reply of respondents No.1 to 5 are reproduced hereinafter:-

"2. That the Largi Sainj Road was already in existence prior to 1965 as it was constructed by the Forest Department and was handed over to Public Works Department in the year 1965-66. It is further submitted that in the year 2000, the authority of NHPC Ltd. made request to the Public Works Department vide their office letter No.NHPC (18III) 2000 dated 19.10.2000 (attached at R-1, to widen the said road, as NHPC authority had to transport Tunnel Boring Machine and other heavy machinery to Power House site for the construction of Parbati Hydro Electric Project. On the request and requisition of NHPC, the Public Works Department started widening of the Largi Sainj Road and acquisition proceedings was also initiated by the Department on the assurance of NHPC Authority. The NHPC Authority time and again requested the replying respondent Department to widen the above mentioned road and to assess the value of houses/land which were supposed to be acquired for the purpose of widening of the road. Copy of requisition/request letter and other correspondence made by NHPC Authority in this regard are attached as (R-1 to R-2) for kind perusal of this Hon'ble Court. It is pertinent to mention here that notifications under Sections 4, 6, 7 and 9 of the Land Acquisition Act were already issued timely and matter was taken with the NHPC Authority as some

of the private houses were required to be acquired to complete the widening work. But the NHPC Authority vide their office letter No.NHPC/PHEP II/PHC/2010/282-86 dated 16.02.2010 intimated the replying respondent/Department that "there is no doubt that HPPWD had been asked to accelerate the widening of road. But land/houses acquisition processes were to be taken on priority i.e. before widening of road. As the road width of HPPWD road in this reach is sufficient to meet out ongoing construction activities of Parbati HE Project Stage-II as on date, the acquisition of any houses is not required". Keeping in view the non responsible attitude of NHPC Authority the notification issued under Sections 4, 6, 7 and 9 were lapsed. However, now the department is going to start fresh acquisition proceedings, for the land only which has already been used for the purpose of widening of above mentioned road. It is respectively submitted that due to non responsible attitude of NHPC Authority now, no house of petitioners is required to be acquired as Public Works Department has stopped the widening work. It is further submitted that earlier on the requisition of NHPC Authority the land/houses of petitioners were supposed to be acquired for widening of the road, but later on when the department widened the road to the extent of 5/7 metres, in width on vacant land and the NHPC Authority was requested for acquisition of land and houses, the NHPC Authority intimated the replying department that acquisition of houses is not required. Hence, no house of the petitioner was disturbed/ damaged as the houses of the petitioners were not required for widening of the road.

4. That respondents had already initiated proceedings for acquisition of land well within time after receiving letter dated 19.10.2000 issued by Chief Engineer NHPC and necessary notification under Sections 4, 6, 7 and 9 of Land Acquisition Act were issued immediately. However, due to refusal of NHPC Authority to pay compensation for total proposed land and houses required for widening of road and award could not be announced and as a result of this, the proceedings were lapsed and further widening work was also stopped. However as already submitted in para supra, now the Department is going to initiate the fresh proceedings for acquisition of land already used for widening of the road. As such the present writ petition is not maintainable and liable to be dismissed ".

5. As undertaken in the reply, notification dated 2.10.2015 (Annexure P-15), under Section 11 of the Right to Fair Compensation and Transparency, Land Acquisition, Rehabilitation and Resettlement Act, 2013, was issued during the pendency of this petition, whereby the land measuring 5-9-2 bighas is being sought to be acquired and acquisition proceedings have been initiated for this land.

6(a). The grievance of the petitioners, now is that Annexure P-15 is in respect of only 5-9-2 bighas of land out of earlier notified land of 17-19-7 bighas. Therefore, petitioners' contention is that entire land and houses as proposed in earlier notifications are required to be acquired.

6(b). In support of his contention, learned counsel for the petitioners relied upon ***(2016) 13 SCC 180 titled as Visakhapatnam Urban Development Authority*** Versus ***S.S. Naidu and Others***, to assert that issuance of notifications dated 19.12.2006 under Section 4 of the Land Acquisition Act in respect of 17-19-7 bighas of land to the *ifso-facto* mean taking over the possession of entire proposed land by the State. Therefore, fresh

acquisition proceedings should have been for the entire proposed land and not just for the part of it.

7 (a). The above contention is misplaced. In Visakhapatnam Urban Development Authority's case relied by the petitioners, the factual position was different from the present case. There the award was made, compensation in respect of the land was determined, the amount was deposited in the Court and possession of the land was also taken. There was no dispute with respect to taking over the possession of the land in the case.

In ***(1993) 4 SCC 375 titled as Parsinni (dead) by LRs and Others*** Versus ***Sukhi and others***, it was held by the Hon'ble Apex Court that possession can be taken of the proposed land after the award of compensation is passed. The land vests in the government upon taking of possession. Till that time title remains with the land owner. It is apt to reproduce relevant paragraph 15 of the judgment:-

> "Ordinarily, the Government can take possession of the land proposed to be acquired only after an award of compensation in respect thereof has been made under Section 11. Upon the taking of possession the land vests in the Government, that is to say, the owner of the land loses to the government the title to it. This is what Section 16 states. The provisions of Section 11-A are intended to benefit the landowner and ensure that the award is made within a period of two years from the date of the Section 6 declaration. In the ordinary case, therefore, when Government fails to make an award within two years of the declaration under Section 6, the land has still not vested in the Government and its title remains with the owner, the acquisition proceedings are still pending and, by virtue of the provisions of Section 11-A, lapse ……."

In another judgment in ***(1988) 1 SCC 50 titled as Special Land Acquisition Officer, Bombay and Others*** Versus ***M/S Godrej and Boyce***, it was held that neither the notification under Section 4 nor the declaration under Section 6 nor the notice under Section 9 of the Act is sufficient to divest the original owner of his land/rights therein and that it is only when the possession is taken by the government, that the title to the land can vest in the government under Section 16 of the Land Acquisition Act. Till that point of time, the land continues to be with the original owner and he is free to deal with the land as he likes. Relevant paras of the judgment are quoted hereinafter:-

> "5. We are of opinion that the High Court erred in striking down the order under Section 48 and compelling the State Government to acquire the lands of the respondent. Under the scheme of the Act, neither the notification under Section 4 nor the declaration under Section 6 nor the notice under Section 9 is sufficient to divest the original owner of, or other person interested in, the land of his rights therein. Section 16 makes it clear beyond doubt that the title to the land vests in the government only when possession is taken by the government. Till that point of time, the land continues to be with the original owner and he is also free (except where there is specific legislation to the contrary) to deal with the land just as he likes, although it may be that on account of the pendency of [proceedings for acquisition intending purchases may be chary of coming near the land. So long as possession is not taken over, the mere fact of a notification under Section 4 or declaration under Section 6 having been made does not divest the owner of his rights in respect of the land or relieve him of the duty to take care of the land and protect it against encroachments. Again, such a notification does not either confer on the State Government any right to interfere with the ownership or other rights

in the land or impose on it any duty to remove encroachments therefrom or in any other way safeguard the interests of the original owner of the land. It is in view of this position, that the owner's interests remain unaffected until possession is taken, that Section 48 gives a liberty to the State Government to withdraw from the acquisition at any stag before possession is taken. By such withdrawal no irreparable prejudice is caused to the owner of the land, and if at all he has suffered any damage in consequence of the acquisition proceedings or incurred costs in relation thereto, he will be compensated therefor under Section 28 (2). In this view of the matter, it does not matter even if there is lapse of considerable time between the original notification and withdrawal under Section 28 as held in Trustees of Bai Smarth Jain Shvetambar Murtipujak Gyanoddhaya Trust v. State of Gujarat. It also follows that the State can be permitted to exercise its power of withdrawal unilaterally and no requirement that the owner of the land should be given an opportunity of being heard before doing so should be read into the provision.

6. The High Court has taken the view that a decision of withdrawal from acquisition must be backed by reasons and cannot be arbitrary or whimsical. We may observe that having regard to the scheme of the Act as discussed above, it is difficult to see why the State Government should at all be compelled to give any cogent reasons for a decision not to go ahead with its proposal to acquire a piece of land. It is well settled in the field of specific performance of contracts that no person will be compelled to acquire a piece of land As any breach of a contract to purchase it can always be compensated for by damages. That is also the principle of Section 48(2). But this consideration apart, and even assuming that a withdrawal order under Section 48 should be backed by reasons and should be bona fide, we are of the opinion that in the present case the order is not vitiated in any manner. The government had intended to acquire a vast piece of vacant land for construction of houses by the State Housing Board. But this land had been overrun by slum dwellers to such an extent that it was no longer possible for the government to effectuate the intended purpose of acquisition. The High Court's observations that "the respondents have not stated in their affidavit that the lands in question are unsuitable for the purpose in question" and that "the purpose continues to exist" lose all meaning in the face of the finding recorded by the High Court itself at another place that "the lands of the petitioners today are fully occupied by unauthorised hutments which have come up on these lands, rendering the lands worthless". The basis question is really whether the government can be held responsible for this state of affairs and can be compelled to go ahead with the acquisition though its purpose could not be achieved. We have already pointed out that the State cannot be held responsible for the occupation of the land by trespassers. It is true that if the government decides to go ahead with the acquisition and to take possession of the land, it has powers to evict trespassers and to secure possession of the land but, for this reason alone, they cannot be compelled to go ahead with the acquisition……."

7(b) In the present case, it is undisputed that earlier notifications issued under Sections 4, 6, 7 & 9 of the Land Acquisition Act had lapsed. The case of the respondents is that for widening of road, only part of the land out of entire initially proposed land had been used, for which, fresh acquisition proceedings have been initiated vide Annexure P-15, isseed during the pendency of the present writ petition. Use of any other land/houses is disputed. Taking of possession over any other land/house is not admitted. It has been

further asserted that no damage, disturbance etc. has been caused to the houses in question.

7 (c) The prayer of petitioners for directing the respondents to acquire entire 17-19-7 bighas of land cannot be granted, in view of factual stand taken by respondents No.1 to 5 and 6, to the effect that:-

i) No other land save and except what is notified in terms of Annexure P-15 dated 2.10.2015 has been utilized for widening of road in question and that possession of any other land/houses was not taken.

ii) Neither the houses of the petitioners were disturbed/damaged nor there is any future proposal to acquire any house of the petitioners as such, therefore, the remaining land or the houses are not required to be acquired.

Learned counsel for the petitioners has asserted that houses of the petitioners have actually been damaged in widening of road and are not inhabitable. To prove this fact, he has prayed for appointment of a Local Commissioner in terms of prayer made in CMP No. 2122 of 2019, under Order 26, Rule 9 of Code of Civil Procedure. This prayer cannot be accepted while exercising writ jurisdiction under Article 226 of Constitution of India more particularly in a case of this nature when facts are highly disputed.

8. For redressal of grievance of petitioners in seeking direction to the respondents, with respect to acquisition of entire 17-19-7 bighas of land in question, all above disputed questions of fact need to be gone into by a Court of Competent Jurisdiction by looking into cogent and reliable evidence which is to be produced and proved in accordance with law by the parties.

9. In view of foregoing observations, present writ petition is dismissed with liberty to the petitioners to file appropriate proceedings in accordance with law in the Court of Competent Jurisdiction in respect of all the surviving grievances. Needles to say, in case they succeed, all consequential benefits will be granted to them. Respondents are, however, directed to expeditiously complete acquisition proceedings initiated under Annexure P-15 dated 2.10.2015. It is made clear that observations made in this order will not come in the way of the petitioners, in any other proceedings, which may be initiated by them in accordance with law. All pending application(s), if any, are also disposed off.

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

Lekh Ram ....Appellant/Plaintiff.

Versus

Sh. Chanchal Ram and others ... Respondents/Defendants.

RSA No. 18 of 2007
Decided on: 30.4.2019

Specific Relief Act, 1963- Section 38- Permanent prohibitory injunction- Entitlement- Necessity of proof of settled possession- Plaintiff filing suit for permanent prohibitory injunction with respect to his own land as well as another land recorded in ownership of State- Lower Courts concurrently denying decree with respect to Govt. land- RSA by

plaintiff- Suit land recorded in ownership of State and in possession of right holders of estate- Exclusive possession of plaintiffs over it not recorded- No oral evidence worth credence to prove his possession on said land- Held, plaintiff rightly held not entitled for injunction – RSA dismissed. (Paras10)

Himachal Pradesh Land Revenue Act, 1954 - Section 45- Record of rights and periodical records- Presumption of truth- Nature of- Held, presumption of truth attached to entries record in jamabandi is rebuttable- Onus lies on party which assails such revenue entries as wrong. (Para 7 & 10)

Himachal Pradesh Land Revenue Act, 1954 - Section 45- Record of rights and periodical records- Presumption of truth- Conflicting entries- Held, if there are two conflicting jamabandis on record, then latest jamabandi shall prevail over previous one unless it is shown that latest entry was incorporated without proper procedure. (Para10)

For the appellant. : Mr. G.R. Palsra, Advocate.
For respondents : Mr. Sanjeev Bhushan, Sr. Advocate with
Ms. Abhilasha Kaundal, Advocate**.**

The following judgment of the Court was delivered:

Ajay Mohan Goel, J*(Oral)*

By way of this appeal, appellant/plaintiff has challenged the judgment and decree passed by the Court of learned Civil Judge (Senior Division) Court No.1 Mandi in Civil Suit No. 99/2002 dated 5.4.2005 vide which, relief to the extent of grant of injunction in favour of the plaintiff and against defendants qua Government land stood denied by learned Trial Court, as also the judgment and decree passed in appeal by the learned Presiding Officer, Fast Track Court, Mandi in Civil Appeal No. 54/2005, 193/2005 dated 8.11.2006 vide which appeal filed by present appellant against the judgment and decree passed by learned Trial Court stood dismissed.

2. Brief facts necessary for adjudication of the present appeal are that appellant/plaintiff (hereinafter referred to as plaintiff) filed a suit for permanent prohibitory injunction against the defendants, seeking injunction in respect of suit land as stated in para-1 and para-2 of the plaint. The suit land mentioned in para-1 was owned and possessed by the plaintiff, whereas as per averments made in the plaint, the suit land described in para-2 of the plaint though was owned by the Government, but was purportedly stated to be in possession of the plaintiff. The case of the plaintiff was that defendants who had no right, title or interest over the suit land were habitual and casual trespassers over the suit land and were causing obstruction by way of demolishing dunga, removing grass and maize crop etc. Defendants denied the claim of the plaintiff and stated that they had never trespassed upon the suit land owned by the plaintiff and as plaintiff was having inimical relations with them, the suit was in fact filed just to harass them. Defendants denied that the suit land mentioned in para-2 of the plaint was in possession of the plaintiff.

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

"1. Whether the plaintiff is joint owner in possession of the land described in para-1 of the plaint? OPP

2. Whether the plaintiff is in settled possession of the got. Land described in para-2 of the plaint? OPP

3. Whether the defendants without any right, and title are causing interference with the possession of the plaintiff in respect of land described in para-1 and 2 of the plaint? OPP

4. Whether the defendants have caused damage to grass, maize crop and Danga existing over land mentioned above worth Rs. 18,000/- and plaintiff is entitled to recover the same from defendants? OPP

5. Whether the plaintiff is entitled for the relief of permanent prohibitory injunction against defendants, as prayed for? OPP

6. Whether the suit in the present form is not maintainable as alleged?OPD

7. Whether the plaintiff has no cause of action to file the suit, as alleged? OPD

8. Whether the suit is not properly valued for the purpose of Court fee and jurisdiction, as alleged? OPD

9. Relief."

4. On the basis of evidence led by parties, learned trial Court returned the following findings on the said issues:-

"Issue No.1 : Partly Yes.

Issue No.2. : No.

Issue No.3. : Partly Yes.

Issue No.4. : No.

Issue No.5. : Yes

Issue No.6. : No.

Issue No.7. : No.

Issue No.8. : No.

Relief : Suit partly decreed and partly dismissed per operative part of the judgment."

5. Thus, learned trial Court decreed the suit of the plaintiff with regard to the suit land, details of which were described in para-1 of the plaint. However, with regard to land described in para-2 of the plaint, learned trial Court held that plaintiff was not entitled to the relief of injunction as plaintiff had failed to prove his possession over the suit land as also his locus to file the suit with regard to Government land described in para-2 of the plaint.

6. Feeling aggrieved, plaintiff filed an appeal.

7. Learned appellate Court while upholding the findings returned by learned trial Court held that except the bald statements of PW1 and PW2 that plaintiff was in possession of the Government land as described in para-2 of the plaint, there was no evidence on record to prove the same and the stand of the plaintiff was belied/contradicted by revenue record which was produced on record by the plaintiff himself. Learned appellate Court held that Ex. PB copy of jamabandi for the year 1995-96 clearly demonstrated that land described in para-2 of the plaint was recorded to be owned by the State of Himachal Pradesh and was in possession of estate right holders and there was no entry in the jamabandi that the plaintiff was in unauthorized possession over the suit land. It further held that presumption of truth was attached with the copy of latest jamabandi unless the same was rebutted and as entry in copy of jamabandi Ext. PB was against the plaintiff, onus

was upon the plaintiff to rebut the said presumption by leading convincing and satisfactory evidence but plaintiff had failed to do so. It further held that the entry in the copy of Misal Haquiat Bandobast Jadeed Ex. PC in which land detailed in para-2 of the plaint was shown in possession of Hari Ram, who is alleged to be the grandfather of plaintiff was of no help to the plaintiff because said entry was a stray entry and plaintiff had failed to place on record any other jamabandi in which possession of the plaintiff or his grandfather over the Government land was recorded. It held that said entry as contained in the copy of Missal Haquiat Bandobast Jadeed Ex. PC stood rebutted by the entry in latest jamabandi i.e. Ext. PB in which the land defined in para-2 of the plaint was recorded to be in possession of estate right holders. Learned appellate Court further held that it was settled law that in case of conflict between the latest revenue entry and previous revenue entry, it is the latest entry which will prevail over the previous revenue entry unless it is shown that the latest revenue entry was incorporated without following the proper procedure. It held that plaintiff did not lead any evidence to prove that entry in the copy of jamabandi Ex. PB was incorrect and the same was not incorporated in accordance with the prescribed procedure. On these basis, learned appellate Court dismissed the appeal.

8. Feeling aggrieved, appellant filed this present appeal which was admitted on the following substantial question of law:-

> *"Whether both the ld. Courts below have misread, misinterpreted and misconstrued the oral as well as documentary evidence of the parties especiall9y Ex.P2, Ex.PW5/A, Ex.PW6/A, Ex.PW7/A and Ex.PD, which has materially prejudiced the case of the appellant?*

9. I have heard learned counsel for the parties and have also gone through the record of the case as well as judgments and decrees passed by both the learned Courts below.

10. There is a concurrent finding of fact returned by both the learned Courts below against the plaintiff that he was not able to prove that suit land described in para-2 of the plaint was in his possession. A perusal of the record demonstrates that findings so returned by both the learned Courts below are duly borne out from the record of the case and the same cannot be said to be perverse findings. The documents which find mention in the substantial question of law do not further the case of the plaintiff because fact of the matter remains that Ex.PB, which is the latest revenue entry placed on record by the plaintiff himself demonstrates that the suit land mentioned in para-2 of the plaint though was owned by the Government, but it was shown to be in possession of the estate right holders. As held by learned both Courts below, onus was squarely upon the plaintiff to have had proved that the said revenue entry was incorrect and it was the plaintiff who was in possession over the suit land. As I have already mentioned herein-above that there is a concurrent finding returned against the plaintiff that it is not he who is in possession over the suit land prescribed in para-2 of the plaint, but the same is in possession of the estate right holders. The findings returned by both the learned Courts below are based upon the entry as contained in Ext.PB Jamabandi of year 1995-1996. During the course of arguments learned counsel for the appellant relied upon the entry contained in Ext. PC, but the fact of the matter remains, as rightly observed by learned appellate Court, this was a stray entry and there was nothing on record as to how this entry came to be incorporated in the Misal Haquiat. Thus there is no infirmity with the findings returned by both the learned Courts below to the effect that the suit land prescribed in para-2 of the plaint was not in possession of the plaintiff. Substantial question of law is answered accordingly.

The appeal is accordingly dismissed. No order as to cost. Pending miscellaneous applications, if any, also stand disposed of.

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

Mahajan Ram and others .....Appellants/Plaintiffs.

Versus

Prakash Chand & Anr. ....Respondents/defendants.

FAO No. 265 of 2017.
Reserved on : 30.04.2019.
Decided on : 30th May, 2019.

Code of Civil Procedure, 1908– Order XXVI - Rules 9 & 10 – Report of Local Commissioner- Objections thereto- Mode of disposal- First Appellate Court setting aside decree of trial court and remanding suit on ground that objections to report of Local Commissioner were not decided by it- Appeal against remand order- Held, Local Commissioner appeared as witness and himself dispelled all objections raised to his report in his deposition – There was not necessity for trial court to pass separate order rejecting or accepting report of Commissioner- Order of Appellate Court set aside- Matter remanded to it decide appeal on merits. (Paras 2 & 3)

For the Appellants:	Mr. Devender K. Sharma, Advocate.
For Respondent No.1:	Mr. Lalit Sharma, Advocate.
For Respondent No.2:	Mr. Hemant Vaid, Mr. Desh Raj Thakur, Addl. Advocate Generals with Mr. Y.S. Thakur, and, Mr. Vikrant Chandel, Dy. Advocate Generals.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs' suit for rendition of a decree for permanent prohibitory injunction, and, for rendition of a decree for mandatory injunction, vis-a-vis, the suit khasra number, hence, stood decreed by the learned trial Court. However, the aggrieved defendant/respondent herein, carried an appeal therefrom, before the learned First Appellate Court, and, the latter Court proceeded to remand the lis to the learned trial Court.

2. Be that as it may, the rendition, of, the afore affirmative decree, upon, the plaintiffs' suit, by the learned trial Court, rather stood hinged, upon, a report of the Local Commissioner, embodied in Ex.PW1/A, and, obviously therein elucidations, were borne, vis-a-vis, the defendant, hence, making encroachment(s), upon, the suit khasra number, in the area(s) enumerated therein. However, the learned First Appellate Court, upon, being seized, with Civil Appeal No. 42 of 2015, as stood preferred therebefore, by the aggrieved defendant, rather though the impugned order, made, a, direction, of, remand of the lis, to the learned trial Court, on anvil of (a) the objections preferred, vis-a-vis, the report of the local commissioner, by the defendant/respondent No.1 herein neither being pronounced to be accepted or rejected, (b) and, for want of an adjudication being meted thereon, it, hence

concluded qua the issue appertaining, to the afore factum,rather enjoining the making, of, an order of remand, vis-a-vis, the learned trial Court.

3. Even though, the afore order of remand, is, a limited remand, and, also hence, is, an issue based remand, and, consequently, it is not construable, to be a wholesale remand, for hence this Court, concluding that the impugned order of remand, is ingrained, with, any pervasive vice of, any, infallibility. Nonetheless, the afore reason, as stand meted, by the learned First Appellate Court, to remand the lis to the learned trial Court, is, yhet gripped with a vice of fallibility (i) as a reading of the verdict, rendered by the learned trial Court, makes upsurging, qua all objections appertaining to the purported invalidity, of the report of the local commissioner, rather being recoursed by the aggrieved defendant, recoursings whereof are comprised, in, qua in consonance therewith, hence suggestions being meted to the local commissioner concerned, upon, the latter stepping into the witness box, as PW-1. Since, all the afore suggestions, stood dispelled, by the witness concerned, who is also the author, of Ex.PW1/A, (ii) thereupon, the learned trial Court prima facie, made a conclusion, qua the afore suggestions, not dwindling the might, and, clout of echoigns, made by the local commissioner, in his report, borne in ex.PW1/A. Since, the afore recoursings, were prima facie repelled by the learned trial court, thereupon, there was no necessity for the learned trial Court, to proceed to make a separate order, upon, the objections reared, by the defendant,to the report of the local commissioner, nor want of any decision being made thereon, prima facie renders the verdict of the learned trial Court, to be ingrained with any pervasive vice of any infallibility nor hence the impugned order of remand, as, recorded on the afore anvil, can hence be validated.

4. For the reasons recorded hereinabove, the instant appeal is allowed, and, the order of remand, impugned before this Court is set aside. The learned First Appellate Court is directed to re-register the appeal, on its record, and, decide the same on merits. The afore exercise shall be completed with six weeks from today. The parties are directed to appear before the learned First Appellate Court on 20th June, 2019. Records be sent back forthwith. All pending applications also stand disposed of. However, the observation made hereinabove, shall have, no bearings on the merits of the case.

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

Makholi Ram ....Petitioner.

-Versus-

Dr. Monika .....Respondent.

COPC No.: 59 of 2019
Date of Decision18.06.2019

Constitution of India, 1950 - Article 215 – Contempt of court- Proof- Earlier writ petition disposed of on basis of statement of Police Department that investigation in the matter was complete- As such, Police was directed by court to file charge sheet immediately in the concerned court- However, no charge sheet filed in trial court- Petitioner filing contempt petition- Facts revealing that charge sheet was filed in court only after issuance of notice of contempt petition to police authorities- Police officers however giving assurance that in future they would be more vigilant and implement court orders in letter and spirit expeditiously- Held, prima facie there has been delay in filing charge sheet in the court as

directed vide earlier judgment- But matter closed in view of assurance given by respondents of expeditious compliance of court orders in future. (Paras 4 & 5)

For the petitioner: M/s K.B. Khajuria and Pushpender Kumar, Advocates.
For the respondent: Mr. Dinesh Thakur, Additional Advocate General, with M/s R.P. Singh & Amit Kumar Dhumal, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this Contempt Petition, the petitioner has highlighted the factum of there being willful disobedience of the directions passed by this Court in CWP No. 1907 of 2018, decided on 04.10.2018, which petition stood disposed of by this Court in the following terms:

> *"3. Mr. Ajay Vaidya, learned Senior Additional Advocate General, submits that the present petition can be disposed of in view of the response filed by the Superintendent of Police, Chamba, District Chamba (respondent No. 4), wherein it stands clarified that post registration of FIR No. 79/2017 dated 03.10.2017, under Section 420 of the Indian Penal Code at Police Station, Bharmaur, District Chamba, the investigation stands completed and the challan with respect thereto shall be filed immediately. His statement is accepted and taken on record."*

2. The petitioner filed the present petition, as despite the fact that learned Senior Additional Advocate General had submitted before the Court that the challan shall be filed before the Court immediately, no challan was filed till the filing of the Contempt Petition.

3. Notice was issued in the present petition on 06.05.2019. Response stands filed by the respondent, perusal of which demonstrate that now the challan has been filed before the appropriate Court on 10.06.2019.

4. Be that as it may, the original petition stood disposed of by this Court on 4th October, 2018, wherein it was stated on behalf of the State that as the investigation was complete, challan with respect thereto shall be filed immediately. This Court fails to understand as to whether as per respondent the word 'immediately' means six months? *Prima facie,* this Court is of the view that there has been delay in filing the challan.

5. At this stage, learned Deputy Advocate General has submitted that he shall instruct the officers concerned that in future, they have to be more diligent and vigilant and orders passed by the Court have to be implemented in letter and spirit expeditiously. Taking into consideration the assurance so given to the Court by the learned Deputy Advocate General, the Contempt Petition is closed. Notice is discharged.

Petition stands disposed of.

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BEFORE HON'BLE MS. JYOTSNA REWAL DUA, J.

Sh. Master Jagmohan (Minor) & others ....petitioners.

Versus

Shri Amar Chand ..... respondent.

CMPMO No 249 of 2019
Decided on: 31.05.2019

Code of Civil Procedure, 1908 - Section 47 – Execution of decree of specific performance of agreement to sell- Objections thereto- Disposal thereof- Decree of specific performance of agreement to sell attained finality vide judgment of Hon'ble Supreme Court- DH filing execution- Wife and children of judgment debtor (JD) filing independent suit and also objections in execution proceedings to effect that suit land was ancestral in nature and JD was not competent to sell it- Executing Court dismissing objections summarily - Petition against- Held, no material on record suggesting that there was inherent lack of jurisdiction of trial court in passing decree- Decree attained finality vide judgment of Hon'ble Supreme Court- Executing Court cannot go behind decree- Decree as stands is to be executed by it- Rights and title of objectors will be decided independent suit filed by them- Dismissal of objections will not come in way of determination of their right in independent suit. (Paras 7 & 9)

Cases referred:

Brakewel Automatic Components (India) vs. P.R. Selvam Alagappan, 2017 (5) SCC 371
Dhurandhar Prasad Singh vs. Jai Prakash University and others (2001) 6 SCC 534
Gulab Singh and others vs. Mahender Singh and others 2019 (2) Him L.R. (HC) 1055
Sneh Lata Goel vs. Pushplata and others (2019) 3 SCC 594
Vasudev Dhanjibhai Modi vs. Rajabhai Abdul Rehman and Others, 1970(1) SCC 670

For the petitioners. : Mr. Owais Khan Pathan, Advocate.
For the respondent : Nemo for the respondent.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, J *(Oral)*

Instant petition has been preferred against the order dated 2.8.2018, passed by the learned Senior Civil Judge, Kullu, H.P., dismissing Objection Petition No. 1/2015, filed by the petitioners in Execution Petition No. 68-X/2013.

02. The factual matrix of case :-

2 (i) Suit was filed by the respondent seeking specific performance of the agreement to sell dated 25.08.1998. The suit was decreed vide judgment dated 20.5.2004 (Civil Suit No. 207 of 1999/62/2003). First appeal filed by the Judgment Debtor was dismissed by the learned District Judge, Kullu. Second appeal filed by the Judgment Debtor (RSA No.1 of 2005) was dismissed by this Court, vide judgment, dated 22.03.2013. Special Leave Petition bearing No. 24773/2013 filed by the Judgment Debtor was also dismissed by the Hon'ble Apex Court, vide order dated 16.8.2013.

2(ii) Decree holder, thereafter filed execution petition on 02.12.2013. Objections were preferred by the Judgment Debtor and thereafter by petitioners (wife and children as his successors) to the effect that (a) suit land was joint Hindu ancestral property and that Judgment Debtor had no right to execute the agreement in respect of same; (b) petitioners became aware of previous litigation only after dismissal of Special Leave Petition, whereafter, they instituted an independent Civil Suit (No. 76 of 2014) against the Judgment Debtor and Decree Holder. In this suit presently pending adjudication, before the learned Civil Judge Senior Division, Lahul and Spiti at Kullu H.P., petitioners have challenged the judgment and decree dated 20.05.2004, have also sought declaration that they have rights over the suit land and that Judgment Debtor had no right to transfer the same.

2(iii) Replies to the objections were filed by the respondent-Decree Holder, denying that the suit land was joint/ancestral land. It was pleaded that Judgment Debtor had sold the suit land in favor of Decree Holder under the agreement dated 25.08.1998 and that the concurrent judgments right upto Hon'ble Apex Court had been passed affirming the decree of the suit for specific performance of this agreement dated 25.08.1998. The subsequent suit filed by the wife of the Judgment Debtor against the Judgment Debtor and Decree holder was asserted to have been filed in connivance with the Judgment Debtor.

03. Learned Executing Court observed in the impugned order that admittedly no document has been brought on record by the petitioners to show that the suit land was joint Hindu ancestral property. It was also observed that since subsequent to the dismissal of the Special Leave Petition by the Hon'ble Apex Court, petitioners have instituted a separate civil suit for determining their alleged rights over the suit land, therefore, their rights, title or interest, if any, shall be decided in the said Civil Suit. The objections were dismissed. Nine months after the dismissal of objection vide impugned order, present petition has been instituted, challenging the same.

04. I have heard learned counsel for the petitioners and gone through the appended record. Learned counsel for the petitioners argued that the petitioners were not aware of the earlier litigation and the successive appeals filed by Judgment Debtor (Father of Petitioners No. 1 & 2 and Husband of Petitioner No.3). Further that they became aware of the decision only after the Special Leave Petition No. 24773 of 2013 was dismissed on 16.08.2013. It is only thereafter they filed their own separate Civil Suit (No. 76 of 2014). It was further asserted that learned Executing Court should have framed issues in their objection petition and should have given them adequate opportunity to lead evidence for proving their contentions that the suit land was joint Hindu Ancestral Property and that Judgment Debtor was not competent to execute agreement dated 25.08.1998. The order of the learned Executing Court in summarily dismissing the objection was erroneous and therefore is liable to be interfered with.

05. It is settled law that the Executing Court cannot go behind the decree and has to execute the decree as it stands. The Hon'ble Supreme Court in **Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Others,** 1970(1) Supreme Court Cases 670 held as under:-

> *"6. A Court executing a decree cannot go behind the decree: between the parties or their representatives it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties.*
>
> *7. When a decree which is a nullity, for instance, where it is passed without bringing the legal representative on the record of a person who was dead at the*

date of the decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a Court which has no inherent jurisdiction to make objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record: Where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction. In Jnanendra Mohan Bhaduri and Another v. Rabindra Nath Chakravarti, the Judicial Committee held that where a decree was passed upon an award made under the provisions of the Indian Arbitration Act, 1899, an objection in the course of the execution proceeding that the decree was made without jurisdiction, since under the Indian Arbitration Act, 1899, there is no provision for making a decree upon an award, was competent. That was a case in which the decree was on the face of the record without jurisdiction.

06. In case of **Brakewel Automatic Components (India) Vs. P.R. Selvam Alagappan,** 2017 (5) Supreme Court Cases 371**,** it was held by Hon'ble Apex Court as under:-

"20. It is no longer res integra that an executing court can neither travel behind the decree nor sit in appeal over the same or pass any order jeopardising the rights of the parties thereunder. It is only in the limited cases where the decree is by a court lacking inherent jurisdiction or is a nullity that the same is rendered non est and is thus unexecutable. An erroneous decree cannot be equalled with one which is a nullity. There are no intervening development as well as to render the decree unexecutable.

21. As it is, Section 47 of the Code mandates determination by an executing Court, questions arising between the parties or their representatives relating to the execution, discharge or satisfaction of the decree and does not contemplate any adjudication beyond the same. A decree of court of law being sacroscant in nature, the execution thereof ought not to be thwarted on mere asking and on untenable and purported grounds having no bearing on the validity or the executability thereof."

In Paras 22 and 23 of the aforementioned judgment Hon'ble Apex Court relying upon judgments rendered in **Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Others, (**1970) 1 Supreme Court Cases 670 and in **Dhurandhar Prasad Singh Vs. Jai Prakash University** and others (2001) 6 Supreme Court Cases 534, held that purview of scrutiny under Section 47 of the Code qua a decree is limited to objections to its executability on the ground of jurisdictional infirmity or voidness. Exercise of power under Section 47 of the Code is microscopic and lies in a very narrow inspection hole and an Executing Court can allow objection to the executability of the decree, if it is found that the same is void ab initio and is a nullity, apart from the ground that it is not capable of execution under the law, either because the same was passed in ignorance of such provision of law or the law was promulgated making a decree unexecutable after its passing.

Similar principles have been laid down by Hon'ble Apex Court in **Sneh Lata Goel Vs. Pushplata and others** (2019) 3 Supreme Court Cases 594 that the Executing Court lacks jurisdiction to decide an objection, which does not relate to inherent lack of jurisdiction of Civil Court.

07. It is not the case of the petitioners here that the decree was passed by a Court lacking inherent jurisdiction. It also cannot be said that objections are such which are apparent on the face of the record. In fact, the objections pertain to the merits of the matter. Any decision thereupon by Executing Court would amount to reopening of the judgment and decree passed in favour of the Decree Holder, which have been concurrently upheld right till the Hon'ble Apex Court. This would have been impermissible in execution petition. Jurisdiction of Executing Court is limited and narrow. Right to raise objection does not mean that objector can re-open the matter. The jurisdiction of Executing Court cannot be equated with that of appeal or review. Therefore, no fault can be found in the impugned order, dismissing the objection petition.

08. Regarding the rights and contentions of the parties in the suit filed by the petitioners, subsequent to the dismissal of the Special Leave Petition, it will be apt to refer few paragraphs of decision of Hon'ble Supreme Court in **Sneh Lata Goel Vs. Pushplata and others** (2019) 3 Supreme Court cases 594:-

> *5. on 12th May 2014, the appellant filed proceedings for the execution of the final decree at Ranchi. On 1st January 2015, the first respondent filed an objection under Section 47 of the Code of Civil Procedure contending that the decree dated 13.6.1990, the final decree dated 5th April 1991 and the supplementary final decree dated 18th December 2013, were without jurisdiction and therefore, a nullity. On 10th March 2015, the first respondent challenged the decree dated 13th June 1990 in appeal under Section 96 CPC. The appeal is pending.*
>
> *6. On 10th March 2016, the executing court dismissed the objections of the first respondent under Section 47 CPC with the following observations:*
>
> *"The decree holder is entitled to get the fruits of the decree and the executing cannot go behind the decree. When a decree is made by a court which has no inherent jurisdiction, an objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record. Where the objection as to the jurisdiction of the court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at trial, which could have been but have not been raised, the executing court will have no jurisdiction to entertain an objection as to the validity of the decree on the ground of jurisdiction.*
>
> _____.....____
>
> *25. The respondent has filed a first appeal (First Appeal No. 43 of 2015) where the issue of jurisdiction has been raised. We must clarify that the findings in the present judgment shall not affect the rights and contentions of the parties in the first appeal."*

Thus, while affirming order of Executing Court dismissing the objection, which did not pertain to inherent lack of jurisdiction of Court, the rights and contentions of the parties in the first appeal were protected by the Hon'ble Apex Court. Such protection was also accorded by this Court in **Gulab Singh and others versus Mahender Singh and others** 2019 (2) Him L.R. (HC) 1055, a case involving some what similar factual position.

09. Learned Executing Court has rightly observed in the impugned order that right, title or interest of the objectors (petitioners), if any over the suit land shall be decided in the Civil Suit (No. 76 of 2014). Thus, dismissal of the objection petition will not come in the way of determination of right, title or interest of the petitioners over the suit land in their independent suit pending before the learned Civil Judge Senior Division, Lahul and Spiti at

Kullu, H.P. Observations made in present judgment are for adjudication of present petition and shall have no bearing on Civil Suit filed by the petitioners.

10. In view of the foregoing observations, the present petition is dismissed, being devoid of any merit. Pending miscellaneous application(s), if any, also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Meena Kumari alias Matto ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Cr.MP(M) No. 1056 of 2019
Order reserved on : 17.6.2019
Date of Decision : June 21, 2019

Code of Criminal Procedure, 1973 – Section 439 – **Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989 -** Sections 3(1)(s) – Assault, calling by caste names etc.- Regular bail- Grant of- Circumstances- Complainant and accused, neighbours- Accused, a lady and she already having joined investigation- Nothing incriminatory to be recovered from her- Accused having no criminal history and her presence can always be secured- Pettiion allowed- Bail granted subject to conditions. (Paras 6 & 8)

For the petitioner : Mr. Y.P. Sood, Advocate, for the petitioner.
For the respondent : Ms. Ritta Goswami, Additional Advocate General, Ms. Divya Sood, Deputy Advocate General and Mr. Manoj Bagga, Assistant Advocate General for the respondent/State.

The following judgment of the Court was delivered:

Anoop Chitkara, Judge.

The present petition is under Section 439 of the Code of Criminal Procedure, seeking ad-interim as well regular bail in FIR No. 98 of 2019, dated 29.4.2019, registered in Police Station, Haroli, District Una, Himachal Pradesh, under Sections 3(1)(s) of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as the 'Act') and 323 of the Indian Penal Code.

2. ASI, Ramesh Kumar, I/O - Police Station Haroli, Distt. Una, H.P. was present on the last date, when the matter was heard. He had filed the police report and had also brought the police file. I have seen the status report as well as the police file to the extent it was necessary for the purpose of deciding the present petition and the same stands returned to the police official. Status report was also taken on record.

3. On 11.6.2019, this Court passed an interim order, directing the petitioner to be enlarged on bail on her furnishing personal bond in the sum of `5000/- to the satisfaction of any of the Registrar/Additional Registrar/ Deputy Registrar/Assistant

Registrar of this Court, subject to her complying with the conditions imposed therein. The said interim order is in operation till date.

4. The gist of the First Information Report and the investigation is as follows:

(a) That on 29.4.2019 a written complaint was made to the SHO Haroli, Distt. Una by the complainant Smt. Mahinder Kaur. She alleged therein that the complainant and her son Naresh Kumar are residents of village Kugrat.

(b) That on the same day i.e. 29.4.2019 at about 9.30 a.m. accused Smt. Matto (bail petitioner Meena Kumari) attacked them with wooden stick and called them by name of caste.

(c) She further stated in her complaint that they had to take first aid and the injuries on their heads were stitched.

(f) Hence F.I.R. under Sections 3(1)(s) of the Scheduled Caste & Scheduled Tribes (Prevention of Atrocities) Act, 1989 and 323 of the Indian Penal Code was registered.

5. I have heard learned counsel for the petitioner as also the learned Additional Advocate General for the respondent/State. Status report also perused.

6. It has been admitted in the status report that the petitioner has joined the investigation as she was directed by this Court. It has further been submitted that no recovery is to be effected from the bail petitioner. Also in the status report there is no mention of any previous criminal history of the bail petitioner. The petitioner is a lady and both she and the complainant are neighbours. The petitioner is a permanent resident of the address mentioned in the memo of parties. Therefore, the presence of the petitioner can always be secured. I am satisfied that the no purpose will be served if the bail petitioner is sent to judicial custody.

7. At this stage, reference is being made to Section 437 Cr.P.C. where the Legislature has mandated that the provisions of bail for woman are not stringent.

8. In the result the present petition is allowed. Interim order dated 11.6.2019 is made absolute subject to further following conditions: :

a) The petitioner is directed to join the investigation as and when called by the Investigating Officer. It shall be open for the Investigating Officer to call the petitioner as and when he feels such a necessity. The petitioner undertakes to appear before the Investigating Officer as and when directed to do so. However, whenever the investigation takes place within the boundaries of the Police Station or Police Post, then the Petitioner shall not be called before 9 A.M and shall be let off before 5 p.m.

b) The Petitioner shall neither influence nor try to control the investigating officer, in any manner whatsoever.

c) The petitioner undertakes not to threaten or browbeat the complainant or to use any pressure tactics.

d) The Petitioner undertakes not to make any inducement threat or promise, directly or indirectly, to the investigating officer or any person acquainted with the facts of the case to dissuade him from disclosing such facts to the Court or any Police Officer or tamper with the evidence.

e) The Petitioner shall not hamper the investigation.

f) In case the of the launching of the prosecution, the petitioner undertakes to attend the trial and to appear before the Court which issues the summons or warrants and shall furnish fresh bail bonds to the satisfaction of such Court.

9. Any observation made herein above shall not be taken as an expression of opinion on the merits of the case and the trial Court shall decide the matter uninfluenced by any observation made herein above.

Petition stands allowed in the aforesaid terms.

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BEFORE HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Cr.MP No. 886 of 2019 in
Cr. Revision No. 227 of 2017 and
Cr.MP No. 885 of 2019 in
Cr. Revision No. 228 of 2017
Date of Decision : June 3, 2019

1. <u>Cr. Revision No. 227 of 2017</u>

Sh. Mohan Lal ...Petitioner/applicant.

Versus

Golf Link Finances & Resorts Pvt. Ltd. ...Respondent.

2. <u>Cr. Revision No. 228 of 2017</u>

Sh. Mohan Lal ...Petitioner/applicant.

Versus

Golf Link Finances & Resorts Pvt. Ltd. ...Respondent.

Code of Criminal Procedure, 1973 - Section 482 – Inherent powers- Exercise of- Quashing of NBW- Circumstances- Petitioner convicted and sentenced by trial court in a cheque bounce case- Conviction and sentence upheld by Sessions Court- In revision proceedings, accused undertaking to deposit entire compensation amount- However, he not fulfilling this undertaking resulting into issuance of NBW against him- Petition against- Held, since accused was found having deposited entire compensation amount after issuance of NBW, NBW ordered be recalled- Petition allowed. (Paras 9 to 11)

Cases referred:

Kaushalya Devi Massand vs. Roopkishore Khore, (2011) 4 SCC 593

Meters and Instruments Private Limited and another vs. Kanchan Mehta, (2018) 1 SCC 560

For the petitioner : Mr. Parmod Singh Thakur, Advocate, for the petition/applicants in both the cases.

For the respondent : None.

The following judgment of the Court was delivered:

Anoop Chitkara, Judge. (Oral)

Cr.MP No. 886 of 2019 in Cr. R. No. 227/2017 & Cr.MP No. 885 of 2019 in Cr.R. No. 228/2017

The petitioner/convict Mohan Lal has filed these applications under Section 482 Cr.P.C. for cancellation of the Non Bailable Warrants issued by a Co-ordinate Bench of this Court on 30.5.2019. However, petitioner has also submitted that he has deposited the outstanding amount of compensation awarded against him by the learned Trial Court, which order was also upheld by the learned Sessions Judge.

2. The necessity of filing these applications has arisen because the petitioner failed to obey the assurances given to this Court on various occasions. Initially when the matter was listed for the first time on 11.8.2017 then a prayer was made that the petitioner/convict is willing to compromise the matter in terms of judgment delivered by the Hon'ble Supreme Court in *Damodar S. Prabhu vs. Sayed Babalal H.*, (2010) 5 SCC 663. On that basis the substantive sentence was suspended. Thereafter on 8.09.2017 the Court referred the matter to mediation and on 24.8.2018 the Court was informed that the mediation has failed, therefore Bailable Warrants were issued against the petitioner-convict. From order dated 14.9.2018, it appears that regarding the previous order learned counsel appearing for the petitioner could not get confirmation, as such, he sought an adjournment with an undertaking to send another communication through Registered AD to his client and consequently the Court issued fresh Bailable Warrants against the petitioner/convict.

3. On 12.10.2018 the petitioner-convict appeared in person and prayed for four weeks time to deposit the compensation amount of `65,000/-. The Co-ordinate Bench of this Court allowed that request, putting stringent conditions and permitted him to do so within the stipulated time. On 19.11.2018, petitioner/convict again presented himself before the Co-ordinate Bench of this Court and learned counsel sought one week further time to comply with the previous order and the time was granted. Subsequently on 5.12.2018 two weeks further time was sought which was also granted. Vide order dated 26.12.2018 it was submitted that `7500/- have been deposited in the Registry of this Court. The order dated 26.12.2018 is reproduced herein below:

> "As per report of Registry, `7500/- i.e. 15% of the cheque amount stands deposited in the Registry.
>
> Petitioner is present in person, who through his counsel seeks further time to approach the respondent with amount of compensation. By way of special indulgence, one more adjournment is granted, as requested by learned counsel for the petitioner.
>
> List on 1st March, 2019."

4. On 01.03.2019 the petitioner-convict again presented himself before the Court and made cash payments of `10,000/- to the respondent through his learned counsel and consequently the Co-ordinate Bench granted him time till 10.04.2019 to deposit the balance amount. On 12.4.2019 it was informed to the Court that order dated 11.8.2017 was not complied with. Therefore, it was ordered by the Co-ordinate Bench of this Court which is reproduced as under:

> "Despite ample opportunities having been granted by the Court, order dated 11.08.2017 till date has not been complied with. List on 16th April, 2019, on which date, the petitioner shall remain

> present in the Court in person. It is clarified that in case order dated 11.08.2017 is not complied with in letter and spirit by the petitioner by 16th April, 2019, then the consequences will follow. Copy dasti."

5. On 16.04.2019 the petitioner/convict gave an undertaking before this Court that he has deposited `34,000/- out of which 17,000/- is in each case and balance amount shall be deposited within three weeks. On 13.5.2019 it was brought to the notice of the Court that order dated 16.4.2019 was not complied with and the Co-ordinate Bench ordered the matter to be listed on 22.5.2019, affording one week more time to comply with the order.

6. On 22.05.2019 petitioner did not present himself before Court nor did he deposit the balance amount in terms of order dated 16.4.2019. However, learned counsel for the petitioner/convict submitted that order dated 13.5.2019 was duly conveyed to the petitioner. Under these circumstances, the Co-ordinate Bench of this Court observed in the following terms:

> "When this Court had directed the petitioner to remain present in person in the Court, then, non-appearance of the petitioner amounts to willful disobedience of the Court order as no cogent explanation has been given as to why he is not present in the Court today. Accordingly, let non-bailable warrant be issued against the petitioner returnable for 30.05.2019."

7. On 30.5.2019 it was brought to the notice of the Court that the Non Bailable Warrants could not be served. Consequently fresh Non Bailable Warrants were issued against the petitioner/convict returnable for 2.7.2019. The present applications have been filed seeking to recall the executable portion of the orders dated 22.5.2019 and 30.5.2019.

8. Mr. Pramod Thakur, learned counsel for the petitioner/convict has submitted that the entire balance amount of `38,000/- has been deposited in the Registry of this Court vide D.D. No. 007213 dated 31st May, 2019.

9. The Hon'ble Supreme Court in *Meters and Instruments Private Limited and another vs. Kanchan Mehta,* (2018) 1 SCC 560 has held as under:

> 18. From the above discussion following aspects emerge:
>
> 18.1. Offence under Section 138 of the Act is primarily a civil wrong. Burden of proof is on accused in view presumption under Section 139 but the standard of such proof is "preponderance of probabilities". The same has to be normally tried summarily as per provisions of summary trial under the Cr.P.C. but with such variation as may be appropriate to proceedings under Chapter XVII of the Act. Thus read, principle of Section 258 Cr.P.C. will apply and the Court can close the proceedings and discharge the accused on satisfaction that the cheque amount with assessed costs and interest is paid and if there is no reason to proceed with the punitive aspect.
>
> 18.2 The object of the provision being primarily compensatory, punitive element being mainly with the object of enforcing the compensatory element, compounding at the initial stage has to be encouraged but is not debarred at later

> stage subject to appropriate compensation as may be found acceptable to the parties or the Court.
>
> 18.3. Though compounding requires consent of both parties, even in absence of such consent, the Court, in the interests of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the accused.
>
> 18.4. Procedure for trial of cases under Chapter XVII of the Act has normally to be summary. The discretion of the Magistrate under second proviso to Section 143, to hold that it was undesirable to try the case summarily as sentence of more than one year may have to be passed, is to be exercised after considering the further fact that apart from the sentence of imprisonment, the Court has jurisdiction under Section 357(3) Cr.P.C. to award suitable compensation with default sentence under Section 64 I.P.C. and with further powers of recovery under Section 431 Cr.P.C. With this approach, prison sentence of more than one year may not be required in all cases.
>
> 18.5. Since evidence of the complaint can be given on affidavit, subject to the Court summoning the person giving affidavit and examining him and the bank's slip being prima facie evidence of the dishonor of cheque, it is unnecessary for the Magistrate to record any further preliminary evidence. Such affidavit evidence can be read as evidence at all stages of trial or other proceedings. The manner of examination of the person giving affidavit can be as per Section 264 Cr.P.C. The scheme is to follow summary procedure except where exercise of power under second proviso to Section 143 becomes necessary, where sentence of one year may have to be awarded and compensation under Section 357(3) is considered inadequate, having regard to the amount of the cheque, the financial capacity and the conduct of the accused or any other circumstances.

10. In *Kaushalya Devi Massand vs. Roopkishore Khore,* (2011) 4 SCC 593, the Hon'ble Supreme Court held as follows:

> "11. Having considered the submissions made on behalf of the parties, we are of the view that the gravity of a complaint under the Negotiable Instruments Act cannot be equated with an offence under the provisions of the Indian Penal Code or other criminal offences. An offence under Section 138 of the Negotiable Instruments Act, 1881, is almost in the nature of a civil wrong which has been given criminal overtones.
>
> 12. The learned Magistrate, in his wisdom was of the view that imposition of a fine payable as compensation to the Appellant was sufficient to meet the ends of justice in the instant case. Except having regard to the submission made that the Appellant/ complainant, is a widowed lady of advanced age, there is no other special circumstance which calls for interference with the order of

the learned Magistrate, as confirmed by the High Court, with an increased fine.

13. After an interval of 14 years, we are not inclined to interfere with the order of the High Court impugned in the appeal, except to the extent of increasing the amount of compensation payable by a further sum of ` 2 lakhs. The said amount of ` 2 lakhs in addition to the sum of ` 6 lakhs already directed to be paid by the Respondent to the Appellant, shall be deposited in the Trial Court within two weeks from date and upon such deposit being made, the Appellant will be at liberty to withdraw the same by way of compensation, together with the amounts already deposited, if not already withdrawn. In default of such deposit, the Appellant shall undergo one month's simple imprisonment."

11. In view of the law declared by the Hon'ble Supreme Court of India pertaining to the jurisprudence behind the Negotiable Instruments Act, 1881 and also in view of the fact that the entire compensation amount has been deposited, these applications are allowed and Non Bailable Warrants issued against the petitioner-convict on 30.5.2019 are hereby recalled. Applications stands disposed of accordingly.

Registry is also directed to place a certified copy of this order in Cr. Revision No. 228 of 2017.

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

Mool Raj ...Petitioner.

Versus

Sonam Angroop ...Respondent.

CMPMO No.102 of 2017.
Reserved on : 21.5.2019.
Decided on: 20th June, 2019.

Code of Civil Procedure, 1908 (Code)- Order XXVI- Rule 9– Appointment of Local Commissioner- Purpose of – Held, purpose of appointment of Local Commissioner is not to create evidence for a party- Suit of plaintiff is for permanent prohibitory injunction- No boundary dispute exists interse parties- Plaintiff wanted to create evidence in his favour by appointing Local Commissioner- Petition against order of trial court dismissing such application also dismissed- Order upheld. (Para 7)

Cases referred:

Som Nath vs. Gurdev, 2017 (3) Himachal Law Reporter 1413

For the petitioner : Mr. Naveen Kumar Bhardwaj, Advocate.
For the respondent : Mr. Bhupender Gupta, Sr. Advocate with Mr. Ajeet Jaswal, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present petition, under Article 227 of the Constitution of India, is maintained by the petitioner for quashing and setting aside the impugned order, dated 22.12.2016, passed by the learned Civil Judge (Junior Division), Manali, District Kullu, whereby an application under Order 26 Rule 9 of the Code of Civil Procedure, was dismissed.

2. The key facts, giving rise to the present petition are that the petitioner-plaintiff (hereinafter referred to as 'plaintiff') has maintained a suit for permanent prohibitory injunction against the respondent-defendant (hereinafter referred to as 'defendant') alleging that the plaintiff is owner-in-possession of the land measuring 0-01-58 hectares, comprised in Khasra No.1627, 1648, 1649, Khata/Khatauni No.281/336, situated at Muhal Bari Phati Bari Kothi, Baragarh, Tehsil Manali, District Kullu, H.P (*hereinafter referred to as 'suit land'*), whereas the defendant is neither owner nor co-sharer of the suit land, rather, the defendant is a stranger to the suit land and has no right, title or interest over the suit land and he is causing unlawful interference in the suit land threatening to demolish '*Khokha*' in Khasra No.1627 and to raise permanent structure over the suit land and encroach upon the suit land to grab the same and to dispossess the plaintiff from the suit land. The defendant filed written statement and admitted that Khasra No.1627, was got recorded in the name of plaintiff. Thereafter, the plaintiff moved an application under Order 26 Rule 9 read with section 151 of the Code of Civil Procedure, for appointment of Local Commissioner, whereby the said application was dismissed, vide order dated 22.12.2016.

3. Feeling aggrieved, the impugned order, dated 22.12.2016, passed by the learned Trial Court, the plaintiff maintained the present petition.

4. Learned counsel appearing on behalf of the plaintiff has argued that the present dispute with respect to the boundary is as per the law laid down by this Hon'ble Court rendered in ***2017 (3) Himachal Law Reporter, 1413, titled Som Nath vs. Gurdev,*** decided on 8.5.2017, wherein a Local Commissioner was appointed. On the other hand, Mr. Bhupender Gupta, learned Senior counsel appearing for the defendant has vehemently argued that there is no dispute with respect to the title.

5. To appreciate the arguments of learned counsel appearing on behalf of the parties, I have gone through the entire record in detail.

6. After going through the record, an application under Order 26 Rule 9 of the Code of Civil Procedure, was filed by the plaintiff for appointment of Local Commissioner, wherein he has averred before the learned Court below that the plaintiff is owner-in-possession of the land bearing Khasra No.1627, 1648 and 1649 and the defendant is raising construction over Khasra No.1627. As per the defendant, land bearing Khasra No.1627 was previously Government land in the revenue record and the same has been coming in peaceful, continuous and hostile possession of the defendant and public at large for the last more than 40-45 years. Thereafter, in the year 1995, the plaintiff in connivance with the settlement/revenue officer/officials got recorded this land in his name and that act of the plaintiff is totally illegal, as there are simple mere paper entry qua this land in the name of the plaintiff. There is no record with the revenue department, as to how and in what capacity, land bearing Khasra No.1627 was got recorded in the name of the plaintiff. The plaintiff, in connivance with the revenue officials, got this land granted in his favour without spot verification. The plaintiff never came in possession of land of Khasra No.1627

and the same is in settled and peaceful possession of the defendant. Hence, the revenue entries qua land of Khasra No.1627, in the name of the plaintiff, are wrong and the same are liable to be corrected. It is further averred that during the pendency of suit, the defendant has raised the structure/building over the suit land despite the stay order. As a matter of fact, Leela Devi, maintained an application for correction of revenue entries qua the suit land before the Settlement Officer, Kangra. Consequent upon such application, demarcation was carried out qua the suit land and at the time of demarcation, it was found that the land of the plaintiff is at some other place as 'MULLAKHA' of the land of the plaintiff has wrongly been shown and as per the said demarcation, the plaintiff has not been found in possession of the land comprised in Khasra Nos.1627 and 1649. The spot, which the plaintiff is claiming to be in his possession, is shown to be a forest land on spot verification. The building of the defendant has been already existing over the land much before the filing of the suit that too over the Government land.

7. After hearing the learned counsel appearing on behalf of the parties, this Court finds that the dispute is not with respect to the boundary, so, the aforesaid judgment (supra) as citied by the learned counsel appearing for the petitioner, is not applicable to the facts and circumstances of the present case. The dispute between the parties is with respect to the ownership and possession of Khasra No.1627 and it is the suit for title only. In these circumstances, the plaintiff wants to create evidence in his favour by getting the Local Commissioner appointed. It is for the parties to prove their case, as in the instant case, there is no dispute with respect to the boundary and neither it is pleaded nor it is otherwise come in the record of learned Court below. So, this Court finds that in these circumstances, there is no illegality and infirmity in the impugned order, dated 22.12.2016, passed by the learned Trial Court. Otherwise also, the jurisdiction under Article 227 of the Constitution of India, is not required to be exercised in the present case, as the impugned order passed by the learned Trial Court is just and reasoned and after appreciating the facts, which have come on record to its true perspective.

8. In view of what has been stated hereinabove, the present petition sans merits, deserves dismissal and is accordingly dismissed. No order as to costs. Parties through their learned counsel are directed to appear before the learned Court below on ***16th July, 2019.*** Pending application(s), if any, also stand (s) disposed of.

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

M/s Krishna Collection and another ....Petitioners.

Versus

Canara Bank and another ... Respondents.

CMPMO No No 275 of 2019
Decided on: 13.6.2019

Code of Civil Procedure, 1908 (Code) – Section 148- Order VIII- Rules 1 & 10– Written statement- Time limitation in filing and extension thereof- Consequences of not filing written statement within time - Held, when written statement is not filed within 90 days of service of defendant and no application for extension of time is filed, court is justified in striking of defence – Court cannot come to rescue of party who is not vigilant about its rights. (Para 3)

For petitioners. : Mr. Sanjay Dutt Vasudeva, Advocate.
For respondents : None

The following judgment of the Court was delivered:

Ajay Mohan Goel, J *(Oral)*

By way of this petition a prayer has been made for setting aside order dated 1.7.2017 vide which right of the present petitioner to lead defence was closed on the ground that no written statement was filed within 90 days nor any application was filed under Section 148 read with Section 151 of the CPC for extension of time for filing the written statement.

2. I have heard learned counsel for the petitioners and have also gone through the record of the case appended with the petition.

3. The impugned order is dated 1.7.2017. Present petition was initially filed on 31st August, 2018. It appears that certain objections were raised by the Registry. These objections were removed by the petitioner and the petition was refiled on 14.5.2019. There is no cogent explanation as to why initially the petition was filed after one year from the passing of the impugned order and thereafter what took the petitioner such a long time to remove the objections raised by the Registry. Learned counsel for the petitioner could not apprise the Court as to what is the status of the suit as of now. In these peculiar circumstances, this Court neither sees any infirmity with the impugned order nor any case has been made out by the petitioner to show any indulgence, as the Court cannot come to the rescue of a party which is not vigilant about its rights.

Accordingly, this petition being devoid of any merit is dismissed. Miscellaneously applications, if any, also stand disposed of.

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

M/s Mahou India Private Limited ....Plaintiff
Versus
M/s Aradhna Wines ....Defendant

Civil Suit No. 84 of 2016
Judgment Reserved on 7th March, 2019
Date of Decision 11th June, 2019

Code of Civil Procedure, 1908 (Code) - Order XXXVII- Rule 1(2)– Dishonour of cheque- Summary suit for recovery of amount - Whether maintainable? - Held, summary suit for recovery of amount covered by dishonoured cheque(s) along with interest, is maintainable under Order XXXVII Rule 1(2) of Code. (Para 14)

Cases referred:
Dura Line India Pvt. Ltd. vs. Bpl Broadband Network Pvt. Ltd 111(2004)DLT 736; 2004(74)DRJ 266

M/s Flint Group India Pvt. Ltd. vs. M/s Good Morning India Media Pvt. Ltd, CM(M) No. 369 of 2017 and CM Nos. 13049-50/2017

For the Plaintiff: Mr. Anand Sharma, Advocate.
For the Defendant: Ex-parte.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

The plaintiff, M/s Mahou India Private Limited, a company formerly Arian Breweries and Distilleries Pvt. Limited, incorporated under the Companies Act, 1956, engaged in the business of manufacturing and sale of beer, has filed present suit under Order 37 CPC against defendant M/s Aradhna Wines, the sole proprietor concern engaged in business of selling beer from outlets situated at several locations in Himachal Pradesh, to recover a sum of Rs.3,09,59,430/- along with pendente lite and future interest at the rate of 18% per annum.

2 The suit has been filed through Director of plaintiff company by placing on record certified true copy of resolution passed in the meeting of Board of Directors of plaintiff company held on 23.9.2016.

3 As per plaint, plaintiff company had been supplying beer products after procuring the same from brewery at the outlet of defendant situated in Himachal Pradesh in response to permits for import of beer products duly procured by defendant from the Excise Department of the State of Himachal Pradesh and submitted to the plaintiff company.

4 Against the supply of beer products, defendant had been making payments, either in full or in part, without referring the invoices against which the payment was made and the plaintiff company had been maintaining running account of transactions with defendant for the supplies made to it and had been crediting the payments received against the pending invoices on the basis of first in-first out principle and crediting the first against the invoices raised earlier in time and thereafter adjusting the remaining amount towards the next invoice of the next date. The defendant was making irregular payments of lump sum amount which were being accepted by the plaintiff and despite having outstanding amount against the defendant, the plaintiff had been supplying the beer products to defendant as it was a regular customer of plaintiff.

5 In the month of June, 2016, an amount of Rs.3,09,59,430/- became outstanding towards defendant to be paid to the plaintiff for supply of various items including transportation charges etc. In response to various reminders of plaintiff, through telephonic as well as in person conversations, defendant had issued five cheques for Rs.50 lacs as part payment of its total liability. However, cheques were dishonoured for insufficient funds on several occasions, which resulted into issuance of legal notice dated 22.4.2016 under Section 138 of Negotiable Instrument Act, 1881 but defendant neither responded to the same nor made any payment.

6 It is averred in plaint that despite acknowledging its liability to pay the amount of Rs.3,09,49,430/-, defendant had not shown willingness to pay the said amount which amounted to refusal to make the payment without any justifiable or lawful reason. Whereupon after issuing legal notice, plaintiff was constrained to file the present suit for recovery.

7 Notice issued to defendant through Process Serving Agency was received back with endorsement that defendant concern was closed and there was lock on the gate of firm and proprietor of the said concern Mr. Anil Dogra was residing somewhere else. Dasti notices issued to defendant were also received back with report that Mr. Anil Dogra, owner of the defendant company, was not residing in his house since long and his house as well as office had been sealed and his whereabouts were not known. Notices issued through registered AD were not received back. Therefore, plaintiff was permitted to serve defendant by way of publication/advertisement in two newspapers as well as by way of affixation and accordingly, service by way of affixation was effected on 29.8.2017 and publication in newspapers was made on 29.8.2017 in the Divya Himachal and 31.8.2017 in The Tribune. Despite that, none appeared for the defendant. However, one more notice was issued to the defendant on the address mentioned in plaint as well as another address of defendant procured by plaintiff. Thereafter, again there was no representation on behalf of the defendant on 4.10.2017 the date fixed for hearing. However, on perusal of record, it transpired that service upon the defendant was effected through affixation and publication, but copy of plaint and annexures thereto were not sent for affixation as required under Order 37 Rule 3(1) CPC. Therefore, defendant was again served through affixation by pasting notice alongwith plaint and its documents on both addresses of defendant for 7.12.2017. In aforesaid circumstances, the defendant was proceeded ex-parte.

8 Plaintiff, along with plaint, had filed photocopies of documents relied upon to substantiate its pleadings. Therefore, the plaintiff was directed to produce original documents, which were filed by plaintiff in Registry of this Court and are part of record.

9 Present suit has been filed under Order 37 CPC. This order applies to the following classes of suits:-

> ***(a) suits upon bills of exchange, hundies and promissory notes;***
>
> ***(b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising-***
>
> ***(i) on a written contract; or***
>
> ***(ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or***
>
> ***(iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only.***
>
> ***(iv) suit for recovery of receivable instituted by any assignee of a receivable."***

10 Present case has been filed for recovery of money payable by the defendant arising on a written contract in the shape of invoices read with import permits and Bill of Exchange, i.e. cheques worth Rs. 50 lac.

11 In plaint, in compliance of provisions of Order 37 Rule 2 CPC, it has been specifically stated that suit has been filed under Order 37 and the plaintiff has not claimed any relief which does not fall within ambit of this Rule and in the cause title also, it is specifically mentioned that suit is under Order XXXVII of CPC and resultantly, summons of the suit were also issued as provided in form IV in Appendix B. Defendant has failed to put in appearance despite repeated efforts which were made for procuring the presence of defendant by serving through various modes but it has failed to put in appearance.

12 To substantiate the claim in plaint, plaintiff has produced excise pass issued to the defendant for transporting beer products since 8.8.2014 to 10.2.2015 issued in response to order placed by the defendant by submitting photocopies of import permits issued by Excise and Taxation Department Government of H.P. during this period. Photocopies of import permits along with bility and GRs issued for transportation have also been placed on record with receipts. The details containing invoice no., date, amount etc. which are related to the defendant has also been placed on record. Original invoices books containing carbon copy of invoices with respect to goods supplied against the order placed by defendant at various times have been placed on record. Plaintiff has also placed on record original cheques issued by Mr. Anil Dogra, sole proprietor of the defendant concern bearing Nos. 266439, 266440, 266441, 266442 and 266443 dated 31.12.2016 for Rs.10 lacs each. Information given by bankers of plaintiff i.e. ICICI Bank with regard to dishonour of cheque for insufficient funds has also been placed on record in original. Copy of legal notice dated 22.4.2016 along with receipt of courier company has been placed on record. Print of ledger record of running account of defendant maintained by the plaintiff company showing the receipt and outstanding amount has also been placed on record.

13 The said ledger account has been generated from the computer of plaintiff and a certificate under Section 65B of the Indian Evidence Act has also been placed on record stating therein that ledger account of the defendant maintained by the plaintiff is in electronic form on the computer system of plaintiff and has been down loaded from computer system of plaintiff and it is true and accurate record of copy maintained on the computer system and copies of ledger account placed on record are true hard copies of electronic record, which are identical to the record maintained by the plaintiff.

14 Plaintiff has claimed recovery of Rs. 3,09,59,430/- in total with further averment that for making part payment thereof, defendant had also issued five cheques worth Rs.10,00,000/- each, total amounting to Rs.50 lacs, which were dishonoured by the Bank for insufficiency of funds. A summary suit based upon “Bill of Exchange” is maintainable under Order 37 CPC as provided in its Rule 1(2). Cheque is a special kind of “Bill of Exchange” as defined under Section 6 of the Negotiable Instrument Act 1881 (NI Act). Therefore, summary suit for recovery of cheque amount is maintainable under Order 37 CPC. Accordingly, plaintiff’s claim for Rs. 50 lacs against the cheques is maintainable. However, the amount of these dishonoured cheques i.e. Rs.50 lacs is a part of total outstanding amount of Rs. 3,09,59,430/- sought to be recovered in the suit and therefore, in case plaintiff is entitled for recovery of entire amount, it would not be necessary to pass a separate decree for recovery of Rs. 50 lacs, the amount contained in cheques, which were issued by the defendant as part payment towards outstanding amount.

15 Besides, resting its claim of Rs. 50 lacs on the basis of cheques, plaintiff has also claimed his suit based on a written contract with submission that import permits, supply of goods in response thereto through respective invoices constitutes a complete written contract between the parties, as invoices contain the name of importer (purchaser), exporter(seller), description of goods with quantity, along with its rates and price thereof along with tax applicable and levied thereon and also other terms and conditions.

16 Reliance has also been placed on judgments passed by Delhi High Court in ***Dura Line India Pvt. Ltd. vs. Bpl Broadband Network Pvt. Ltd 111(2004)DLT 736; 2004(74)DRJ 266and M/s Flint Group India Pvt. Ltd. vs. M/s Good Morning India Media Pvt. Ltd in CM(M) No. 369 of 2017 and CM Nos. 13049-50/2017.***

17 I am in agreement with the plea raised on behalf of the plaintiff and also with the findings returned on relevant issue in aforesaid judgments cited in support thereof.

18 Import permits placed on record, on Form L-34 issued by the Excise and Taxation Department, Government of H.P. contains the details of licence number, Firm's name, Licensee's name and address of not only the importer (consignee) but also of the exporter (consignor) along with complete description of goods i.e. beer therein. The said import permits were submitted by the defendant to the plaintiff for supply of goods and vide corresponding invoices placed on record, the goods prescribed in the export permits were supplied by plaintiff to the defendand and invoice also contains the name of importer(consignee), exporter(consignor), description of goods with complete identity of seller, purchaser, quantity, rates and price of goods supplied. Besides aforesaid details the invoices also contain the number of truck and GRs along with date regarding the transportation of goods so supplied to the defendant. Corresponding GRs have also been placed on record substantiating the supply and transportation of goods by plaintiff in response to order placed by defendant through import permits. Import permits, invoices, GRs and other documents placed on record contain the name of plaintiff as exporter (consignor) and description of defendant as importer(consignee). Export permit, issued by Excise and Taxation Department, can be in favour of a licensee only as the liquor is a controlled business which is permissible under restrictions imposed under license to be issued/granted by the Government and it is only the licensee who is entitled to apply for issuance of import permit according to his licence and in the present case, defendant is a licensee and import permits, placed on record, have also been issued in its favour permitting to import the beer. The said import permit when was placed before the plaintiff for supplying/transporting the liquor/beer permitted to be imported by defendant, is an offer made by the defendant which stands accepted by the plaintiff by supplying the goods as per requisition of defendant and the invoices issued in furtherance of said offer are completing the written contract between the parties. Contract is not necessary to be completed in one document only, it can be completed in more than one separate documents prepared in continuity establishing offer and acceptance thereof wherein one may be offer and another may be acceptance. In the present case, offer has not only been accepted but the contract has also been acted upon between the parties, as the goods were supplied as per demand of defendant and by making part payments against thereof, defendant has also acknowledged the completion of contract. The payments made by defendant have been reflected in the ledger account/running account of defendant maintained by the plaintiff, copies whereof, establishing the payments made by defendant and outstanding amount yet to be paid by the defendant, are on record.

19 Even if invoices are to be considered as a counter offer by plaintiff, even then the contract is complete as the said offer stands accepted by the defendant by accepting the goods supplied to him through these invoices and by making part payment against the said supply. Invoices may not have been signed by defendant, but the same have been signed by the authorized signatory of plaintiff and it is not necessary for a valid contract that it must be signed by both the parties. A contract signed by one party is also a valid contact particularly when there is ample evidence on record that same was accepted and acted upon by the concerned party/parties. Outstanding amount Rs. 3,09,59,430/- has been duly established from ledger account of plaintiff. Therefore, plaintiff is entitled for recovery of Rs. 3,09,54,430/- as claimed.

20 Amount involved in present case pertains to business transaction and definitely, by withholding the payment due to plaintiff which may have been utilized by plaintiff in the business of plaintiff for non-availability of funds to be poured in the business activities so as to grow further. Therefore, the plaintiff is also entitled for interest @ 12% per annum on the amount to be recovered from the defendant.

21 In view of aforesaid discussion, suit of the plaintiff succeeds and accordingly, a decree for recovery of Rs. 3,09,59,430/- along with interest at the rate of 12% per annum from the date of liability wherefrom the said amount becomes due till the final realization of the entire amount is passed in favour of the plaintiff and against the defendant with costs. Decree Sheet be drawn accordingly. Suit stands decreed accordingly. All pending miscellaneous application(s), if any, shall also stand disposed of.

****

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

M/s Vil Limited ...Petitioner.

Versus

IL & FS Transportation Networks ltd. ....Respondent.

CARBC No. 2 of 2018.
Reserved on : 16.5.2019.
Decided on : 30th May, 2019.

Arbitration & Conciliation Act, 1996 – Section 9 - Interim injunction against encashment of bank guarantee- Grant of- Circumstances- Petitioner filing application for restraining respondent from encashing bank guarantee executed by petitioner in favour of latter on ground that contract was unilaterally rescinded by respondent and its encashment without settlement of accounts would cause irreparable loss to it- Held, an unconditional bank guarantee or letter of credit is an independent and separate contract- Injunction against encashment of bank guarantee can only be granted where there is a fraud in connection with bank guarantee vitiating its foundation or where allowing its encashment would result in irretrievable harm or injustice to one of parties concerned- In absence of material to support these elements requisite for grant of injunction, relief cannot be granted to petitioner- Petition dismissed. (Para 3)

Cases referred:

Bharat Aluminium Company vs. Kaiser Aluminium Technical Services Inc., (2012)9 SCC 552

General Electric Technical Services Company Inc. vs. Punj Sons (P) Ltd. And another, (1991)4 SCC 230

Himadari Chemicals Industries Ltd. vs. Coal Tar Refining Co., (2007)8 SCC 110

Indus Mobile Distribution Private Ltd. vs. Datawind Innovations Private Limited, (2017)7 SCC 678

Union of India vs. Hardy Exploration and Production, Civil Appeal No.4628 of 2018

U.P. State Sugar Corporation vs. SUMAC International Ltd., (1997) 1 SCC 568

For the Petitioner: Mr. Ankush Dass Sood, Senior Advocate with Mr. Vivek Singh Attri andMr. Nachiketa Goel, Advocates.

For the Respondent: Mr. R.L. Sood, Senior Advocate with Mr. Arjun Lall, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Through the instant petition, the petitioner has claimed rendition(s) of hereinafter extracted relief(s):-

> (a) restrain the respondent from invoking/encashing the performance bank guarantee bearing No. 6288BG00006714 dated 6.11.2013 issued by ICICI bank amounting to Rs.12,53,00,000/-;
>
> (b) restrain the respondent from receiving any amount under the aforesaid bank guarantee No. 6288BG00006714 dated 6.11.2013 issued by ICICI bank amounting to Rs.12,53,00,000/- if the said bank guarantee is already invoked;
>
> (c) pass an ad-interim ex-parte order in terms of prayer (a) above;
>
> (d) award the costs of the present petition in favour of the petitioner and against the respondent; and
>
> (e) grant such other or further relief(s) in favour of the petitioner and against Respondent as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

In pursuance to clause 4.7, as, embodied in the apposite arbitration agreement, clause whereof stands extracted hereinafter:-

> "**4.7 Guarantee and Performance Security**
>
> (A) The Contractor shall provide to ITNL with a Performance Bank Guarantee in the form set out in Appendix 7 from any scheduled Bank and having a place of business in India (Draft of the Performance Bank Guarantee as per Appendix 7 shall be approved by ITNL before the issuance). The performance security amounting to 5% of the contract Price shall be submitted along with the signing of the contract document. The Performance Security shall be valid upto 6 months after completion of works.
>
> (B) The Contractor shall not less than 30 days before the expiry of the Performance Security and any other guarantee issued by the Contractor to ITNL (and any substitute Performance Security if required under this clause 4.7) provide ITNL with a substitute Performance Security which commences on the expiration of the existing Performance Security and is in an amount equivalent to the existing Performance Security and otherwise in the form of the existing Performance Security. If the Contractor fails to provide a substitute Performance Security by the date required in this Clause 4.7 ITNL shall be entitled to call the entire amount of the existing Performance Security and retain it as security for the Contractor's obligations under this Agreement until a substitute Performance Security is provided.
>
> (C) Each Performance Security shall be returned to the Contractor within a reasonable time following the expiration of its validity. The cost of complying with the requirements of this Clause shall be borne by the Contractor.

Hence, at page 37 of the paper book, the contentious bank guarantee stands borne, and, the beneficiary of the afore bank guarantee, is, IL& FS Transportation Networks Ltd.

2. A reading of the pleadings reared before this Court, hence, by the contesting litigants, make(s) candid disclosure(s), qua a dispute arising inter se both, vis-a-vis, satisfactory or unsatisfactory execution(s), rather by the petitioner, of works assigned/awarded thereto, by the respondent herein. The learned counsel appearing for the petitioner has contended much vigour, before this Court, (i) while relying, upon, a communication embodied in page 242 of the paper book, and, bearing Annexure P-4, that, with graphic reflections being borne therein qua, on 2nd June, 2017, hence, vis-a-vis, the petitioner, hence, trade balance(s) rather being borne in a sum of Rs.17,92,39,270/-, (ii) and, therefrom he draws leverage to contend, that the afore reflections tantamounting, to acquiescence(s), of, the respondent qua the afore sums of money, being amenable for liquidation, hence, by the respondent, to the petitioner, (iii) and, he has also therefrom proceeded, to, hence concomitantly make an argument qua the afore performance security or bank guarantee , upon, its being permitted, to be ecashed by the respondent herein, (iv) would besides causing irreparable loss or injury to the petitioner herein, (v) rather would also slight the underlying salutary purpose, vis-a-vis, its execution, underlying purpose whereof, being qua, despite, the petitioner herein, given the afore trade balance leaning, vis-a-vis, it, and, thereupon also rather, it, naturally satisfactorily executing the awarded works, and, rather upon the respondent being permitted to make encashment(s), of, the afore bank guarantee, it, being encumbered with a gross prejudice. Furthermore, the further dependence(s), in his making, the afore submission, stand(s), also rested, upon, Annexure P-21, existing at page 454 and 455, of the paper book, wherein, in consonance therewith, the, inclining(s), vis-a-vis, the petitioner, hence, the trade payable, qua it, on 10th January, 2018, stands echoed therein, to be borne, in a sum, of, Rs.17,92,39, 270/-. The learned counsel for the petitioner, in making the afore conjoint reliance(s), upon, the afore, has proceeded to strengthen, his submission, that, hence when the works, were prior thereto, (vi) hence rescinded on 10 January, 2017, rather renders, even the rescinding of the contract, being construable, to, prima facie hence breaching the afore executed contract, (vii) rather emphasisingly, when the afore reflections, stir an inference, qua the contract being satisfactorily executed by the petitioner herein, and, thereupon, the performance security or guarantee also outliving its salutary purpose, and, it being not legally permissible, hence, to be encashable by the respondent.

3. However, before proceeding to mete adjudication(s), upon, the afore espousals, it is also necessary to allude, to the relevant law appertaining, to the validity(ies), of the afore espousals, as, made before this Court. The learned counsel appearing for the respondent, has placed reliance, upon, a judgment of the Hon'ble Apex Court, as, rendered in a case titled as ***U.P. State Sugar Corporation vs. SUMAC International Ltd.***, reported in ***(1997) 1 SCC 568***, the relevant paragraphs No.11 and 12 whereof, stand extracted hereinafter:-

> "11. These bank guarantees which are irrevocable in nature, in terms, provide that they are payable by the guarantor to the appellant on demand without demur. They further provide that the appellant shall be the sole judge of whether and to what extent the amount has become recoverable from the respondent or whether the respondent has committed any breach of the terms and conditions of the agreement. The bank guarantees further provide that the right of the purchaser to recover from the guarantor any amount shall not be affected or suspended by reason of any disputes that may have been raised by the respondent with regard to its liability or on the ground that proceedings are pending before any Tribunal, Arbitrator or Court

with regard to such dispute. The guarantor shall immediately pay the guaranteed amount to the appellant-purchasers on demand.

12. The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may co-exist in some cases. In the case of U.P. Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd. (988 [1] SCC 174), which was the case of works contract where the performance guarantee given under the contract was sought to be invoked, this Court, after referring extensively to English and Indian cases on the subject, said that the guarantee must be honoured in accordance with its terms. The bank which gives the guarantee is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the suppler has performed his contractual obligation or not, nor with the question whether the supplier is in default or not. The bank must pay according to the tenor of its guarantee on demand without proof or condition. There are only two exceptions to this rule. The first exception is a case when there is a clear fraud of which the bank has notice. The fraud must be of an agregious nature such as to vitiate the entire underlying transaction. Explaining the kind of fraud that may absolve a bank from honouring its guarantee, this Court in the above case quoted with approval the observations of Sir John Donaldson, M.R. in Bolivinter Oil SA v. Chase Manhattan Bank NA (1984 [1] AER 351 at 352):

> "The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must

> be clear both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it charged".
>
> This Court set aside an injunction granted by the High Court to restrain the realisation of the bank guarantee."

wherein, the Hon'ble Apex Court, has settled, the law appertaining to the entitlement(s) or disentitlement(s) of the beneficiary(ies), of, the apposite bank guarantee. The hereinabove extracted paragraphs, make clear, and, candid expostulations of law qua (i) the beneficiary of the bank guarantee, rather holding an infeasible right, to ensure its realization or its encashment, dehors, any or all pending disputes, arising from the apposite contract (ii) and, the bank issuing, the requisite, guarantee rather being enjoined with a sacrosanct obligation, and, irrespective of any dispute raised, by its customer, hence to ensure its encashment, at the instance, of, beneficiary(ies) thereof, (iii) and, if the afore apposite realization is not ensured, and, the beneficiary's right, to seek its realization is scuttled, thereupon, the salutary purpose, underlying the making of the bank guarantee, rather being untenably defeated. However, therein two exceptions to the afore principles are carved. (iv) A fraud in connection with such a bank guarantee, hence, vitiating the very foundation, of, the apposite bank guarantee, (v) thereupon permitting, the, encashment, of, an unconditional bank guarantee, hence, sequelling irretrievable harm or injustice being encumbered, upon, one of the party concerned. The genre of fraud, hence, vitiating, and, shaking the foundation, of the bank guarantee, should rather evidently, hold concomitant cascadings deleterious effects, upon, commercial dealings, in the country. The afore principle of law, finds reiteration(s), in a verdict rendered by the Hon'ble Apex Court, in a case titled, as, ***Himadari Chemicals Industries Ltd. vs. Coal Tar Refining Co.,*** reported in ***(2007)8 SCC 110***, and, the requisite principles, as enshrined therein, are, borne in paragraph No.14, paragraph No.14 whereof reads as under:-

> "14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a Bank Guarantee or a Letter of Credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a Bank Guarantee or a Letter of Credit :-
>
> (i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional Bank Guarantee or Letter of Credit is given or accepted, the Beneficiary is entitled to realize such a Bank Guarantee or a Letter of Credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.
>
> (ii) The Bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.
>
> (iii) The Courts should be slow in granting an order of injunction to restrain the realization of a Bank Guarantee or a Letter of Credit.
>
> (iv) Since a Bank Guarantee or a Letter of Credit is an independent and a separate contract and is absolute in nature,

> the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of Bank Guarantees or Letters of Credit.
>
> (v) Fraud of an egregious nature which would vitiate the very foundation of such a Bank Guarantee or Letter of Credit and the beneficiary seeks to take advantage of the situation.
>
> (vi) Allowing encashment of an unconditional Bank Guarantee or a Letter of Credit would result in irretrievable harm or injustice to one of the parties concerned."

A reading of clause (iv) of para 14, of, the judgment supra, makes a categorical and explicit expression, of law, (a) that, an unconditional bank guarantee, or a letter of credit, being an independent, and, a separate contract, and, is absolute in nature, (b) and, its clout, even, upon emergence or existence of any dispute inter se the parties qua the contract rather not constituting any valid ground, for, restraining, through, court injunction, the, encashment or enforcement, of, a bank guarantee or letter(s) of credit. Even, the, afore trite excepting principle, borne therein vis-a-vis, no injunction being grantable against, the, encashment, of, a bank guarantee, and, trite exception(s) whereof, is, rested, upon, evident irretrievable harm being encumbered, upon, the party concerned, (c) and, also further when it rather stands hence fully expatiated, and, dilated in paragraph No. 17(i), borne in Himadari Chemicals's case (supra), and, the apt dilation thereof, is, rested, (d) upon, evident exceptional emergences, of, emergent circumstances, rather personificatory qua, the guarantor being precluded, to reimburse himself, vis-a-vis, the amount(s) borne, in, the bank guarantee, upon its/his ultimately succeeding, in a dispute arising/emerging, from the apposite contract, conspicuously, upon, declining, of, injunction, qua its encashment, vis-a-vis, it/him.

4. The dependence(s), by the learned counsel appearing, upon, the afore material existing on record, and, his thereafter relying, upon clause (vi) borne, in, of para 14 embodied, in the verdict rendered, by Hon'ble Apex Court, in Himadari Chemicals' case (supra), is/are gross mis-dependence(s) thereon, as (a) both the afore annexures, are, apparently made, at the instance, and, at the motion of the petitioner herein, (b) and, hence, the making of the afore obviously, cannot be concluded, to be bilateral, rather is/are to be concluded, to be unilateral, (c) whereupon, the afore reflection(s), as stand, echoed therein, rather engendering a conclusion qua theirs, being prima facie engineered, and, motivated by the petitioner herein. Even otherwise, the underlying subtle nuance, of, clause (vi) of Para 14 borne, in, the verdict rendered by the Hon'ble Apex Court, in Himadri Chemicals' case (supra), and, thereafter, in, extenso dilated, in paragraph No.17 thereof, (d) and, when derivation(s) of leverage, if any, upon, clause (iv) thereof, also enjoins existence, of, material, exemplificatory qua an imminent disability being encumbered, upon, the guarantor, vis-a-vis, reimbursements, of, amounts borne therein, and, the apposite disability(ies), rather standing sparked by evident emergences, of, exceptional emergent circumstances, (e) conspicuously, upon, his/its ultimately hence succeeding in the lis rather engaging the beneficiary and the guarantor, thereupon, its being defficult, to realise the awarded sums/decretal sums, from the respondent, hence, the espoused injunction being renderable. However, no material in tandem therewith hence exists on record, excepting a stray averment, borne in the petition, qua upon, the espoused permission being granted, vis-a-vis, the respondent to encash the bank guarantee, it sequeling great irretrievable harm, and, hardship, to the petitioner, and, hence also leading, to, financially destablizing, the petitioner company, despite, its, already reeling under huge financial stress. However, the afore bald averments, without any further averment nor supporting material qua, the, extant bankruptcy, or imminent/impeding bankcruptcy, of the respondent, or are, hence

insufficient to constitute, the requisite emergent circumstances, qua, hence, even upon the guarantor, rather succeeding in the lis, arising out, of the contract, drawn, inter se it, and, the respondent therein, (f) thereupon, it being precluded to realize, from, the respondents, the amount borne, in the bank guarantee. Thereupon, the afore lack of tandem therewith or concurrent therewith material, for, hence ensuring satiation, of, the afore principle encapsulated in clause (vi) of para 14, of, Himadri Chemicals' case (supra), (g) principle whereof, is, further fully expatiated, in paragraph 17 thereof, rather begets a conclusion, qua, the petitioner hence abysmally failing to establish qua, upon, his securing success, in the apt litigation, thereupon, upon, permission being granted, vis-a-vis, encashment of the bank guarantee, hence irretrievable harm, and, injustice being encumbered upon it. The further reason hence constraining this Court to conclude, qua even the afore submission, harboured, upon, anvil qua despite, it, satisfactorily rather executing works, as, awarded to it, (h) yet, the, apposite contract(s) being untenably rescinded, and, hence, there, is imminent likelihood of its succeeding in the lis, as has, arisen or may arise, vis-a-vis, sums of money payable, in pursuance, to, purported complete satisfactory execution, of, apt work, (I) is, also prima facie, eclipsed by an averment, cast in paragraph No.23 of the petition, qua the respondent rather beseeching the petitioner for joint verification, and, reconciliation of the works, hence at a belated stage, and, also claiming amounts towards rectification costs. The afore bald averment, is construable, to be an acquiescence of the petitioner, qua the afore request(s) being made, upon it, for joint verification of works, and, when thereafter, no scribed communication stands placed on record, and, it rather unveiling qua the afore request being acceded or declined, rather upon, only valid, and, tangible reasons, (j) thereupon, it is to be concluded, that, the entire edifice, of the petitioner's submission, that prima facie, the petitioner, despite, satisfactorily completing the works, (k) yet the contract being unjustifiably rescinded by the respondent, rather being jettisoned, (l) hence, it being also estopped to make any submission, before this Court, that, any validly, due and outstanding sums of money, yet, remaining unliquidated, vis-a-vis, it by the respondent, (m) AND, obviously hence, no further submission, can also, be justifiably reared before this Court, that, prima facie, the petitioner company, would validly succeed, in the lis which may arise or has already arisen inter se it, and, the respondent, (n) and, that in case the espoused interim injunction is not accorded, vis-a-vis, it, thereupon, rather vis-a-vis, the amounts validly determined, vis-a-vis, the petitioner, rather being unamenable, for, realisation rather excepting, upon, the bank guarantee being kept alive, for the afore purpose.

5. Be that as it may, the afore conundrum besetting this Court, is, also settled, by a judgment rendered, by the Hon'ble Apex Court, in a case titled, as ***General Electric Technical Services Company Inc. Punj Sons (P) Ltd. And another, reported in (1991)4 SCC 230,*** the relevant paragraph No.9 whereof stands extracted hereinafter:-

> "9. The question is whether the Court was justified in restraining the Bank from paying to GETSCO under the bank guarantee at the instance of respondent-1. The law as to the contractual obligations under the bank guarantee has been well settled in a catenae of cases. Almost all such cases have been considered in a recent judgment of this Court in U.P. Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd., [1988] 1 SCC 174 wherein Sabyasachi Mukherji, J., as he then was, observed (at 189) 'that in order to restrain the operation either of irrevocable letter of credit or of confirmed letter of credit or of bank guarantee, there should be serious dispute and there should be good prima facie case of fraud and special equities in the form of preventing

> irretrievable injustice between the parties. Otherwise, the very purpose of bank guarantees would be negatived and the fabric of trading operations will get jeopardised'. It was further observed that the Bank must honour the bank guarantee free from interference by the Courts. Otherwise, trust in commerce internal and international would be irreparably damaged. It is only in exceptional cases that is to say in case of fraud or in case of irretrievable injustice, the Court should interfere. In the concurring opinion one of us (K. Jagannatha Shetty, J.) has observed that whether it is a traditional bond or performance guarantee, the obligation of the Bank appears to be the same. If the documentary credits are irrevocable and independent, the Bank must pay when demand is made. Since the Bank pledges its own credit involving its reputation, it has no defence except in the case of fraud. The Bank's obligations of course should not be extended to protest the unscrupulous party, that is, the party who is responsible for the fraud. But the banker must be sure of his ground before declining to pay. The nature of the fraud that the courts talk about is fraud of an "egregious nature as to vitiate the entire underlying transaction". It is fraud of the beneficiary, not the fraud of somebody else."

Further the afore principle qua the bank, being rather obliged, hence, to honour the bank guarantee, since, the bank concerneds' credit and repudiation, in declining, to the beneficiary, the encashment, of, the bank guarantee, hence, is at stake, (a) thereupon, its encashment, being the rule, and, the apposite exception, qua its declining, rather the bank guarantee, hence, vis-a-vis, the beneficiary, being, recoursable, and, also being well founded, upon, prima facie echoings, made, by cogent material, qua his/its beneficiary thereof, hence indulging in fraud. In consonance therewith, (b) however, the petitioner, has except its, making only a stray and bald afore averment, hence has not made any further averment, qua upon declining, of, the espoused injunction, rather thereupon this Court condoning, hence, elements of deep vice(s), of, vitiatory fraud(s), and, it hence evidently concomitantly shaking the foundation of the bank guarantee, and, all rather fully surfacing. Furthermore, even the afore material, as placed on record in support, of the afore submission, also, omits to beget satiation, of the afore principle, (b) importantly when, the, contemplated therein genre, of, fraud, rather enjoins, it, being well rested, upon, clear averments besides satiating therewith material, hence, also making amplifying echoings qua elements, of, deepest fraud rather permeating, the, execution, and, the making of the bank guarantee. Consequently, abysmal lack, of, afore averments, in the petition, do not, visibly permit the petitioner to encash, upon, the afore contemplated, hence, genre, of, fraud, borne in the judgment supra, nor hence, the petitioner can constrain this Court, to, grant the espoused relief qua it.

6. Even otherwise, the egregious nature, of, hence fraud rather underlying the bank guarantee, stands dwelt upon, by the Hon'ble Apex Court, in a verdict rendered, in a case titled, as U.P. State Sugar Corporation versus SUMAC international Ltd., reported in (1997)1 SCC 568, wherein, it stands enshrined qua it being generated, upon, it also carrying adverse effect(s), on commercial transactions, in the country. However, in succoring, the afore expostulation of law, vis-a-vis, egregious fraud rather underlying the making of, the, extant bank guarantee, and, also with want, of, satiating therewith, hence, material on record, (a) and, rather when, for reasons aforestated, the petitioner, has, an indefeasible right to encash it, irrespective, of, any dispute likely to emerge or subsisting inter se the

parties at contest, and, appertaining , vis-a-vis, the covenanted therewith hence contracts, (b) thereupon, when reiteratedly, the, afore genre, of, fraud, rather remains un-displayed, by any tangible material hence on record, nor when, upon, the espoused injunction being declined, rather hence the commercial dealing(s) in the country, being the ensuing catastrophe, is, displayed to beget satiation. In sequel, the afore submission is entirely rudderless, and, merits dismissal. Consequently, the prayer of the petitioner, for, grant, of, interim injunction qua the respondent being restrained, from, encashing the bank guarantee, is, rejected.

7. The learned counsel, appearing for the petitioner, and,l for the respondent, make contra submissions, qua this Court not holding jurisdiction, and, this Court holding jurisdiction, to make an order, upon, the instant petition, and, for determining, the afore submission, clause 18.3 of the agreement, stands extracted hereinafter:-

> "18.3 Arbitration.
>
> (A) In the event that the parties are unable to resolve any dispute, controversy, or claim in accordance with 18.1. or 18.2, such dispute, controversy or claim shall be finally settled by a panel of arbitrators (the "Arbitration Panel") in accordance with the Arbitration and Conciliation Act, 1996 with re-enactments or amendments thereof. The Arbitration Panel shall consist of three parties. ITNL and Contractor shall appoint one arbitrator each and such arbitrators shall, within seven days of their appointment, designate a third Person to act as presiding arbitrator in order to organize an Arbitration Panel. The arbitral proceedings shall take place in Mumbai and shall be conducted in English language. The award of the arbitrators shall be a reasoned one giving reasons for each claim allowed and disallowed and shall be final and binding on the parties.
>
> (B) Any dispute, controversy or claim referred to the Arbitration Panel in accordance with subsection (a) above shall be considered a commercial dispute arising under the Arbitration and Conciliation Act, 1996."

The relevant portion thereof, echoes, qua all arbitral proceedings, being, conducted at Mumbai, and, the afore proceedings hence being conducted in English language. The learned counsel appearing for the respondent, has placed reliance,upon, a decision of the Hon'ble Apex Court, rendered in a case titled as ***Indus Mobile Distribution Private Ltd. vs. Datawind Innovations Private Limited,*** reported in (2017)7 SCC 678, and,l has hence contended, that, the afore clause, is in tandem with the afore verdict, and, when therein, it stands enshrined qua where (a) upon contracting parties, hence, determining, the, arbitration seat or the venue, of, arbitration, thereupon, the afore contractual covenant, vis-a-vis, seat of arbitration, also per se vesting jurisdiction in the court(s), wherewithin whose territorial limits, the, contractually covenanted seat, of arbitration also exists, (b) and, hence on anvil, of the afore clause, rather this Court also being barred to render a decision, upon, the extant petition. He has also proceeded, to contend that, when in the extant agreement, the parties, contractually designate Mumbai, to be the place of arbitration, hence, the afore venue, entails, upon, the parties rather an obligation, to succumb to the jurisdiction, of courts located at Mumbai.

8. However, the afore submission, addressed by the learned counsel appearing for the respondent, is, anvilled, upon, a piecemeal reading, of, the verdict supra, and, is also

anchored, upon, his being oblivious, to, the striking distinguishing therefrom factual scenario hence hereat, (a) and, appertaining to, vis-a-vis, the afore judgment, rather not emanating, from, any alike herewith apposite clause, rather, therein, the, covenanted and designated seat, of arbitration, being also contractually constituted, to, hence therethrough(s) jurisdiction, being also vested in Courts rather located at Mumbai, for, theirs holding trial, of, all disputes, hence arising inter se the litigating parties, from, the thereat contract. However, reiteratedly, the afore extracted clause, existing in the extant agreement, excepting, its, designating Mumbai, to be, the, venue of arbitration, and, also qua it covenanting, all proceedings being carried in English language, rather does not, in tandem with, the afore clause, occurring in Indus Mobile case (supra), (b) carry any further, contractual covenant, qua the courts located, within, the territory of the afore designated arbitration venue, also holding jurisdiction, to try and entertain or render adjudication(s), vis-a-vis, all differences, and, disputes arising out of or in connection, with, the extant contract. Even otherwise, the afore judgment, is not, in departure, from, the decision rendered, by the Hon'ble Apex Court in ***Bharat Aluminium Company vs. Kaiser Aluminium Technical Services Inc., reported in (2012)9 SCC 552***, rather, (a) is, in consonance therewith, it also has made apposite segregations, and, thereupon, clear expostulations, of, law qua there being no overlapping, vis-a-vis, the provisions contained in Part-I, and, in Part-II, of the Arbitration Act, and, also it has declared qua all laws articulated in Part-I of the Arbitration Act, only holding, applicability, vis-a-vis, arbitration proceedings, held within the country, and, the afore part also rather hence, being applicable, only, vis-a-vis, domestic arbitration, (b) and, in addition, the verdict of the Hon'ble Apex Court rendered in Indus Mobile's case (supra), alike the verdict rendered in Bharat Aluminium Company's case (supra), also dwells, upon, the statutory definition assigned, vis-a-vis, court, and, as existing in Section 2(e), of the Arbitration and Conciliation Act, 1996, provisions whereof stand extracted hereinafter:-

> "2. **Definitions.**- (1) In this Part, unless the context otherwise requires-
>
> (e) **"Court"** means the Principal Civil Court of Original Jurisdiction in a district, and, includes the High Court in exercise of its ordinary original civil jurisdiction, having, jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject matter of a suit, but does not include any civil court of a grade inferior to such Principal Civil Court or any Court of Small Causes;"

(c) AND, has, in consonance, with, the, verdict rendered in Bharat Aluminim Company's case (supra), and, upon, applying the afore statutory definition, of, Courts, vis-a-vis, the afore relevant clause, wherethrough, exclusive jurisdiction, is, also contractually vested, vis-a-vis, the subject matter, in dispute, in the courts located at Mumbai, dehors, the afore venue of arbitration, being the contractual arbitral seat, (d) rather hence reiteratedly, on cumulative construction(s) thereof hence concluded, that the contracting parties, upon, designating Mumbai to be venue, of, arbitration, also, contractually rather conferring the apt jurisdiction, and, for all relevant purposes, upon, Courts hence located thereat, (e) thereupon, reiteratedly when rather in contradistinction therefrom, the clause, existing hereat, though, designates Mumbai to be the seat, of the arbitral situs, yet when it is reticent, vis-a-vis, the subject matter of arbitration being also triable by the Courts located, at Mumbai, thereupon, this Court has the jurisdiction, to try, and, entertain the extant lis.

9. Even though at the fag end, the learned counsel appearing for the respondent, has placed reliance, upon, a judgment of the Hon'ble Apex Court rendered in a

case titled as ***Union of India Vs. Hardy Exploration and Production, Civil Appeal No.4628 of 2018***, and, hence contends, that, with, in the afore decision, a reference being made to the larger Bench, and, the decision, of the Hon'ble Apex Court, rendered in Bharat Aluminus Company's case (supra) being also encapsulated, in the apposite reference, hence, no reliance can be placed thereon. However, the afore submission is not amenable for acceptance, given, a reading of the paragraph No.23 thereof, para whereof stands extracted hereinafter:-

> "23. In our opinion, though, the question regarding the "seat" and "venue" for holding arbitration proceedings by the arbitrators arising under the Arbitration Agreement/International Commercial Arbitration Agreement is primarily required to be decided, keeping in view the terms of the arbitration agreement itself, but having regard the law laid down by this Court in several decisions by the Benches of variable strength as detailed above, and, further taking into consideration the aforementioned submissions urged by the learned counsel for the parties and also keeping in view the issues involved in the appeal, which frequently arise in International Commercial Arbitration matters, we are of the considered view that this is a fit case to exercise our power under Order VI Rule 2 of the Supreme Court Rules, 2013 and refer this case (appeal) to be dealt with by the larger Bench of this Court for its hearing."

(c) rather with clarity making clear bespeaking qua the afore reference hence appertaining to International Commercial Arbitration matters, and, when the category, of the lis, engaging the parties at contest hereat, does not fall, within the afore category, (d) rather is candidly, and, uncontestedly, a domestic arbitration, and, whereto Part-I of the Arbitration Act applies, (e) and, when, vis-a-vis, the afore part of the Arbitration Act, therein is no wrangle, qua both the subject matter, of, the relevant Arbitration clause, as, also the arbitral jurisdictional seat, both being fathomable, from, rather in consonance therewith, clear and explicit expression(s) hence, existing in the contract, (f) and, when rather the afore distinctive clause hereat, vis-a-vis, the verdict supra, hence, constrains this Court to exercise jurisdiction, upon, the extant lis, (g) thereupon, the afore reference when reiteratedly, does not, appertain, vis-a-vis, the genre, of, the extant lis, hence, this Court, is, of the firm view, that, in consonance with the verdict, rendered in Indus Mobile Distribution case (supra), this Court hence holding jurisdiction(s), to try, the extant lis.

10. In view of the above, it is held that this Court has the jurisdiction to try and entertain the instant petition, and, further the prayer of the petitioner qua ad-inter injunction, hence, restraining the respondent from invoking/encashing the bank guarantee, is, also rejected. Any observations made hereinabove is only for deciding the prayer made for interim injunction, and, shall not have any bearings, on the merits, of, the case(s) of the contesting parties.

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

M/s Virus through its Prop. Sh. Gaurav Walia and another
....Petitioners.

Versus

Sh. Ramesh Jaswal ... Respondent.

Cr.MMO No.38 of 2019
Decided on: 28.5.2019

Judicial discipline- Requirement of - Conduct of trial court deprecated- Trial court dismissing accused's application for leading additional evidence- Accused challenging order before Additional Sessions Judge- Additional Sessions Judge issuing notice to complainant and in meanwhile staying proceedings of trial court- However trial court still closing defence evidence by orders of court- Petition against- Held, order of trial court is not sustainable in law as it is issue of propriety and judicial discipline- Petition allowed- Order set aside with direction to trial court to give one more opportunity to accused to adduce his evidence. (Para 9)

For the petitioners. : Mr. Amar Deep Singh, Advocate.
For the respondent. : Mr. Shemmi Heer, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J *(Oral)*

The controversy involved in this petition is very narrow compass. Proceedings stand initiated against present petitioners by the respondent herein, under Section 138 read with Section 142 of the Negotiable Instruments Act. Despite number of opportunities having been granted by learned trial court to the present petitioners to lead evidence, the same was not led. In the meanwhile, petitioners herein preferred two applications before learned trial court i.e. one application under Section 243 read with Section 311 of the Cr.P.C. along with Section 45 and 73 of the Indian Evidence Acts and another application was filed under Section 216 read with Section 313 of Cr.P.C.

2. The application filed under Section 216 read with Section 313 of Cr.P.C. was dismissed by learned trial court vide Order dated 31.7.2018. While dismissing said application, learned trial court also observed that as four opportunities already stood granted to present petitioners to lead evidence, last opportunity on self responsibility to do so was granted for 18.8.2018.

3. Feeling aggrieved by Order dated 31.7.2018 petitioners filed a Revision Petition before the court of learned Additional Sessions Judge (1) Shimla. Vide order dated 30.10.2018, learned appellate court while issuing notice also stayed the proceedings pending before learned trial court till next date of hearing i.e. 26.11.2018.

4. It appears that as no evidence was again led by present petitioners for 18.8.2018, they were given another opportunity and date for the said purpose was fixed as 30.10.2018.

5. On the said date i.e., 30.10.2018 (wrongly mentioned in the Court order as 29.10.2018), learned trial court closed their right to lead evidence by passing the following order:-

"However, an application for exemption has been moved on behalf of absentee accused, which is considered and allowed for the reasons stated therein for today only. However, the perusal of case file depicts that the case has been listed for the production of the defence witnesses a number of times but neither the steps have been taken by the accused nor he has shown his

intention to get anyone examined in his defence. Accordingly, this court is of the view that the matter cannot delay further. Since it is pending trial before this court since the year 2012. Accordingly, this court deems it fit to close the evidence of the accused and listed for arguments for 14.11.2018."

6. Feeling aggrieved, petitioners have filed the present petition.

7. I have heard learned counsel for the parties and have also gone through the impugned order as well as other documents appended with the petition.

8. It is not in dispute that as on 30.10.2018 the Revision Petition preferred by the present petitioner against Order passed by learned trial court dated 31.7.2018 was listed before the Court of learned Additional Sessions Judge(1), Shimla.

9. It is also a matter of record that on the said date, further proceedings pending before learned trial court stood stayed by the learned Revisional Court. It is also a matter of record that the factum of the Revision being listed before the Revisional Court was in the knowledge of learned trial court, as an application filed on behalf of present petitioners for exemption from appearance stood allowed vide impugned order itself by learned trial court. Therefore, because as on 30.10.2018 learned Revisional Court had stayed further proceedings pending before learned trial court, Order passed on the same date by learned trial court closing the evidence of the accused is not sustainable in law. This Court is not going into the merit of the Order passed by learned trial court. The issue is of proprietory and judicial discipline. When on 30.10.2018 the Revisional Court had stayed the proceedings pending before learned trial court, no order could have been passed in the said trial on 30.10.2018 by learned trial court. Impugned Order, therefore, passed by learned trial court dated 30.10.2018 is not sustainable in the eyes of law.

In view of the above discussion, this petition is accordingly allowed. Impugned Order dated 30.10.2018 vide which learned trial court has closed the right of the present petitioners to lead evidence is set aside with the direction that one more opportunity shall be granted by learned trial court to the present petitioners to lead evidence for a date to be fixed by learned trial court and that too on self responsibility of the present petitioners.

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BEFORE HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Mukesh Kumar ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Cr.MP(M) No. 789 of 2019
Order reserved on : 11.6.2019
Date of Decision : June 12, 2019

Code of Criminal Procedure, 1973 - Section 438 – Pre-arrest bail- Availability- Held, pre-arrest bail is available only when person fears apprehension for commission of non-bailable offences- Application seeking pre-arrest bail for offences, under Section 279 and 304-A of Indian Penal Code, which are bailable, is not maintainable. (Para 2)

For the petitioner : Mr. Ashok K. Tyagi, Advocate, for the petitioner.
For the respondent : Ms. Ritta Goswami, Additional Advocate General, Ms. Divya Sood, Deputy Advocate General and Mr. Manoj Bagga, Assistant Advocate General for the respondent/State.

The following judgment of the Court was delivered:

Anoop Chitkara, Judge.

Present petition is under Section 438 of the Criminal Procedure Code seeking anticipatory bail in connection with F.I.R. No. 136 of 2019, dated 30.4.2019, registered at Police Station Paonta Sahib, Distt. Sirmaur, H.P. under Sections 279, 304-A Indian Penal Code read with Section 187 of the Motor Vehicles Act.

2. I have gone through the status report on record and heard learned counsel for the parties. All these offences are bailable in nature. Petition under Section 438 Cr.P.C. is maintainable only when the offences are non-bailable. Hence this petition is dismissed being not maintainable.

3. Needless to say that in the event of the arrest of the petitioner, the Investigating Officer is under legal obligation to release the petitioner on furnishing bail bonds in terms of Section 436 Cr.P.C.

Petition stands disposed of in the aforesaid terms.

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BEFORE HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

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

Cr.MP(M) No.224 of 2019
Reserved on : 19.6.2019
Date of decision : 21st June,2019

Code of Criminal Procedure, 1973 (Code) – Section 438 – **Indian Penal Code, 1860 (IPC)**- Sections 307, 341, 323, 427, 452, 506 and 34– Pre-arrest bail– Grant of– Circumstances - Complainant alleged that her husband was beaten by accused and his father and as result of assault, her husband sustained injuries– Petitioner contending that he himself was injured in incident and remained hospitalized for a considerable period and cross FIR was registered– Facts revealing, that injuries suffered by petitioner have not been explained by prosecution– Further, petitioner has joined investigation- Held, prima facie, it creates a situation where genesis of occurrence was suppressed by complainant– There is no criminal history of petitioner- Petitioner is a native and permanent resident of Himachal- His presence can always be secured- No purpose will be served by keeping him in judicial custody– Petition allowed subject to conditions. (Paras 4 to 8)

For the Petitioners : Mr. Sanjeev Bhushan, Senior Advocate with
Mr. Maan Singh, Advocate.

For the Respondent : Ms. Ritta Goswami, Additional Advocate General and
Ms. Divya Sood, Deputy Advocate General for State.
Mr. Ashish Patial, Advocate, for the complainant.

The following judgment of the Court was delivered:

Anoop Chitkara, Judge

The present petition is under Section 438 of the Code of Criminal Procedure, seeking anticipatory bail in F.I.R. No. 44/2019, dated 11.2.2019, registered at Police Station, Kullu, District Kullu, Himachal Pradesh, under Sections 307, 452, 341, 323, 427, 506, 34 of the Indian Penal Code.

2. I have seen the status report.

3. I have heard Mr. Sanjeev Bhushan, learned Senior Advocate duly assisted by Mr. Maan Singh, Advocate for the petitioner, Ms. Divya Sood, learned Deputy Advocate General for the respondent/State and Mr. Ashish Patial, learned Advocate for the complainant. Learned counsel for the petitioner states that the accused had joined the investigation as and when the Investigating Officer so directed him. Learned Additional Advocate General did not dispute this averment.

4. The gist of the First Information Report and the investigation is as follows:

(a) The Investigating Officer recorded statement of Smt. Roma Devi, wife of injured Sanjeev Kumar, under Section 154 of the Code of Criminal Procedure. She stated that she is a house wife.

(b) On 10.2.2019 at around 11:00 O'Clock, her husband was returning home. At that time, Munim Chand (bail petitioner), was also accompanying him. She further stated that when her husband was about to reach home then Munim Chand started hurling abuses on him. On hearing commotion, all the famuily members came out of their home. At that time, Bhagi Ram, father of the bail petitioner came down from his house and he obstructed her husband to enter his house.

(c) Thereafter, Munim Chand, the bail petitioner and his father Bhagi Ram, without any reasons, started beating her husband. They also, threw stones at the window pans of their house, due to which the window pans of glass broke. On hearing this commotion, her father-in-law and grand-father-in-law also came out of the home. She further stated that after beating her husband, they returned to their home.

(d) It was further alleged that due to the beatings administered by Munim Chand (bail petitioner) and his father Bhagi Ram, her husband received injuries on his head and he had to be taken to the hospital. Action was required to be taken.

(e) Initially, an offence punishable under Sections 341, 323, 504, 427 read with Section 34 of the Indian Penal Code was found to have been committed and F.I.R. was registered.

(f) The Investigating Officer visited the spot and collected the evidence. He also obtained M.L.C. of the injured from Regional Hospital, Kullu

as well as P.G.I. Chandigarh, where the injured had surgery on his head.

(g) As per the status report as well as the counsel Mr. Ashish Patial, learned counsel for the complainant, the complainant is undergoing treatment and it is further stated that he is still unconscious.

(h) Learned Deputy Advocate General, stated that because of the injures, the speech of the injured had impaired.

5. Mr. Sanjeev Bhushan, learned Senior Advocate, duly assisted by Mr. Maan Singh, learned counsel for the petitioner, stated that Munim Chand, the bail petitioner, also sustained serious injuries and he remained hospitalized in I.G.M.C., Shimla for 10 days. He further stated that a cross F.I.R. was also registered against the injured for the commission of offence punishable under Section 325 of the Indian Penal Code. He also stated that the weapon of offence is the handle of spade and that there is no history of any other crime against the bail petitioner.

6. I am satisfied that the no purpose will be served if the bail petitioner is sent to judicial custody. Therefore, I am inclined to allow the present petition on the following grounds:

(a) As per the statement of complainant Roma Devi, under Section 154 of the Code of Criminal Procedure, there is no mention of any injuries sustained by the present bail petitioner.

(b) That the bail petitioner also suffered injuries and he remained hospitalized for a considerable period.

(c) These injuries have not been explained by the prosecution.

(d) Prima facie, it creates a situation that genesis of occurrence was suppressed by the injured complainant.

(e) There is no criminal history of the bail petitioner.

(f) The petitioner is a native and permanent resident of Himachal. Therefore, his presence can always be secured. I am of the considered view that, *prima facie*, petitioner has made out a case for grant of bail. His custodial interrogation is not required at all.

7. In the result the present petition is allowed. In the event of arrest of the petitioner, he shall be released on bail, in connection with the FIR mentioned above, on his furnishing personal bond in the sum of Rs.5,000/- with one surety in the like amount to the satisfaction of the Arresting Officer.

8. This Court is granting the protection subject to the conditions mentioned in this order. The petitioner undertakes to comply with all directions given in this order and the furnishing of bail bonds by the petitioner is acceptance of all such conditions:

a) The petitioner is directed to join the investigation as and when called by the Investigating Officer. It shall be open for the Investigating Officer to call him as and when he feels such a necessity. The petitioner undertakes to appear before the Investigating Officer as and when directed to do so. However, whenever the investigation takes place within the boundaries of the Police Station or Police Post, then the Petitioner shall not be called before 9 A.M and shall be let off before 5 p.m.

b) The Petitioner shall neither influence nor try to control the investigating officer, in any manner whatsoever.

c) The petitioner undertakes not to contact the complainant, to threaten or browbeat her or to use any pressure tactics.

d) The Petitioner undertakes not to make any inducement threat or promise, directly or indirectly, to the investigating officer or any person acquainted with the facts of the case to dissuade him from disclosing such facts to the Court or any Police Officer or tamper with the evidence.

e) The Petitioner shall not hamper the investigation.

f) In case the of the launching of the prosecution, the petitioner undertakes to attend the trial and to appear before the Court which issues the summons or warrants and shall furnish fresh bail bonds to the satisfaction of such Court.

g) This bail is being granted on the condition that the petitioner shall not threaten or intimidate the injured or his family members. In case, any threat is found to have been given or the conduct of the bail petitioner towards the family of the complainant is found objectionable, it shall be open for the petitioner to file an application for cancellation of the bail.

9. It is clarified that the present bail order is only with respect to the above mentioned FIR. It shall not be construed to be a blanket order of bail in all other cases, if any, against the Petitioner.

10. Any observation made herein above shall not be taken as an expression of opinion on the merits of the case and the trial Court shall decide the matter uninfluenced by any observation made herein above.

Petition stands allowed in the aforesaid terms.

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BEFORE HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Namaskari Devi and others ... Petitioners.

Versus

State of Himachal Pradesh and another ...Respondents

Cr.MMO No.206 of 2019
Reserved on : 10.6.2019
Date of decision : 12th June,2019

Code of Criminal Procedure, 1973 – Section 482 – Inherent powers- Exercise of- Quashing of FIR- Circumstances- Petitioners seeking quashing of FIR registered against them for rioting, causing hurt and criminal intimidation- Held, incident took place on trivial issue of cleaning drain and without any pre-meditation- No weapons were used- No serious injuries were caused- Parties closely related to each other- Compromise also effected between them- Continuing of proceedings will serve no purpose- Petition allowed- FIR and consequent proceedings quashed . (Paras 5 & 12)

Cases referred:

Ashok Chaturvedi and others vs. Shitul H. Chanchani and another, 1998(7) SCC 698
Girish Sarwate vs. State of A.P., 2005(1) R.C.R.(Criminal) 758
Himachal Pradesh Cricket Association vs. State of Himachal Pradesh (SC); 2018 (4) Crimes 324
Kunstocom Electronics (I) Pvt. Ltd. vs. Gilt Pack Ltd. and another, (2002) 2 SCC 383
Madhavrao Jiwaji Rao Scindia vs. Sambhajirao Chandrojirao Angre, 1988 (1) SCC 692
R.P. Kapur vs. State of Punjab, AIR 1960 SC 866

For the Petitioners : Mr. Shyam Singh Chauhan, Advocate.
For the Respondents : Ms. Ritta Goswami, Additional Advocate General, Ms. Divya Sood, Deputy Advocate General and Mr. Manoj Bagga, Assistant Advocate General for Respondent No.1.
Ms. Chetna Thakur, Advocate vice Ms. Babita Chauhan, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Anoop Chitkara, Judge

The present petition is under Section 482 of the Code of Criminal Procedure read with Article 227 of the Constitution of India for quashing of FIR No.256 of 2016 dated 14.9.2016, registered in Police Station, Haroli, District Una, Himachal Pradesh, for the commission of offences punishable under Sections 147, 148, 149, 323, 504, 506 read with Section 201 of the Indian Penal Code.

2. The present FIR was registered on the basis of a complaint filed by one Shri Ram Asra, who is respondent No.2 in the petition against petitioners/accused No.1 to 7. The gist of the allegations contained in FIR is as follows:-

(a) The complainant Ram Asra, who was aged about 58 years in 2016 when this FIR was registered, has stated that on 14.9.2016, he was present in his residential house.

(b) At around 8:30 am, his neighbour Shri Shyam Chand was cleaning the drain in front of his house.

(c) At that very time his sister-in-law, Smt. Namaskari Devi (petitioner/accused No.1), niece Ms. Reena (petitioner/accused No.2), Shri Naresh Kumar, son of his uncle Shri Des Raj (petitioner/accused No.4), came there and asked Shri Shyam Lal not to clean the drain.

(d) Thereafter, the elder brother of the complainant, Shri Tilak Raj (Petitioner No.5), real uncle Shri Des Raj (petitioner/accused No.3), aunt Surindra Devi (Petitioner No.6) and Smt. Poonam Devi (petitioner/accused No.7), also came there.

(e) All these persons hurled abuses at Shyam Lal and started beating him.

(f) At that very time, he alongwith wife of Shyam Lal came out and noticed that these people were beating Shyam Lal black and blue and thus he tried to intervene.

(g) Then, at that time, Naresh Kumar (Petitioner/ accused No.4), gave beatings to him with fist blows and due to which he received injuries on his nose and teeth.

(h) His niece Ms. Reena inflicted a blow from a tin on the head of Shyam Lal and his cousin brother Sh. Naresh Kumar (petitioner/ accused No.4) inflicted a blow on the head of Shyam Lal with an iron rod.

(i) Blood started oozing out from the head of Shyam Lal and he became unconscious.

(j) It was further stated that all these people had assembled with an intention to kill them and they threatened them not to clean the drain and subsequently left the spot.

(k) Consequently, the injured was taken to Dehla hospital.

(l) It was further stated that all these people nurtured a grudge against the complainant as well as Shyam Lal and due to this animosity they have indulged in this scuffle without any reason.

3. On this information, the aforesaid FIR was registered. It has been mentioned in this petition that the parties have entered into a compromise *inter se* and the said compromise is annexed with the petition as Annexure P-2.

4. I have heard learned counsel for the parties and gone through the FIR as well as compromise deed (Annexure P-2).

5. Admittedly, the dispute pertains to parties who are closely related to each other. The following aspects would be relevant to arrive at a final conclusion in this petition:-

(i) Admittedly both, complainant and the accused, are closely related to each other.

(ii) They have already compromised the matter and in terms of Paragraph-2(i) of the compromise deed, the complainant has undertaken to withdraw the FIR.

(iii) The withdrawal of FIR would be through District Magistrate as a normal procedure.

(iv) However, there is inherent jurisdiction of the High Court under Section 482 of the Code of Criminal Procedure to intervene in such kind of matter and it is not the requirement of law that the cancellation has to be approved only through the District Magistrate.

(v) Even if this case is put to trial, the parties are likely to maintain the stand which they have taken in this compromise which is likely to result in the acquittal of all the accused.

(vi) There was no pre- meditation or prior concert and this incident took place on a trivial issue of cleaning the drain.

(vii) No weapon of any sort was used during the scuffle.

(viii) No dangerous injuries were received by any of the injured persons.

(ix) The parties are likely to live in the neighbourhood for long time and intervention at this stage would create cordial environment for peaceful relation.

6. In **Ashok Chaturvedi and others v. Shitul H. Chanchani and another, 1998(7) SCC 698,** Hon'ble Supreme Court holds that the determination of the question as regards the propriety of the order of the Magistrate taking cognizance and issuing process need not necessarily wait till the stage of framing the charge. The Court observed thus :-

> "…. …. ….This argument, however, does not appeal to us inasmuch as merely because an accused has a right to plead at the time of framing of charges that there is no sufficient material for such framing of charges as provided in Section 245 of the Criminal Procedure Code, he is debarred from approaching the court even at an earliest (sic earlier) point of time when the Magistrate takes cognizance of the offence and summons the accused to appear to contend that the very issuance of the order of taking cognizance is invalid on the ground that no offence can be said to have been made out on the allegations made in the complaint petition. It has been held in a number of cases that power under Section 482 has to be exercised sparingly and in the interest of justice. But allowing the criminal proceeding to continue even where the allegations in the complaint petition do not make out any offence would be tantamount to an abuse of the process of court, and therefore, there cannot be any dispute that in such case power under section 482 of the Code can be exercised."

7. In **Kunstocom Electronics (I) Pvt. Ltd. v. Gilt Pack Ltd. and another, (2002) 2 SCC 383**, Hon'ble Supreme Court holds as under:-

> "8. …. …. ….There is no hard and fast rule that the objection as to cognizability of offence and maintainability of the complaint should be allowed to be raised only at the time of framing the charge."

8. **In R.P. Kapur v. State of Punjab, AIR 1960 SC 866**, a three Judges Bench of Hon'ble Supreme Court observed as under:-

> "6. …. … …It is well established that the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any Court or otherwise to secure the ends of justice. Ordinarily, criminal proceedings instituted against an accused person must be tried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction. However, we may indicate some categories of cases where the inherent jurisdiction can and should be exercised for quashing the proceedings. There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to the abuse of the process of the Court or that the quashing of the impugned proceedings would secure the ends of justice. If the criminal proceeding in question is in respect of an offence alleged to have been committed by an accused person and it manifestly appears that there is a legal bar against the

institution or continuance of the said proceeding, the High Court would be justified in quashing the proceedings on that ground. Absence of the requisite sanction may, for instance, furnish cases under this category. Cases may also arise where the allegations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no question of appreciating evidence arises; it is a matter merely of looking at the complaint or the First Information Report to decide whether the offence alleged is disclosed or not. In such case, it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal Court to be issued against the accused person. A third category of cases in which the inherent jurisdiction of the High Court can be successfully invoked may also arise. In cases falling under this category the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases, it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction under S. 561-A, the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial magistrate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained. Broadly stated that is the nature and scope of the inherent jurisdiction of the High Court under S. 561-A in the matter of quashing criminal proceedings, and that is the effect of the judicial decisions on the point (Vide : In Re: Shripad G. Chandavarkar, AIR 1928 Bom 184, Jagat Chandra Mozumdar v. Queen Empress, ILR 26 Cal 786, Dr. Shankar Singh v. State of Punjab, 56 Pun LR 54 : (AIR 1954 Punj 193), Nripendra Bhusan Roy v. Gobina Bandhu Majumdar, AIR 1924 Cal 1018 and Ramanathan Chettiyar v. Sivarama Subramania, ILR 47 Mad 722 : (AIR 1925 Mad 39)."

9. In **Girish Sarwate v. State of A.P., 2005(1) R.C.R.(Criminal) 758**, the Full Bench of Andhra Pradesh High Court holds as under:-

"30. In the light of these judgments of the Supreme Court, we have no doubt in our mind that under Section 482 of the Code of Criminal Procedure, the High Court has the power to quash an FIR or even a complaint subject to limitations and conditions laid down by the Hon'ble Supreme Court in various judgments. It need not wait for completion of investigation and taking cognizance by the Magistrate. There is no dispute that this power has to be exercised by the High Courts very sparingly with circumspection and also in rarest of rare cases. Though there are limitations on exercise of power by the High Court, yet that would not in any way suggest that High Court lacks the power."

10. In **Himachal Pradesh Cricket Association v. State of Himachal Pradesh (SC); 2018 (4) Crimes 324**, Hon'ble Supreme Court holds as under:-

> "47. As far as Writ Petition (Criminal) No. 135 of 2017 is concerned, the appellants came to this Court challenging the order of cognizance only because of the reason that matter was already pending as the appellants had filed the Special Leave Petitions against the order of the High Court rejecting their petition for quashing of the FIR/Chargesheet. Having regard to these peculiar facts, writ petition has also been entertained. In any case, once we hold that FIR needs to be quashed, order of cognizance would automatically stands vitiated."

11. **Madhavrao Jiwaji Rao Scindia v. Sambhajirao Chandrojirao Angre, 1988 (1) SCC 692**, the Hon'ble Supreme Court has held as under:-

> 7. The legal position is well-settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilised for any oblique purpose and where in the opinion of the court chances of an ultimate conviction is bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage."

12. In view of the entirety of the facts of the case, as well as judicial precedents, a few of which have been mentioned hereinabove, I am of the considered opinion that continuation of these proceedings will only cause a burden on the trial Courts without resulting into any fruitful purpose whatsoever. Our trial Courts are already burdened with so many cases and it will be a total wastage of the valuable time of the Courts, if this FIR is permitted to be continued and the accused are prosecuted and it will serve no purpose whatsoever. Therefore, I am of the considered opinion that the inherent jurisdiction of the High Court under Section 482 of the Code of Criminal Procedure is invoked to quash the above mentioned FIR and consequent proceedings.

13. Consequently, this petition is allowed and the FIR No.256 of 2016 dated 14.9.2016, registered in Police Station, Haroli, District Una, Himachal Pradesh for the commission of offences punishable under Sections 147, 148, 149, 323, 504, 506 read with Section 201 of the Indian Penal Code, is quashed. Since FIR has been quashed, the proceedings pending before learned Additional Chief Judicial Magistrate, Court No.1, Una, district Una, in Case No./Challan No.13/2017, titled as *State of H.P. vs. Namaskari Devi and others*, are also quashed and set aside.

14. The bail bonds are accordingly discharged.

Pending application(s), if any, also stand disposed of.

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

National Insurance Company Ltd. .....Appellants.

Versus

Smt. Shakuntala Devi and others ....Respondents.

FAO No. 403 of 2017.
Reserved on : 20th May, 2019.
Decided on : 30th May, 2019.

Motor Vehicles Act, 1989 – Sections 166– Motor accident – Death case- Income of deceased- Determination- Held, in absence of documentary evidence regarding income of deceased Government notification prescribing minimum wages as applicable on date of death is to be taken into consideration- Tribunal cannot rely upon subsequent notification revising wages and make it operative retrospectively from date of accident. (Paras 3 to 5)

Case referred:

National Insurance Co. Ltd. vs. Pranay Sethi and others, 2017 ACJ 2700

For the Appellant:	Ms. Devyani Sharma, Advocate.
For Respondents No. 1 to 3:	Mr. K.S. Kanwar, Advocate.
For Respondent No. 4:	Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The Insurer of the offending vehicle, has, instituted the instant appeal before this Court, wherethrough, it, casts, a, challenge, upon, the award pronounced by the learned Motor Accident Claims Tribunal, Kunnaur at Rampur Bushahr, District Shimla, H.P., upon, MAC Petition No. 0000112 of 2015, (i) whereunder, compensation amount comprised, in, a sum of Rs.12, 59,000/-- alongwith interest accrued thereon, at the rate of 7.5% per annum, and, commencing from, 24.8.2015 till realization thereof, stood, assessed, vis-a-vis, the claimants, and, the apposite indemnificatory liability thereof, was, fastened upon the insurer/appellant herein.

2. The learned counsel appearing for the insurer/appellant herein, has contested, the computation, of, per mensem wages of the deceased, in a sum of Rs.6,300/- per mensem, and, the afore submission is anvilled, upon, the factum, (a) that with the relevant mishap occurring, in the year 2015, inasmuch as on 6.6.2015, (b) hence, with the apposite thereto notification No. FIN-(pr)B(7)-33/2010 of 17th April, 2015 hence holding force, and, effect(s), in contemporaneity thereto, and its also constituting the befitting notification, for computing therefrom, the per diem wages, of the deceased workman, (c) and, contrarily, the learned tribunal, rather deriving, sustenance from a notification issued in the year 2017, hence, subsequent to the occurrence, rather has committed, a, grave illegality. The afore submission, is, well merited, as the appropriate notification wherefrom, the computation of per diem wages of the deceased workman, from his purported avocation, as an agriculturist or a horticulturist, was, hence to germinate (d) especially in the absence of cogent, and, tangible evidence being adduced qua incomes being derived therefrom, by the deceased, (e) obviously hence is one in existence in contemporaneity, vis-a-vis, the relevant mishap, (f) and, thereupon, the notification issued in the year 2017, rather constituted, the,

unbefitting documentary material, for, computing therefrom, the per diem wages, of the deceased. Consequently, while assigning judicial notice to the notification of 2015, copy whereof, is, placed on record, wherein the per diem wages, of, an unskilled worker or a beldar, is, recited to be borne ina sum of, Rs.180 per day, thereupon, on anvill thereof, the per diem wages of the deceased, is computed, in a sum of Rs.180 per day.

3. Since, escalations, and, hikes towards future gains, vis-a-vis, the afore per diem income, of the deceased, from his avocation, as a beldar, is also, to be assigned or meted thereto, (a) given the learned tribunal declining, to, make, computation, vis-a-vis, the earning(s) derived, by the deceased, from, the purported agricultural and horticulture pursuits, rather for want of credible or precise evidence being qua therewith, hence, adduced, (b) and, hence, rather made, on anvil, of a legally unbefitting notification, of, 2017, hence computation of per diem wages, of, the deceased, in a sum of Rs.210/-. Since, the afore per diem wages, stand modified, in a sum of Rs.180/-, and, when the afore purported avocation, of, the deceased as an agriculturist, and, a horticulturist, is the self employment of the deceased, and, when the afore per diem income derived therefrom, and, computed, on anvil of, a, notification of 2015, would also naturally with the passage of time, beget, increase(s) or escalation(s), (c) thereupon, the requisite addition(s) rather towards accretions thereof, are to be meted thereto, and, in the afore endeavour, an allusion is made to the age of the deceased, age whereof stand recited, in the postmortem report, to be 38 years, and, hence, in consonance, with the verdict of the Hon'ble Apex Court rendered in a case titled as ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** reported in ***2017 ACJ 2700***, the relevant paragraph No.61, extracted hereinafter:

> "61. In view of the aforesaid analysis, we proceed to record our conclusions:-
>
> (i) The two-Judge Bench in Santosh Devi should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.
>
> (ii) As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.
>
> (iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.
>
> (iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.
>
> (v) For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by

> paragraphs 30 to 32 of Sarla Verma which we have reproduced hereinbefore.
>
> (vi) The selection of multiplier shall be as indicated in the Table in Sarla Verma read with paragraph 42 of that judgment.
>
> (vii) The age of the deceased should be the basis for applying the multiplier.
>
> (viii) Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years. "

hence, is entitled for 40% increase in his apposite per mensem income, borne in a sum of Rs.5400/- (Rs.180/- x30 days), increases whereof, are, computed to stand borne in a sum of Rs.7,560/-. Significantly, the number of dependents, of, the deceased, are, 3, hence, 1/3rd deduction is to be visited, upon, a sum of Rs.7,560/-, hence, after making, the, apt aforesaid deduction, vis-a-vis, the afore sum, the per mensem dependency, comes to Rs.5040/-. In sequel whereto, the annual dependency, of the dependents, upon, the income of the deceased, is computed, at Rs.5040/- x 12=Rs.60,480/-. After applying thereto, the apposite multiplier of 15, the total compensation amount, is assessed in a sum of Rs.60,480/- x 15=Rs.9,07,200/- (Rs. Nine lakhs, seven thousand, two hundred only).

5. Furthermore, the quantification, of damages, by the learned Tribunal in a sum of Rs.1 lacs vis-a-vis, the widow of deceased, (i) under the head, loss of consortium, (ii) and quantification, of compensation, borne in a sum of Rs.25,000/- under the head "funeral charges", is (a) in, conflict with the mandate of the Hon'ble Apex Court rendered in **Pranay Sethi's** case (supra), (b) wherein, it has been expostulated, that reasonable figures, under conventional heads, namely, loss to estate, loss of consortium vis-a-vis the widow of the deceased, and, funeral expenses being quantified only upto Rs.15,000/-, Rs.40,000/-, and Rs.15,000/- respectively. Consequently, the award of the learned tribunal is interfered, to the extent aforesaid, of, its determining compensation, under, the aforesaid heads vis-a-vis the widow of the deceased, as also, vis-a-vis the other claimants. Accordingly, in addition to the aforesaid amount of Rs.9,07,200/-, the claimants, are, entitled under conventional heads, namely, loss to estate, loss of consortium, only, vis-a-vis, the widow of the deceased, and, funeral expenses, sums of Rs.15,000/-, Rs.40,000/- and Rs.15,000/- respectively, as such, the total compensation to which the appellants/claimants are entitled comes to Rs.9,07,200 + Rs.15,000/- + Rs.40,000/- + Rs.15,000/-= Rs.9,77,200/-(Rs. Nine Lakhs, seventy seven thousand, two hundred only).

6. For the foregoing reasons, the appeal filed by the insurer is allowed, and, the impugned award, is, in the aforesaid manner, hence modified. Accordingly, the claimants/respondents No.1 to 3, are, held entitled to a total compensation of Rs.9,77,200/- along with interest @7.5%, from, the date of petition till the date, of, deposit, of the compensation amount. The indemnificatory liability, vis-a-vis, the afore compensation amount, shall be, of the insurer of the offending vehicle, i.e. appellant herein. The amount of interim compensation, if already awarded, be adjusted in the aforesaid compensation amount, at the time of final payment. The aforesaid amount of compensation, be apportioned, in the manner as ordered by the learned tribunal. The shares of the minor children, shall remain invested, in FDRs, upto, the stage of theirs attaining majority. However, interest accrued thereon, shall be releasable vis-a-vis their mother, only when she explains, of, its being required, for, the upkeep and benefit of her minor children. All pending applications also stand disposed of. Records be sent back forthwith.

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

Neena Kumari .....Appellant.
Versus
Pawan Kumar ....Respondent.

FAO No. 267 of 2017.
Reserved on : 6th May, 2019.
Decided on : 30th May, 2019.

Hindu Marriage Act, 1955– Sections 7 & 12(c) – Annulment of marriage on ground of obtaining consent by fraud and non-performance of essential ceremonies i.e. saptapadi- Proof- Trial court dismissing wife's petition seeking annulment of marriage- Appeal against- Wife contending her consent was obtained by husband by administering some psychotropic substance and it was fraud played upon her- And essential ceremonies of saptapadi were not performed- Held, photographic evidence of marriage placed on record clearly depict solemnization of marriage in accordance with Hindu rites and saptapadi being performed- Affidavits of parties submitted before S.D.M. containing averments of marriage having taken place in consonance with Hindu rites at Sanatan Dharam Mandir, Shimla- In absence of some medical evidence, bald statement that she was administered some psychotropic substance before marriage ceremonies took place is not sufficient to cause annulment of marriage- Appeal dismissed. (Paras 9 to 11)

Indian Evidence Act, 1872 (Act)- Section 35- Official record- Relevancy- Held, record maintained by Sub-Divisional Magistrate (SDM) in discharge of his official capacity/ duty imbibes mandate of Section 35 of Act. (Para 8)

For the Appellant: Mr. Mukesh Thakur, Advocate.
For the Respondent : Mr. R.L. Chaudhary, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal, stands, directed by the aggrieved petitioner/appellant herein, namely Neena Kumari, against, the dismissal of her petition, cast under the provisions of Section 12(1) (c) of the Hindu Marriage Act, 1955, wherethrough, she sought annulment of her martial ties with her husband/respondent herein, on anvil, of, the requisite Saptapadi, not, standing performed.

2. The brief facts of the case are the sister of the respondent was the classmate of the petitioner/appellant herein, and, they planned to go to their home via Shimla. They reached Shimla on 27.3.2009 at about 9.30 a.m. The respondent received them at bus-stop at Shimla, and, on the pretext that the bus to Hamirpur is after some time, he took them to his residential accommodation to have in the meantime some refreshment. On consumption of eatables and drinks, the petitioner/appellant herein felt abnormal and toxic as if some psychotropic substance would have been administered to her. The petitioner on disclosing that some thing abnormal is happening with her and on finding herself totally helpless asked Meena Kumari, sister of respondent to take her care. On returning to her senses,

petitioner found herself in the house of respondent at village Katoh, Tehsil Bhoranj, District Hamirpur. Meena Kumari told that her health suddenly deteriorated and want not in senses, as such was brought to village Katoh. On 29.3.2009, respondent took her to her parents at village Lahra, Post Office, Galore, Tehsil Nadaun,District Hamirpur and on disclosing about her health, her parents thanked respondent to have taken her care. The petitioner completed her B. Tech Degree by the last quarter of 2011, and, her parents started looking for a suitable match for her marriage. On getting engaged and likelihood of marriage may be solemnised during March,/April 2012, the petitioner shared said news with Meena Kumari. The respondent maintained a close touch with the petitioner and her parents and kept on making secret queries regarding whereabouts of her would be spouse and his family. In may, 2012, respondent proclaimed that the marriage of petitioner has been performed with respondent on27.3.2009 at Radha Krishan Temple Gang Bazar, Shimla and also produced photographs. The respondent showed these photographs to the proposed groom and his family members which led to breakdown of the marriage. This struck the mind of the petitioner about the incident happened on or about 27.3.2009, making her to reasonable believe that during her loosing her senses, the respondent on taking advantage thereof would have managed to take her to temple and took some photographs posing corresponding to Hindu Marriage in temple. In fact no valid marriage has been solemnized by the petitioner with respondent nor the same was ever consummated. It is averred that on discovering the fraud being played, the petitioner and her family members reminding the respondent of the existence of good relationship between them persuaded the respondent that if any wrong has happened about which neither the petitioner knows nor she ever told to her parents, said shim marriage be got dissolved by mutual consent. He however agreed to same but later refused to sign the petition on raising demand of Rs.1,50,000/- which was beyond the capacity of the petitioner's father being a petty employee i.e. driver. Hence the instant petition.

3. The petition for divorce instituted by the petitioner before the learned Addl. District Judge concerned, stood contested by the respondent, by his instituting a reply thereto, wherein, he averred that about six months prior to 27.3.2009, the petitioner and her father as well as sister-in-law were in continuous contact with him in order to settle the marriage which was fixed for 27.3.2009. For solemnization of marriage, petitioner reached Shimla on 25.3.2009 and as per Hindu folkways, rites, custom and ceremonies, the marriage of petitioner was solemnized with respondent on 27.3.2009. Since, 25.3.2009 to 31.3.2009, the petitioner was in the company of respondent and celebrated their Suhagrat in the house of respondent and thereafter left to VPO Tarkwari, Teh. Bhoranj. A contrary story presented by the petitioner is false. The respondent then sent the petitioner for higher studies i.e. B. Tech. To Baddi and bore all expenditure of the education for three years. It is submitted that , in fact after completion of her studies, the petitioner without any reasons, and, his consent absconded from the matrimonial home, and, is living in adulterous relationship with her Jija i.e. Rajesh Kumar and with his connivance has concocted the alleged false story. The petitioner filed a complaint before S.P. Hamirpur where herself admitted that the marriage of petitioner was successful only for three days. It is denied that respondent made any demand for money as alleged. Rajesh Kumar was asked many times to leave the petitioner so that she could join the company of the respondent being his legally wedded wife, but in vain. Contrarily, he has conveyed that during his life, he will not allow her to return to matrimonial home.

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

1. Whether marriage of petitioner with respondent is result of force or fraud practized upon her as alleged?OPP.
2. Whether necessary ceremonies constituting a valid marriage have not been performed, as alleged?OPP.
3. Whether the petitioner is entitled for a decree of nullity of marriage as prayed for?OPP.
4. Whether the petition is not in consonance with the Hindu Marriage Divorce Act (Himachal Pradesh) Rules 1982?OPR.
5. Whether the petitioner has not approached the court with clean hands?OPD.
6. Whether the petition is not maintainable?OPR
7. Relief.

5. On an appraisal of evidence adduced before the learned District Judge, the latter dismissed, the, apposite petition.

6. The photographic evidence existing on record, and, bearing mark R-1 to Rx-11,though makes vivid display(s) qua, (a) Hindu Marriage inter se the petitioner, and, the respondent being solemnised at Radha Krishan Mandir, Ganj Bazar Shimla, (b) and, the photographs bearing Mark R-2, and, Rx-5, also make pointed communication(s) qua the "Saptapadi" at the afore temple, rather being progressed. However, the learned counsel appearing for the appellant, has contended, that the afore echoing, emanating from the afore photographic evidence, cannot, (c) comprise either a valid or admissible evidence, vis-a-vis, performance of "Saptapadi", at the afore temple, as, the negatives, which comprise the original(s) thereof, rather remained unadduced into evidence. However, the afore espousal, reared before this court, for negativing or repelling the reliance placed thereon, by the learned counsel appearing, for the respondent, rather warrants, it, being discountenanced, (d) as, the petitioner, while being faced, with, the afore photographic evidence, hers not denying qua the afore photographs being morphed or being forged, (e) rather when she has in her deposition, made an admission qua hers figuring, in the afore photographs, (f) thereupon, an inference, is, sparked, qua, dehors negatives thereof, hence, comprising the original(s), of the afore photographic evidence, rather remaining unadduced into evidence, rather not belittling the afore displays existing therein, imperatively, vis-a-vis, the marked display therein, of hers progressing "saptapadi" with, the respondent herein,at the afore temple. Corollary thereof, is that, the afore admission, renders the relevant displays, in the afore, to be both admissible, (f) and, want of adduction into evidence qua negatives thereof, though, comprising the original(s) of the afore evidence, rather not entailing, this Court to be dismissive, vis-a-vis, hence palpable sanctity, being meteable thereto, conspicuously, vis-a-vis, the performance of "Saptapadi", at the afore temple.

7. Be that as it may, further there onwards, affidavits respectively, borne in Ex.PW4/A, and, in Ex.PW4/B, hence, stood furnished before the Sub Divisional Magistrate, Shimla (Urban), with declarations borne, therein qua the petitioner, and, the respondent solemnizing their marriage, in consonance, with the Hindu rites and customs, at Sanatam Dharam Mandi Anaj Mandi, Shimla, (i) and, the afore adds corroborative vigour to the afore photographic evidence, and, with the petitioner, when faced, with the afore exhibits neither taking to contest the occurrence of her signatures thereon, hence, lends added forthright corroboration, vis-a-vis, the photographic evidence, borne, in the afore referred marks.

8. Even though, the petitioner has also strived, to contest, all the afore echoings borne, in the afore referred evidence, by hers rearing an espousal, qua, (i) at the

afore stage, some narcotic drug/substance being surreptitiously administered, to her, (ii) and, under influence thereof, hers performing "Saptapadi", with the respondent herein, at the afore temple, hence, the afore act being stained, with, lack of volition(s), (iii) and, also, her signing, the, afore affidavit with the afore echoings also likewise being a sequel of soporific effects, uponj her, emanating from hers being surreptitiously administered some drugs, (iv) and, thereupon, no reliance being meteable thereon, rather, the performance, of, "Saptapadi", and, also execution of affidavit(s), with, echoings therein qua hers performing marriage, in consonance with the Hindu rites, and, customs at Sanatan Dharam Mandir Anaj Mandi, Shimla, H.P. with the respondent herein, begetting hence stains of deception, undue influence, and, misrepresentation. However, the afore espousal, reared in the petition, and, in the testification, as, rendered in consonance therewith, by the petitioner/appellant herein, is, eroded of its vigour, (a) given her affidavit borne in PW4/A, being sworn, on 28.3.2009, and, it echoing the factum of hers solemnizing marriage, with the respondent on 26.3.2009 at Sanatam Dharam Mandi Anaj Mandi, Shimla, hence, two days prior to the execution of the affidavit, (b) thereupon, with its execution occurring, in the interregnum, vis-a-vis, of the performance of the marriage with the respondent, in consonance with the Hindu rites and customs, and, with the afore affidavit, being attested by Sub Divisional Magistrate, Shimla (Urban), District Shimla, hence, renders the afore mark, of, attestation, made on Ex.RW4/A, by the Sub Divisional Magistrate, Shimla (Urban), to be a public act, (c) and, imbibes therewithin, the mandate of Section 35 of the Indian Evidence Act, qua it being made by the officer concerned, in the discharge, of his public duty, (d) and, the further sequel thereof, is also, marshable qua the afore performance, of, a public duty, by the officer attesting Ex.PW4/A, being regularly and duly performed, (e) whereupon, the afore espousal qua the authoring of the afore contents, borne in Ex.PW4/A being rather under the influence, of, some narcotic drug, if any, as stood purportedly surreptitiously administered to her, hence, hers making it, in-volitionally, rather being also both eclipsed and waned, (f) unless best medical evidence, in contemporaneity therewith, was adduced. However, the best medical evidence highlighting, and, earmarking the afore effects, rather remained unadduced on record, and, thereupon, the afore presumption, remains unfalsified. Even otherwise, Ex.RW4/A was executed, in March, 2009, and, the Hindu Marriage Petition, seeking annulment of marital ties inter se the petitioner, and, the respondent, for want of performance of "Saptapadi", stood instituted, in the year 2012, (g) hence, the afore inordinate procrastinated delay since the making, of, the affidavits till the institution, of the HMA petition, before the learned Addl. District Judge, and, with the afore espousal, being enunciated therein rather renders, the afore espousal, and, also the evidence in consonance, therewith, as, testified by the petitioner/appellant herein, to be merely a sharp contrivance, and, an afterthought, and, thereto no credence, can be, meted. Contrarily, a formidable inference is erectable, that the making of the photographic evidence, as well, as the authoring of Ex.PW4/A by the petitioner/appellant herein, both emanating, from hers volition being free, from effect, if any, of hers being surreptitiously administered, some narcotic substance/drug, (h) nor it can be concluded that, the, marriage as stood solemnized inter se the petitioner, and, the respondent, being a sequel, of, any exertion of undue influence, fraud, and, deception, upon, her.

9. Further, thereonwards, the petitioner herein, does not contest, that she instituted in the year 2012, hence, belatedly since the afore marriage occurred inter se her and the respondent also predominantly, since, her authoring affidavit Ex.PW4/A, a complaint, against, the respondent herein, qua hers being blackmailed by the respondent herein, to, solemnise marriage with the latter. However, the effect, if any, of the afore complaint reared, by the petitioner/appellant herein, against the respondent, (i) rather works adversarially, to the petitioner, (ii) and, also undermines, the afore espousal reared, by her, for, hence credence being not meted, vis-a-vis, the afore evidence, rather

pronouncing qua hers solemnising marriage, in consonance with Hindu rites and customs with the respondent herein, (iii) as therein, an admission is made by her qua hers solemnizing. a Hindu marriage, with the respondent, in a temple on 27.3.2009. Even though, she has alleged, that, the respondent rather blackmailing her, for, solemnising the afore marriage, with him, (iv) yet when the more trite and important factum, of hers, being surreptitiously administered drugs, with, an concomitant waning effect, upon, her cognitive faculties, and,when she had reared, the latter espousal in the Hindu marriage petition, thereupon, with inter se contradictions, vis-a-vis, Mark Ry, and, the averments made in the HMA petition, rather renders a conclusion from this Court qua hers prevaricating, the, factum of hers solemnising marriage, with respondent herein, under the influence of some narcotic drug/substance, purportedly, surreptitiously administered, to he,r by the respondent.

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

11. 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 SURESHWAR THAKUR, J.

FAO No. 429 of 2018 along
with FAO No. 85 of 2019.
Reserved on: 25th April, 2019.
Decided on : 30th May, 2019

1. FAO No. 429 of 2018.

New India Assurance Company Ltd. .....Appellant.
Versus
Subhash Chand & Others ....Respondents.

2. FAO No.85 of 2019.

Pankaj Mahajan .....Appellant.
Versus
Subhash Chand & others. ....Respondents.

Motor Vehicles Act, 1988 – Section 166 – Motor accident – Claim application- Acquittal of driver of offending vehicle for rash driving by Criminal Court- Effect on claim application- Held, mere acquittal of driver of offending vehicle of rash driving by Criminal Court would not constrain Tribunal to accept ocular evidence adduced before it qua accident having been caused because of his rash and negligent driving. (Paras 2 & 3)

FAO No. 429 of 2018.

For the Appellant(s): Mr. B.M. Chauhan, Sr. Advocate with Mr. Amit Himalivi, Advocate.

For Respondents No. 1 & 2: Mr. Hakam Bhardwaj, Advocate.
For Respondent No.3: Mr. Vinod Chauhan, Advocate.

FAO No. 85 of 2019.

For the Appellant: Mr. Vinod Chauhan, Advocate.
For Respondent No.1: Nemo.
For Respondent No.2: Ms. Parul Sarta, Advocate vice Ms. Leena Guleria, Advocate.
For Respondent No.3: Mr. B.M. Chauhan, Sr. Advocate with Mr. Amit Himalivi, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

FAO No. 429 of 2018, and, FAO No. 85 of 2019, are respectively, reared by the insurer, and, the owner of the offending vehicle, against, the award rendered by the learned Motor Accident Claims Tribunal-IV, Kangra at Dharamshala, camp at Palampur, H.P., upon, MACP No. 130-P/II/10/2007, wherethrough, compensation amount borne in a sum of Rs.2,00,000/-, stood assessed, vis-a-vis, the disabled claimant, and, thereon interest at the rate of 9% per annum also stood levied, and, it was ordered to commence, from, the date of petition till realization, of, the compensation amount. The apposite indemnificatory liability thereto, stood fastened, upon the insurer of the offending vehicle.

2. The insurer of the offending vehicle, through, its counsel, has not, contested the rendition of affirmative findings, upon, the issue appertaining to the relevant mishap, being a sequel of rash and negligent manner, of driving of the offending vehicle, by Subhash Chand, respondent No.2 herein, and, nor he makes any vehement espousal, before this Court, that, the determination of the compensation amount, rather suffering from any infirmity. However, the solitarily contention reared before this Court, by the learned counsel, for the aggrieved insurer, is, grooved in the factum (a) that the fastening of the apposite indemnificatory liability, upon, the insurer rather being both infirm, and, fallible, as, there was, an, evident breach of the fundamental terms and conditions, of, the insurance policy, (b) sparked by the trite factum qua with the registration certificate, appertaining to the offending vehicle, and, borne in Ex.Ry, rather making a marked display, that, it being, a, goods vehicle/commercial vehicle, (c) and, when henceonly, upon, the owner of the goods, rather evidently travels along therewith hence therein, and, also, upon, his sustaining injuries, on his person, in a collision which occurred inter se it, and, with any other vehicle, or, with the apposite offending vehicle, and, also upon the offending vehicle, being proven to be rashly, and, negligently driven, by its driver, (d) hence, thereupon, only the apposite indemnificatory liability being fastenable, upon, the insurer of the offending vehicle. The learned counsel appearing for the insurer, has, further contended, that, with the disabled claimant rather not at the relevant time, travelling in the offending vehicle along with his goods, loaded therein, (e) given his making an admission qua at the relevant time 15 to 16 persons, travelling alongwith him, in the offending vehicle. However, the afore echoing, existing in the examination-in-chief, of, the disabled claimant, and, whereon, the afore espousal, as, reared before this Court by the learned counsel, for the insurer, is, rested, yet cannot at all be capitalized, by the counsel for the insurer, for, his per se, thereupon, (f) rather making any submission before this Court, that, hence the disabled claimant was travelling in the offending vehicle as a gratuitous passenger, and, hence, the fastening of the apposite indemnificatory liability, upon, the insurer of the offending vehicle, being, ingrained with any pervasive vice, of, gross fallibility, (g) the reason for making the afore inference, is

grooved, in the factum, that the learned counsel, for the insurer, has, read the testification, of, the disabled claimant, in a piecemeal, and, fragmentary manner, and, his being also oblivious qua the echoing, existing in the examination-in-chief, of the disabled claimant, qua at the relevant time, certain goods being aboard, the, offending vehicle. The afore echoing, existing, in the examination-in-chief of the disabled claimant, was required, to be sufficiently hence repulsed by the insurer, comprised in its striving, to adduce best evidence, that, in contemporaneity, vis-a-vis, the lodging of FIR, by one Raj Kumar, an apposite list, of goods hence aboard the offending vehicle, standing prepared by the Investigating officer, upon, the latter visiting the site of occurrence, (h) and, it not detailing therein, the factum, qua, certain goods as averred in the claim petition, rather being aboard therein, and, his further onwards hence testifying in consonance with articulation embodied, in, the afore FIR. However, the afore recoursings, remained unendeavoured, by the learned counsel for the insurer, whereas, they constituted, the best evidence, for succoring the afore espousal, made before this Court, by the learned counsel, for the insurer (i) that the disabled claimant at the relevant time, was not travelling along with his goods, as, purportedly stood borne thereon, rather he was travelling, in a vehicle hence registered as a goods vehicle/commercial vehicle, rather as a gratuitous passenger, and, hence, the fastening of the apposite indemnificatory liability, upon, insurer of the offending vehicle, suffering, from, a gross infirmity. The further effect thereof, is, qua, with the informant, one Raj Kumar, also not being led into the witness box, to face the rigor, of, the ordeal of an exacting cross-examination, upon, his purportedly testifying, in his examination-in-chief, in corroboration, vis-a-vis, the recitals borne, in the apposite FIR, importantly qua his, in the apposite FIR rather concealing, the, material factum qua, upon, his visiting the relevant site, of occurrence, rather certain goods, standing carried therein. Reiterateldy, hence, the afore espousal is blunted, of, its efficacy.

3. Lastly, the learned counsel appearing, for the aggrieved owner, of the offending vehicle, has, upon, the apposite therewith FAO bearing No. 85 of 2019, made, a, vehement address, before this Court, that the affirmative findings rendered, upon, the issue appertaining to the relevant mishap being a sequel of rash, and, negligent manner of driving of the offending vehicle, by respondent No.2 herein, not being free from any taint of mis-appreciation, and, non appreciation of the evidence existing on record, given, a verdict of acquittal, being pronounced by the learned trial Court concerned, upon, the apposite FIR, appertaining to the relevant mishap, (i) thereupon, hence, the findings adversarial, to respondent No.2 herein, were not required to be rendered, by the learned tribunal. However, the afore submission, addressed, before this Court, is not acceptable, as the mere rendering, of, findings of acquittal by the criminal court of competent jurisdiction, upon, the charge framed in sequel, to the apposite therewith FIR, would neither estop, nor constrain the learned tribunal, to accept, the adduced ocular evidence rather making display(s) qua the relevant mishap, being a sequel of rash, and, negligent manner, of, driving of the offending vehicle by respondent No.2 herein. Since, the learned tribunal concerned, upon, being seized, with credible ocular evidence, vis-a-vis, the afore factum, and, with the testification rendered by PW-1, the disabled claimant, rather ascribing hence rash, and, negligent manner of driving, of, the offending vehicle, qua No.2 herein, and, with the afore testification, remaining uneroded, and, with Raj Kumar, the informant not stepping, into the witness box, for repelling the testification, rendered by the disabled claimant, (ii) besides with the owner of the offending vehicle, not placing on record, the entire evidence, adduced before the criminal court, of competent jurisdiction, on anvil thereof, the afore criminal court hence made an order of acquittal, upon, the driver of the offending vehicle, and, wherefrom, it was rather gaugeable qua hence, the testification rendered by PW-1, standing belittled or undermined, (iii) thereupon, want of placing on record, of the entire evidence as adduced by the prosecution, before the criminal court of competent jurisdiction rather constrains a conclusion qua the testification rendered by PW-1, wherein he has ascribed

tort of negligence, vis-a-vis, the driver of the offending vehicle, rather holding legal vigour, and, tenacity, dehors an order of acquittal recorded by the criminal court of competent jurisdiction, vis-a-vis, the charge framed, under, Section 279 of the IPC against respondent No.2 herein, Subhash Chand,.

4. For the foregoing reasons, there is no merit in both the appeals, and, they are dismissed. In sequel, the impugned award is maintained and affirmed. All pending applications also stand disposed of. Records be sent back forthwith.

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

Nikka Ram ....Petitioner.
-Versus-
Piar Chand and others .....Respondents.

CMPMO No.: 155 of 2019
Date of Decision: 18.06.2019

Code of Civil Procedure, 1908 - Order VIII Rules 1 & 9- Written statement to amended plaint- Filing of- Unreasonable delay- Consequences- Trial court accepting written statement of defendants to amended plaint almost after one and half year of directing them to file such written statement to amended plaint- Challenge thereto by plaintiff- Held, there was so much delay in filing written statement to amended plaint- Nothing in order of trial court to demonstrate why defence was not struck off- On facts, order of trial court in accepting written statement not interfered with but defendants directed to pay costs of Rs.10,000/- to plaintiff- Petition disposed of. (Paras 6 to 8)

For the petitioner: Mr. R. P. Singh, Advocate.
For the respondents: Mr. Dheeraj Kumar Vashisht, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition, the petitioner has prayed for quashing of order dated 05.01.2019, passed by the Court of learned Civil Judge, Barsar, District Hamirpur, H.P. in Civil Suit No. 320 of 2015, titled as *Nikka Ram Vs. Shri Piar Chand and others*, vide which, written statement filed by the respondents to the amended plaint, was ordered to be taken on record.

2. The grievance of the petitioner, who is plaintiff before the learned Court below, is that the order vide which the amendment in the suit was allowed, was passed on 10.11.2017 and thereafter, despite reasonable opportunities having been granted to the respondents to file the amended written statement, the same was not filed and this aspect of the matter had been ignored by the learned Trial Court while accepting the amended written statement filed by the respondents.

3. The contention of learned counsel for the petitioner is that while allowing the amended written statement to be taken on record vide impugned order, learned

Trial Court erred in not appreciating that there was no reasonable cause assigned by the respondents as to why the amended written statement was not filed within a reasonable time.

4. On the other hand, Mr. Dheeraj Vashisht, learned counsel for the respondents has argued that there is no merit in the present petition as there was no inordinate delay on the part of the respondents in filing the amended written statement. He argued that amended written statement could not filed on earlier occasions, because when the Presiding Officer himself was not present in the Court, the respondents/defendants could not have filed the amended written statement.

5. I have heard learned counsel for the parties and have also gone through the impugned order as well as the record appended with the petition.

6. It is not in dispute that an application filed under Order 6 Rule 17 of the Code of Civil Procedure for amendment of the plaint stood allowed by the learned Trial Court on 10.11.2017. Learned Court below after allowing the said application, listed the case for 09.01.2018 and the defendants were directed to file the amended written statement on or before the said date. Though it is a matter of record that on 09.01.2018, learned Presiding Officer was on leave, but record does not suggest that any amended written statement was tendered in the Court on behalf of the defendants on the said date. Thereafter, the matter was listed on 12.03.2018. On the said date also, though the learned Presiding Officer was on leave, however, again the record does not reveal that the amended written statement was ready for the purpose of filing with the defendants. On the said date, i.e., 12.03.2018, the next date fixed was 12.06.2018. On 12.06.2018, a prayer was made on behalf of the defendants for grant of time to file the amended written statement and the case for the said purpose was ordered to be listed on 14.08.2018. Thereafter, the case was listed on 14.08.2018, 15.09.2018 and 30.11.2018, but on the said dates, amended written statement was not filed and again and again request was made for extension of time to file the amended written statement. Thereafter, the matter was listed on 05.01.2019, when the amended written statement so filed by the defendants was ordered to be taken on record.

7. The abovementioned facts demonstrate that there is merit in the contention of learned counsel for the petitioner that there was delay in filing of the amended written statement and the impugned order does not demonstrate as to why despite so much delay, the defence of the defendants was not struck of and why they were permitted to file the amended written statement at such a belated stage.

8. Be that as it may, as learned Trial Court in its discretion has permitted the amended written statement to be taken on record, this Court is not interfering with the order so passed, but the petition is being disposed of with the direction that in lieu of the amended written statement having been permitted by the learned Trial Court to be taken on record, the respondents herein shall pay cost to the tune of Rs.10,000/- to the petitioner. It is clarified that in case on the next date, cost, as mentioned above, is not paid by the respondents to the petitioner by way of a Demand Draft, then the amended written statement, which has been permitted to be taken on record vide order dated 05.01.2019, shall not be treated as part of the record.

9. Learned counsel for the parties point out and rightly so that in view of the order passed hereinabove, an application filed by the present petitioner under Order 8 Rule 1 of the Code of Civil Procedure before the learned Trial Court stands rendered infructuous. Ordered accordingly.

10. Parties through learned counsel are directed to appear before he learned Trial Court on ***15th July, 2019.***

The petition stands disposed of in above terms, so also pending miscellaneous application, if any.

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BEFORE HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Nitin Dhiman alias Neeraj ...Petitioner.

Versus

State of Himachal Pradesh & another ...Respondent.

Cr.MMO No. 233 of 2019
Order reserved on : 12.6.2019
Date of Decision : June 17, 2019

Code of Criminal Procedure, 1973 - Section 482 - Inherent powers- Exercise of- Quashing of FIR- On facts, victim lodging FIR of rape when accused refused to marry her- After registration of FIR, accused marrying her- Parties compromised matter- Accused still in judicial customary and filing petition for quashing of FIR- Held, continuation of proceedings would cause distressing hardship to accused as well as victim without resulting into any fruitful purpose- Petition allowed- FIR quashed. (Para 23)

Cases referred:

Ashok Chaturvedi and others vs. Shitul H. Chanchani and another, 1998(7) SCC 698
Bharti vs. State of Haryana, 2014(4) SCC 14
Gian Singh vs. State of Punjab, 2012(10) SCC 303
Girish Sarwate vs. State of A.P., 2005(1) R.C.R.(Criminal) 758
Himachal Pradesh Cricket Association vs. State of Himachal Pradesh (SC); 2018 (4) Crimes 324
Kunstocom Electronics (I) Pvt. Ltd. vs. Gilt Pack Ltd. and another, (2002) 2 SCC 383
Madhavrao Jiwaji Rao Scindia vs. Sambhajirao Chandrojirao Angre, 1988 (1) SCC 692
Mahesh Chand vs. State of Rajasthan, 1990 SCC 781
Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and Ors. vs. State of Gujarat & anr., Criminal Appeal No. 1723 of 2017, decided on 4.10.2017
R.P. Kapur vs. State of Punjab, AIR 1960 SC 866
Saloni Rupam Bhartiya vs. Rupam Prahlad Bhartiya, 2015(4) R.C.R.(Criminal) 172
Shakuntala Sawhney vs. Kaushalya Sawhney, (1979) 3 SCR 639, at p 642
State of Madhya Pradesh vs. Laxmi Narayan, Criminal Appeal No. 349 of 2019, decided on 5th of March, 2019
Y. Suresh Babu vs. State of A.P., 2005 (1) SCC 347

For the petitioner : Mr. Sanjay Jaswal, Advocate, for the petitioner.

For the respondent : Ms. Ritta Goswami, Additional Advocate General, Ms. Divya Sood, Deputy Advocate General and Mr. Manoj Bagga, Assistant Advocate General for respondent No. 1/State.

Respondent Number 2 is present in person.

The following judgment of the Court was delivered:

Anoop Chitkara, Judge.

The present petition is under Section 482 Cr. P.C. for quashing of F.I.R. No. 36/2019, dated 7.3.2019, registered at Police Station Nurpur, District Kangra (H.P.) under Section 366 IPC and for quashing of Criminal proceedings arising therefrom.

2. The present F.I.R. stands registered on the basis of information given by the prosecutrix (name withheld) who has been arrayed as respondent No. 2 in the present petition.

FACTS:

3. The gist of the allegations, as contained in the F.I.R., is as follows:

(a) The complainant/prosecutrix, (Respondent No. 2), who was aged 21 years, states in her complaint that she was a student of BA-III in Dehri College.

(b) The accused Neeraj who is the petitioner and in the petition his name is mentioned as Nitin Dhiman alias Neeraj, was a frequent visitor to her college and they became friends. This friendship had maturity of two years.

(c) In the month of March, 2017 the accused established relationship with her and vowed and sworn that he would marry her.

(d) In the month of April, 2017 she accompanied him to Chamunda Resorts for outing and on reaching there, she realized that he is taking her to a hotel. Initially, she showed her reluctance to stay in the hotel. On this, tone of the voice of the Neeraj became harsh, which made her agreeable to his request and they went to the hotel. When she told him that before marriage they would not do anything, she got a promise from the petitioner/accused that he will marry her.

(e) After this, accused again took her to the same resort where they established physical relations and petitioner/accused told her that it would be a onetime stand so that she does not leave him.

(f) The complainant/prosecutrix agreed to his request and then they repeatedly started having sexual intercourse. She told him that she could become pregnant due to these sexual intercourses and then he would assure that being fathered the child, same would belong to him.

(g) In the F.I.R. the complainant/prosecutrix further says that sometimes she would take contraceptive pills and sometimes she was not in a position to take it. She also admits that on many occasions, they indulged in the sexual intercourse in the vehicle itself.

(h) In the year 2018, she was again taken to different hotels. During this time she says that she had been introduced to all the family members of the accused/petitioner and he would tell in the presence of everyone that he would marry her and that is why he had established relationship with her.

(i) Thereafter he started avoiding her on the pretext that his mother is refusing to accept this marriage and his mother is saying that if he marries her, then she would commit suicide. On this the prosecutrix says that she spoke with the mother of the petitioner/accused and disclosed to her about their physical relationship.

(j) After this the petitioner/accused started threatening her that after one year of the marriage he would kill her.

(k) On these allegations the present F.I.R came to be registered against the petitioner/accused and he was arrested.

(l) Vide Annexure-P/2 it is inferable that the petitioner/accused got regular bail from the learned Additional Sessions Judge-I, Kangra at Dharamshala, vide order dated 10.4.2019.

(m) Vide Annexure-P/6, the affidavit of the complainant/prosecutrix, she has mentioned her age as 21 years.

CONDUCT OF ACCUSED/PETITIONER:

4. While the petitioner/accused was in Judicial Custody, the complainant (respondent No. 2), moved an application to the learned Judicial Magistrate that she wants to solemnize marriage with the petitioner/accused, who is willing to marry her and for that purpose she be permitted to marry, while in judicial custody, and adequate provisions be made to enable him to do so. This fact is corroborated from Annexure-P/4, wherein it is evident that during custody on 25.3.2019 an application was made by the prosecutrix before the Judicial Magistrate, Ist Class, Nurpur, Distt. Kangra (H.P.) that she wants to perform marriage with the petitioner/accused. Vide order dated 26.3.2019 the learned Judicial Magistrate, Ist Class, Nurpur, Distt. Kangra permitted the complainant/prosecutrix to solemnize marriage with the respondent and statement was recorded. The petitioner/accused was released for this purpose and subsequently another order was passed wherein it is mentioned that the marriage was solemnized on 26.3.2019.

5. This petition is supported by affidavit Annexure P-7 which is the affidavit of the prosecutrix (R-2) in which she has admitted that she and petitioner/accused have married. She further admits that now she is residing with her husband in her in-laws house from 26.3.2019. She is residing peacefully and her in-laws have accepted her as daughter-in-law. She further states that her husband is loving and caring. She declares that she wants to withdraw the criminal proceedings and she further states that this Court may quash the F.I.R.

DEMEANOR OF VICTIM IN COURT:

6. When the matter was heard on 12.6.2019, the prosecutrix (respondent No. 2) was present in Court along with her husband Nitin Dhiman and Bhabhi Ms Nisha Rani. She was identified by the petitioner, as well as Nisha Rani, who claimed to be her Bhabhi. Ld. Addl. Advocate General also did not dispute her identity.

7. Her demeanor was seen by the Court and it was noticed that she was well oriented to place and time; was in a perfect mental and physical state, wearing costumes of a newly wedded wife; she was looking happy, there was no sign of fear and she was sitting in the Court room quietly. This Court did not notice any sort of threat directly or even indirectly on her. On this, her statement was also recorded, on oath, in which she says that she has compromised the entire matter with the accused without any coercion, duress, pressure or any wrong tactics. She further states that she made statement in her full

conscious state of mind and admitted that she is aware that this stand would result in the quashing of F.I.R. against the petitioner/accused.

REASONING:

8. Admittedly, the dispute pertains to parties who are closely related to each other. The following aspects would be relevant to arrive at a final conclusion in this petition:-

> (i) Admittedly both, complainant and the accused, are now legally married wife and husband. They are living together a happy married life.
>
> (ii) They have already compromised the matter and in terms of the affidavit (Annexure P/7), and vide statement of Complainant Wife (R-2), recorded in Court on oath, wherein she wants FIR to be quashed.
>
> (iii) Although, the withdrawal of FIR would be through District Magistrate as a normal procedure. However, there is inherent jurisdiction of the High Court under Section 482 of the Code of Criminal Procedure to intervene in such kind of matter and it is not the requirement of law that the cancellation has to be approved only through the District Magistrate. Inherent Jurisdiction of High Court under section 482 CrPC can always be exercised, depending upon the facts and circumstances of each and every case.
>
> (iv) Even if this case is put to trial, the parties are likely to maintain the stand which they have taken in this compromise which is likely to result in the acquittal of the accused.
>
> (v) Prima facie, it appears that the complaint was used as a tool to put pressure on the Petitioner to fulfill his promise of marriage, which he indeed performed.
>
> (vii) The parties are likely to live together for long time and intervention at this stage would create cordial environment for peaceful relation between them.
>
> (viii) If the inherent jurisdiction under section 482 CrPC is not invoked, then it may lead to bitterness in relations. Every time the accused will be summoned in the Court, he would blame complainant for the money spent on case and travel.

9. Yuvan Noah Harari, in his world famous book, "Sapiens- A Brief History of Humankind", (London: Vintage, 2011), p-427-428, wrote about the impact of happy married life, as follows:

> "Family and community seem to have more impact on our happiness than money and health. People with strong families who live in tight-knit and supportive communities are significantly happier than people whose families are dysfunctional and who have never found (or never sought) a community to be part of. Marriage is particularly important. Repeated studies have found that there is a very close correction between good marriages and high subjective well-being, and between bad marriages and misery. This holds true irrespective of economic or even physical conditions. An impecunious invalid surrounded by a loving spouse, a devoted family and a warm community may well feel better than an

> alienated billionaire, provided that the invalid's poverty is not too severe and that his illness is not degenerative or painful."

STAGE OF QUASHING FIR:

10. In *Ashok Chaturvedi and others v. Shitul H. Chanchani and another*, 1998(7) SCC 698, Hon'ble Supreme Court holds that the determination of the question as regards the propriety of the order of the Magistrate taking cognizance and issuing process need not necessarily wait till the stage of framing the charge. The Court observed thus :-

> "…. …. ….This argument, however, does not appeal to us inasmuch as merely because an accused has a right to plead at the time of framing of charges that there is no sufficient material for such framing of charges as provided in Section 245 of the Criminal Procedure Code, he is debarred from approaching the court even at an earliest (sic earlier) point of time when the Magistrate takes cognizance of the offence and summons the accused to appear to contend that the very issuance of the order of taking cognizance is invalid on the ground that no offence can be said to have been made out on the allegations made in the complaint petition. It has been held in a number of cases that power under Section 482 has to be exercised sparingly and in the interest of justice. But allowing the criminal proceeding to continue even where the allegations in the complaint petition do not make out any offence would be tantamount to an abuse of the process of court, and therefore, there cannot be any dispute that in such case power under section 482 of the Code can be exercised."

11. In *Kunstocom Electronics (I) Pvt. Ltd. v. Gilt Pack Ltd. and another*, (2002) 2 SCC 383, Hon'ble Supreme Court holds as under:-

> "8. …. …. ….There is no hard and fast rule that the objection as to cognizability of offence and maintainability of the complaint should be allowed to be raised only at the time of framing the charge."

12. In *Girish Sarwate v. State of A.P.*, 2005(1) R.C.R.(Criminal) 758, the Full Bench of Andhra Pradesh High Court holds as under:-

> "30. In the light of these judgments of the Supreme Court, we have no doubt in our mind that under Section 482 of the Code of Criminal Procedure, the High Court has the power to quash an FIR or even a complaint subject to limitations and conditions laid down by the Hon'ble Supreme Court in various judgments. It need not wait for completion of investigation and taking cognizance by the Magistrate. There is no dispute that this power has to be exercised by the High Courts very sparingly with circumspection and also in rarest of rare cases. Though there are limitations on exercise of power by the High Court, yet that would not in any way suggest that High Court lacks the power."

JUDICIAL PRECEDENTS ON JURISPRUDENCE OF QUASHING:

13. In *R.P. Kapur v. State of Punjab*, AIR 1960 SC 866, a three Judges Bench of Hon'ble Supreme Court observed as under:-

> "6. …. … …It is well established that the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any Court or otherwise to secure the ends of justice. Ordinarily, criminal proceedings instituted against an

accused person must be tried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction. However, we may indicate some categories of cases where the inherent jurisdiction can and should be exercised for quashing the proceedings. There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to the abuse of the process of the Court or that the quashing of the impugned proceedings would secure the ends of justice. If the criminal proceeding in question is in respect of an offence alleged to have been committed by an accused person and it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding, the High Court would be justified in quashing the proceedings on that ground. Absence of the requisite sanction may, for instance, furnish cases under this category. Cases may also arise where the allegations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no question of appreciating evidence arises; it is a matter merely of looking at the complaint or the First Information Report to decide whether the offence alleged is disclosed or not. In such case, it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal Court to be issued against the accused person. A third category of cases in which the inherent jurisdiction of the High Court can be successfully invoked may also arise. In cases falling under this category the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases, it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction under S. 561-A, the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial magistrate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained. Broadly stated that is the nature and scope of the inherent jurisdiction of the High Court under S. 561-A in the matter of quashing criminal proceedings, and that is the effect of the judicial decisions on the point (Vide : In Re: Shripad G. Chandavarkar, AIR 1928 Bom 184, Jagat Chandra Mozumdar v. Queen Empress, ILR 26 Cal 786, Dr. Shankar Singh v. State of Punjab, 56 Pun LR 54 : (AIR 1954 Punj 193), Nripendra Bhusan Roy v. Gobina Bandhu Majumdar, AIR 1924 Cal 1018 and Ramanathan Chettiyar v. Sivarama Subramania, ILR 47 Mad 722 : (AIR 1925 Mad 39)."

14. In *Madhavrao Jiwaji Rao Scindia v. Sambhajirao Chandrojirao Angre*, 1988 (1) SCC 692, the Hon'ble Supreme Court has held as under:-

> "7. The legal position is well-settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilised for any oblique purpose and where in the opinion of the court chances of an ultimate conviction is bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage."

JUDICIAL PRECEDENTS ON QUASHING ON COMPROMISE:

15. In *Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and Ors. vs.* State of Gujarat & anr., Criminal Appeal No. 1723 of 2017, decided on 4.10.2017, a Three Judges Bench of Hon'ble Supreme Court, laid down the broad principles for quashing of FIR, which are reproduced as follows:

> "15. The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions :
>
> (i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court;
>
> (ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.
>
> (iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;
>
> (iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;
>
> (v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;
>
> (vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and

> dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;
>
> (vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;
>
> (viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;
>
> (ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and
>
> (x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

16. A three Judges bench of Hon'ble Supreme Court, in *Gian Singh v. State of Punjab*, 2012(10) SCC 303, has settled the law on quashing on account of compromise/compounding, in the following terms:

> "53. Section 482 of the Code, as its very language suggests, saves the inherent power of the High Court which it has by virtue of it being a superior court to prevent abuse of the process of any court or otherwise to secure the ends of justice. It begins with the words, 'nothing in this Code' which means that the provision is an overriding provision. These words leave no manner of doubt that none of the provisions of the Code limits or restricts the inherent power. The guideline for exercise of such power is provided in Section 482 itself i.e., to prevent abuse of the process of any court or otherwise to secure the ends of justice. As has been repeatedly stated that Section 482 confers no new powers on High Court; it merely safeguards existing inherent powers possessed by High Court necessary to prevent abuse of the process of any Court or to secure the ends of justice. It is equally well settled that the power is not to be resorted to if there is specific provision in the Code for the redress of the grievance of an aggrieved party. It should be exercised very sparingly and it should not be exercised as against the express bar of law engrafted in any other provision of the Code.
>
> 57. Quashing of offence or criminal proceedings on the ground of settlement between an offender and victim is not the same thing as

compounding of offence. They are different and not interchangeable. Strictly speaking, the power of compounding of offences given to a court under Section 320 is materially different from the quashing of criminal proceedings by the High Court in exercise of its inherent jurisdiction. In compounding of offences, power of a criminal court is circumscribed by the provisions contained in Section 320 and the court is guided solely and squarely thereby while, on the other hand, the formation of opinion by the High Court for quashing a criminal offence or criminal proceeding or criminal complaint is guided by the material on record as to whether the ends of justice would justify such exercise of power although the ultimate consequence may be acquittal or dismissal of indictment.

58. Where High Court quashes a criminal proceeding having regard to the fact that dispute between the offender and victim has been settled although offences are not compoundable, it does so as in its opinion, continuation of criminal proceedings will be an exercise in futility and justice in the case demands that the dispute between the parties is put to an end and peace is restored; securing the ends of justice being the ultimate guiding factor. No doubt, crimes are acts which have harmful effect on the public and consist in wrong doing that seriously endangers and threatens well-being of society and it is not safe to leave the crime-doer only because he and the victim have settled the dispute amicably or that the victim has been paid compensation, yet certain crimes have been made compoundable in law, with or without permission of the Court. In respect of serious offences like murder, rape, dacoity, etc; or other offences of mental depravity under Indian Penal Code or offences of moral turpitude under special statutes, like Prevention of Corruption Act or the offences committed by public servants while working in that capacity, the settlement between offender and victim can have no legal sanction at all. However, certain offences which overwhelmingly and predominantly bear civil flavour having arisen out of civil, mercantile, commercial, financial, partnership or such like transactions or the offences arising out of matrimony, particularly relating to dowry, etc. or the family dispute, where the wrong is basically to victim and the offender and victim have settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may within the framework of its inherent power, quash the criminal proceeding or criminal complaint or F.I.R if it is satisfied that on the face of such settlement, there is hardly any likelihood of offender being convicted and by not quashing the criminal proceedings, justice shall be casualty and ends of justice shall be defeated. The above list is illustrative and not exhaustive. Each case will depend on its own facts and no hard and fast category can be prescribed."

17. In Criminal Appeal No. 349 of 2019, titled as *State of Madhya Pradesh vs. Laxmi Narayan,* decided on 5th of March, 2019, the Hon'ble Supreme Court has held as under:

"13 .Considering the law on the point and the other decisions of this Court on the point, referred to hereinabove, it is observed and held as under:

i) that the power conferred under Section 482 of the Code to quash the criminal proceedings for the non-compoundable offences under Section 320 of the Code can be exercised having overwhelmingly and predominantly the civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes and when the parties have resolved the entire dispute amongst themselves;

ii) such power is not to be exercised in those prosecutions which involved heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society;

iii) similarly, such power is not to be exercised for the offences under the special statutes like Prevention of Corruption Act or the offences committed by public servants while working in thatcapacity are not to be quashed merely on the basis of compromise between the victim and the offender;

iv) offences under Section 307 IPC and the Arms Act etc. would fall in the category of heinous and serious offences and therefore are to be treated as crime against the society and not against the individual alone, and therefore, the criminal proceedings for the offence under Section 307 IPC and/or the Arms Act etc. which have a serious impact on the society cannot be quashed in exercise of powers under Section 482 of the Code, on the ground that the parties have resolved their entire dispute amongst themselves. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to framing the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. However, such an exercise by the High Court would be permissible only after the evidence is collected after investigation and the charge sheet is filed/charge is framed and/or during the trial. Such exercise is not permissible when the matter is still under investigation. Therefore, the ultimate conclusion in paragraphs 29.6 and 29.7 of the decision of this Court in the case of Narinder Singh (supra) should be read harmoniously and to be read as a whole and in the circumstances stated hereinabove;

v) while exercising the power under Section 482 of the Code to quash the criminal proceedings in respect of non-compoundable offences, which are private in nature and do not have a serious impact on society, on the ground that there is a settlement/compromise between the victim and the offender, the High Court is required to consider the antecedents of the accused; the conduct of the accused, namely, whether the accused was absconding and why he was absconding, how he had managed with the complainant to enter into a compromise etc.

> 14. Insofar as the present case is concerned, the High Court has quashed the criminal proceedings for the offences under Sections 307 and 34 IPC mechanically and even when the investigation was under progress. Somehow, the accused managed to enter into a compromise with the complainant and sought quashing of the FIR on the basis of a settlement. The allegations are serious in nature. He used the fire arm also in commission of the offence. Therefore, the gravity of the offence and the conduct of the accused is not at all considered by the High Court and solely on the basis of a settlement between the accused and the complainant, the High Court has mechanically quashed the FIR, in exercise of power under Section 482 of the Code, which is not sustainable in the eyes of law. The High Court has also failed to note the antecedents of the accused."

NON COMPOUNDABLE OFFENCES CAN BE QUASHED:

18. In the present case, the offences are not compoundable under section 320 CrPC. However, in view of the entire facts and circumstances of the case, the inherent jurisdiction under section 482 CrPC can be invoked to quash the FIR and subsequent proceedings.

19. In *Mahesh Chand v. State of Rajasthan,* 1990 SCC 781 the Hon'ble Supreme Court holds as under:

> "2. The accused were acquitted by the trial court, but they were convicted by the High Court for the offence under section 307 Indian Penal Code This offence is not compoundable under law. The parties, however. want to treat it a special case, in view of the peculiar circumstances of the case. It is said and indeed not disputed that one of the accused is a lawyer practising in the lower court. There was a counter case arising out of the same transaction. It is said that this case has already been compromised. The decision of this Court in *Suresh Babu v. State of Andhra Pradesh, 1987(2) JT 361*, has been also referred to in support of the plea for permission to compound the offence.
>
> 3. We gave our anxious consideration to the case and also the plea put forward for seeking permission to compound the offence. After examining the nature of the case and the circumstances under which the offence was committed, it may be proper that the trial court shall permit them to compound the offence."

20. In *Y. Suresh Babu v State of A.P.,* 2005 (1) SCC 347, Hon'ble Supreme Court, while dealing with section 326 of IPC, which was non-compoundable offence, permitted the parties to compound the offence.

21. In *Bharti v. State of Haryana*, 2014(4) SCC 14, Hon'ble Supreme Court holds as under:

> "6. We are mindful of the fact that Section 354 of the IPC is, as of today, non-compoundable. But, as noticed by us, it was compoundable when the instant offence was committed with the permission of the court. Even then, we would have hesitated to permit compounding of the offence. But, facts of this case are very peculiar. Respondent No.2 and her husband have, even today, maintained their stand taken in the trial

> court that they have entered into a compromise with the appellant. As we have already noted, respondent No.2 has filed an affidavit to that effect in this Court. Compromise is, therefore, not an afterthought. Pertinently, the incident in question took-place way back in the year 2000. About 13 long years have gone-by. In her affidavit respondent No. 2 has stated that the appellant is her neighbour and they are staying peacefully since 2000 till date. We are of the opinion that since the appellant and respondent No. 2 are neighbours it would be in the interest of justice to permit the parties to compound the offences. If the conviction is confirmed, the relations may get strained and the peace, which is now prevailing between the two families, may be disturbed. In the peculiar facts of this case, therefore, in order to accord quietus to the disputes between the appellant and respondent No. 2 and in the larger interest of peace, we permit the appellant and respondent No. 2 to compound the offences. Accordingly, offences under Sections 451 and 354 of the IPC are permitted to be compounded. The impugned judgment is set aside. The appellant is acquitted. The appellant-Bharti is in jail. The appellant-Bharti should be released forthwith, unless he is required in any other case."

22. In *Saloni Rupam Bhartiya v. Rupam Prahlad Bhartiya*, 2015(4) R.C.R.(Criminal) 172, a three Judges Bench of Hon'ble Supreme Court, while dealing with Section 498-A of IPC, which was non-compoundable offence, holds as follows:

> "It was submitted by learned counsel for the parties that in the light of the above subsequent developments especially the fact that the marriage between the parties itself stands dissolved by a decree passed by a competent court, nothing really remained between the parties to be addressed and that the conviction of the respondent-husband under Section 498A of the Indian Penal Code could be set aside. We see no reason to decline that prayer. In the circumstances, therefore, and in the light of the fact that the parties have successfully negotiated an amicable settlement sinking and resolving all their differences and disputes and finding a lasting solution on all the outstanding issues between themselves, we see no reason why the conviction recorded by the courts below and the sentence of imprisonment till the rising of the Court, which the respondent has already undergone should continue to blemish the respondent-husband. We accordingly set aside the judgment and order of conviction of the respondent under Section 498A of the Indian Penal Code."

RELIEF:

23. In view of the entirety of the facts of the case, as well as judicial precedents, a few of which have been mentioned hereinabove, I am of the considered opinion that continuation of these proceedings will only cause unnecessary burden on the trial Courts but in all likelihood is going to cause distressing hardship on both the victim as well as the accused, without resulting into any fruitful purpose whatsoever. The accused and the prosecutrix are living happily. The denial of relief may bring the bitterness in the euphoria of new wedding. Moreover, our trial Courts are already burdened with so many cases and it will be a total wastage of the valuable time of the Courts. If these types of proceedings are permitted to be continued and the accused are prosecuted, it will serve no purpose

whatsoever. Therefore, I am of the considered opinion that this is a fit case where the inherent jurisdiction of the High Court under Section 482 of the Code of Criminal Procedure is invoked to quash the above mentioned FIR and consequent proceedings.

24. In *Himachal Pradesh Cricket Association v. State of Himachal Pradesh (SC)*; 2018 (4) Crimes 324, Hon'ble Supreme Court holds as under:-

> "47. As far as Writ Petition (Criminal) No. 135 of 2017 is concerned, the appellants came to this Court challenging the order of cognizance only because of the reason that matter was already pending as the appellants had filed the Special Leave Petitions against the order of the High Court rejecting their petition for quashing of the FIR/Chargesheet. Having regard to these peculiar facts, writ petition has also been entertained. In any case, once we hold that FIR needs to be quashed, order of cognizance would automatically stands vitiated."

CONSEQUENCES:

25. In *Shakuntala Sawhney v. Kaushalya Sawhney*, (1979) 3 SCR 639, at p 642, *Hon'ble* Supreme Court observed as follows:

> "The finest hour of Justice arise propitiously when parties, despite falling apart, bury the hatchet and weave a sense of fellowship or reunion."

26. Consequently, this petition is allowed and the F.I.R. No. 36/2019, dated 7.3.2019, registered at Police Station Nurpur, District Kangra (H.P.) for the commission of offences punishable under Sections 366 and 376 of the Indian Penal Code, is quashed. Since FIR has been quashed, all the consequential proceedings, if any, are also quashed and set aside.

27. The bail bonds are accordingly discharged.

Petition is allowed. All pending application(s), if any, also stand disposed of.

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

Nnanna Everistus Chinenye ....Petitioner

Versus

State of Himachal Pradesh ...Respondent

Cr.MP(M) No. 1062 of 2019
Decided on: 24th June, 2019

Code of Criminal Procedure, 1973 (Code) – Section 439 – **Narcotic Drugs & Psychotropic Substances Act, 1988 (Act) –** Sections 21 & 29 – Bail- Grant of- Foreign national- Relevant considerations- Held, accused involved in dealing of heroine- Offence serious in nature- Accused also a foreign national and if released on bail, he may flee from justice- Difficult to ensure his presence during trial- Not a fit case for grant of bail to accused- Petition dismissed. (Paras 5 to 7)

For the petitioner: Mr. Abhishek Sood, Advocate.

For the respondent/State: Mr. P.K. Bhatti, Additional Advocate General.

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. 102 of 2019, dated 02.05.2019, under Sections 21 and 29 of the ND&PS Act and Section 14 of Foreigner Act, 03 Passport (Entry Into India) Act, registered in Police Station Sadar Solan, District Solan, H.P.

2. As per the averments made in the petition, the petitioner is innocent and has been falsely implicated in the present case. He is neither in a position to tamper with the prosecution evidence nor in a position to flee from justice. No fruitful purpose will be served by keeping him behind the bars for an unlimited period, so he be released on bail.

3. Police report stands filed. As per the prosecution story, on 01.05.2019, at about 10:00 p.m., a police party was on patrol duty at Deunghat Road. Police received a tip-off qua a drug peddler. After completing all the codal formalities police formed a raiding party and knocked the door of the said drug peddler. One Amit Kumar opened the door and thereafter the police conducted the search of the room. Police recovered a polythene pouch from the room, which contained some powder like substance. Police also recovered lighter, two syringes, a piece of unused foil paper, eight used foil papers, two empty polythene pouches and two empty wrappers of tablet Add NOK-N. The recovered powder, on checking, was found to be heroine (*chitta*) and on weighment it was found to be 11.45 grams. Thereafter, the police completed all the codal formalities and registered a case. Police prepared the spot map and also recorded the statements of the witnesses. The accused was arrested and during the course of interrogation he divulged that he used to purchase *chitta* from one Nigerian person. The accused divulged that he could identify the said Nigerian person. The accused gave his statement under Section 27 of the Indian Evidence Act and on 04.05.2019 he got the present petitioner arrested from Delhi. The petitioner disclosed his name as Nnanna Everistus. The petitioner was arrested and during the course of interrogation he divulged that he has hidden 15 grams of Heroine in his rented room at Uttam Nagar, Delhi. The room of the present petitioner located in H Block 5, Mohan Garden, Delhi, was searched and 15.72 grams of Heroine was recovered. Police completed all the codal formalities and sample of the contraband was sent for scientific analysis and as per the chemical analysis report, the recovered contraband is Heroine. During the course of investigation, it was unearthed that the petitioner is drug peddler. The petitioner disclosed that he is Nigerian citizen, but he could not produce any valid proof qua his citizenship. However, later on the Advocate of the accused produced the Passport of the petitioner, which is yet to be verified. Lastly, it is prayed that the bail application of the petitioner be dismissed, as the petitioner was involved in a serious offence and there is every possibility that in case at this stage he is enlarged on bail, he may flee from justice or tamper with the prosecution witnesses.

4. I have heard the learned Counsel for the petitioner, learned Additional Advocate General for the State and gone through the record, including the police report, carefully.

5. The learned Counsel for the petitioner has argued that the petitioner has been falsely implicated in the present case. He has further argued that the petitioner neither in a position to tamper with the prosecution evidence nor in a position to flee from justice. He has further argued that no fruitful purpose will be served by keeping the petitioner behind the bars for an unlimited period, so the bail application be allowed and the petitioner be enlarged on bail. Conversely, the learned Additional Advocate General has argued that the petitioner was found involved in a serious offence and he is foreign national, so at this stage, in case he is enlarged on bail, he may tamper with the prosecution evidence and may also flee from justice. He has further argued that the petitioner is drug peddler and he is spoiling the society. He has prayed that the bail application of the petitioner be dismissed.

6. In rebuttal the learned Counsel for the petitioner has argued that the petitioner cannot be kept behind the bars for an unlimited period, so the application be allowed and the petitioner be enlarged on bail.

7. At this stage, after taking into consideration the seriousness of the offence, the manner in which the offence is alleged to have been committed, the role of the petitioner in the office, the fact that the petitioner is foreign national and in case he is enlarged on bail, there is possibility that he may flee from justice or tamper with the prosecution evidence and also considering all other facets of the case and without discussing the same at this stage, this Court 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. The petitioner was found involved in a serious offence of dealing in Heroine and in order to secure his presence for the ensuing judicial process, as he is foreign national and may flee from justice, it is apt to dismisses the present bail application. Therefore, the petition, which sans merits, deserves dismissal and is accordingly dismissed.

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

Oriental Insurance Co. Ltd. .....Appellant.

Versus

Smt. Darshna Devi & others ....Respondents.

FAO No. 547 of 2017.
Reserved on : 2nd May, 2019.
Decided on : 30th May, 2019.

Motor Vehicles Act, 1989 – Sections 166 – Motor Accident – Claim application- Rash and negligent driving- Findings of Criminal Court- Relevancy- Held, filing of charge sheet before Criminal Court in a case of motor accident would neither distract Tribunal nor create any hindrance in scrutinizing evidence on record and to record findings independent from one recorded by Criminal Court qua rash and negligent driving on part of driver of offending vehicle. (Paras 3 to 6)

Case referred:
National Insurance Co. Ltd. vs. Pranay Sethi and others, 2017 ACJ 2700

For the Appellant:	Mr. Narender Sharma and Ms. Meenakshi Sharma, Advocates.
For Respondents No. 1 to 5:	Mr. H.R. Sidhu, Advocate.
For Respondent No. 6 and 7:	Mr. Malay Kaushal, Advocate.
For Respondent No.8:	Mr. Ajay Sharma, Sr. Advocate with Mr. Rakesh Chaudhary, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The Insurer of the offending vehicle, has, instituted the instant appeal before this Court, wherethrough, it, casts, a, challenge, upon, the award pronounced by the learned Motor Accident Claims Tribunal (I), Kangra at Dharamshala, H.P., upon, MACP No. 13-N/II/2011, as stood, cast therebefore, under, the provisions of Section 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as the Act), (i) AND, whereunder, compensation amount comprised, in, a sum of Rs.16,34,472/- alongwith interest accrued thereon, at the rate of 7.5% per annum, and, commencing from, the date of petition till realization thereof, stood, assessed, vis-a-vis, the dependents of the deceased, one Jaipal Singh, (ii) who met his end, in sequel to a collision which occurred inter se the offending vehicle bearing registration No. HP-69-0900, driven by Brij Lal, respondent No.7 herein, and, vehicle bearing No. HP38A-8427, driven by Ravinder Kumar, respondent No.8 herein. The apposite indemnificatory liability thereof, was, fastened upon the insurer of the offending vehicle, appellant herein.

2. The learned counsel appearing, for, the appellant/insurer, does not, contest the factum, of, occurrence of demise, of, the afore deceased Jaipal Singh, arising, from, a motor vehicle accident, and, purportedly in the manner as disclosed in the claim petition, and, also enunciated, in, the apposite postmortem report, borne in Ex.PW1/A, wherein, ante mortem injuries, as, noticed, on the body of the deceased, are, rather therein spelt out to be, a, sequel of a road side accident.

3. Be that as it may, the learned counsel appearing for the insurer/appellant herein, has with utmost vigour, made a serious attempt, to, dislodge, the affirmative findings rendered by the learned tribunal upon issue No.1, and, the disaffirmative findings recorded upon issue No.3. The principal reason which stands espoused by the learned counsel, for the insurer, to, make the afore submission before this Court, is, anvilled, (a) upon the factum of an FIR borne in Ex.PW2/A, standing lodged at the police station concerned, by Brij Lal, respondent No.7 herein, with ascriptions therein, vis-a-vis, Ravinder Kumar, respondent No.8 herein, being, the, tortfeasor, and, a report under Section 173 of the Cr. P. C., inconsonance therewith, rather standing instituted before the criminal court concerned. However, the afore lodging of the FIR, and, in sequel thereto, the, institution of a report under Section 173 of the Cr.P.C., before the criminal court concerned, would not either distract this Court nor create any hindrance, for this Court, to delve into, and, incisively scrutinize, the, testimony of, an, independent ocular witness, One Rattan Chand, to the occurrence, and, who stepped into the witness box as PW-4, (a) as, given dehors the afore, the MACT concerned, and, thereafter this Court, is/are both, under law, rather enjoined to record findings, independent, from the one rendered by the criminal court of competent jurisdiction, vis-a-vis, the factum of tort of negligence, being committed, by respondent No.7, or by respondent No.8, the respective drivers of the offending vehicle, and, of vehicle bearing No.HP-38A-8427. However, this Court, would be constrained to not mete, the, gravest and deepest reliance thereto, only upon, his testification borne in his examination-in-chief, and,

the one borne in his cross-examination, rather unveiling qua his being not an eye witness to the occurrence, or upon there existing mutual inter se contradictions. A wholesome reading of the testification, rendered by afore PW-4 Rattan Chand, (b) unveils, that the relevant tort of negligence, in sequel whereto, the collision occurred inter se vehicle bearing No. HP-38A-8427, and, the offending vehicle, rather being a sequel, of, the rash, and, negligent manner of driving, of, the offending vehicle by respondent No.7, (c) and, when his afore testification, borne in his examination-in-chief remains unscathed, vis-a-vis, its vigour, even during the course, of, an ordeal of an exacting cross-examination, (d) and, nor when therein occurs any suggestion with any echoing qua his not being, an, ocular witness to the occurrence, nor when obviously his deposition, borne in his examination-in-chief, is not, contradicted by his deposition comprised in his cross-examination, (e) thereupon, with witness Ravinder Kumar, also testifying that on the fateful day, while his father, being a member of the Barat, hence, traveling in vehicle bearing No. HP-38A-8427, and, after a collision occurring inter se the afore vehicle, and, the offending vehicle, in sequel, to, the negligent manner of driving, of, the offending vehicle by its driver, rather injuries befalling, upon, his father, (f) and, whereafter he was taken for treatment to Nurpur, and, subsequent whereto he was referred for treatment to Pathankot, and, rather the afore succumbing, to the, injuries, hence, in the afore interregnum, (g) and, when the afore testification is unblemished, by any contradiction therewith, hence, erupting in his cross-examination, (h) thereupon, it is believable qua FIR borne in Ex.PW2/A, being lodged by Brij Lal, respondent No.7 herein, at the back of Ravinder Singh, respondent No.8, (i) with, the further corollary qua no dependence therefrom, hence, being drawable, by the afore driver of the offending vehicle, upon, Ex.PW2/A, and, also upon, the report subsequent thereto filed under Section 173 of the Cr.P.C., before the criminal court concerned. Contrarily, it is to be concluded qua the tort of negligence, being aptly concluded, by the learned tribunal concerned, to stand committed by the driver of the offending vehicle, one Brij Lal, respondent No.7 herein, and, the findings rendered in the affirmative, upon, issue No.1, and, the findings rendered in the disaffirmative, upon issue No.3, rather being not amenable for any interference by this Court.

4. Furthermore, the learned tribunal, has not, committed, any error, while construing, the, per mensem income of the deceased Jaipal Singh, hence, being borne in a sum of Rs.13,884/-, and, its further making 1/4th deduction, vis-a-vis, his afore per mensem income, and, towards his personal expenses, and, thereafter its further, calculating the per mensem dependency of the deceased, in, a sum of Rs. 10,413/-, also does not suffer from any fallibility. Moreover, the application, of, a multiplier of 11, vis-a-vis, the sum calculated, under, the head “annual dependency”, also does not suffer from any perversity. However, the learned tribunal while calculating the the total compensation, has, inadvertently applied the multiplier of the 12, vis-a-vis the sum of annual dependency. Consequently, applying the apposite multiplier of 11, vis-a-vis, the sum of annual dependency, the total compensation is quantified in a sum of Rs.13,74,516/- {Rs.1,24,956/- (annual dependency) x 11}.

5. Furthermore, the quantification, of damages, by the learned Tribunal in a sum of Rs.1 lac, vis-a-vis, the claimant No.1, widow of the deceased, (i) under the head, “loss of consortium”, (ii) quantification, of a sum of Rs.25,000/-, vis-a-vis, the claimants, under the head, “Funeral Charges”, (iii) and quantification of a sum of Rs.10,000/-, vis-a-vis, the claimants, under the head “transportation charges”, is in, conflict with the mandate of the Hon'ble Apex Court rendered in ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** reported in ***2017 ACJ 2700***,, (iv) wherein, it has been expostulated, that reasonable figures, under conventional heads, namely, loss to estate, loss of consortium, vis-a-vis, the widow of the deceased, and, funeral expenses being quantified only upto Rs.15,000/-,

Rs.40,000/-, and Rs.15,000/- respectively. Accordingly, in addition to the aforesaid amount of Rs.10,95,120/-, the claimants, are, entitled under conventional heads, namely, loss to estate, loss of consortium (only vis-a-vis the widow of the deceased), and, funeral expenses, sums of Rs.15,000/-, Rs.40,000/- and Rs.15,000/- respectively, as such, the total compensation to which the petitioners are entitled comes to Rs.13,74, 516/-+ Rs.15,000/- + Rs.40,000/- + Rs.15,000/-= Rs.14,44,516/-(Rs. Fourteen lacs, forty four thousand, five hundred sixteen only).

6. For the foregoing reasons, the appeal filed by the insurer is partly allowed, and, the impugned award, is, in the aforesaid manner, hence modified. Accordingly, the claimants, are, held entitled to a total compensation of Rs.14, 44, 516/-(Rs. Fourteen lacs, forty four thousand, five hundred sixteen only), along with interest @ 7.5 % per annum, from, the date of petition till the date, of, deposit, of the compensation amount. The indemnificatory liability, vis-a-vis, compensation amount shall be of the insurer of the offending vehicle, i.e. appellant herein. The afore amount of compensation be apportioned amongst the claimants/respondents No.1 to 5 in the manner as ordered by the learned tribunal. The amount of interim compensation, if any, awarded, be adjusted in the aforesaid compensation amount, at the time of final payment. All pending applications also stand disposed of. Records be sent back forthwith.

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

Oriental Insurance Co. Ltd. .....Appellant.

Versus

Smt. Kanta Devi and others ....Respondents.

FAO No. 546 of 2017.
Reserved on : 2nd May, 2019.
Decided on : 30th May, 2019.

Motor Vehicles Act, 1989 – Sections 166 – Motor Accident – Claim application- Rash and negligent driving- Findings of criminal court- Relevancy- Held, filing of chargesheet before Criminal Court in a case of motor accident would neither distract Tribunal nor create any hinderance in scrutinizing evidence on record and to record findings independent from one recorded by Criminal Court qua rash and negligent driving on part of driver of offending vehicle. (Paras 3 to 6)

Case referred:

National Insurance Co. Ltd. vs. Pranay Sethi and others, 2017 ACJ 2700

For the Appellant:	Mr. Narender Sharma and Ms. Meenakshi Sharma, Advocates.
For Respondents No. 1 to 5:	Mr. H.R. Sidhu, Advocate.
For Respondent No. 6 and 7:	Mr. Malay Kaushal, Advocate.
For Respondent No.8:	Mr. Ajay Sharma, Sr. Advocate with Mr. Rakesh Chaudhary, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The Insurer of the offending vehicle, has, instituted the instant appeal before this Court, wherethrough, it, casts, a, challenge, upon, the award pronounced by the learned Motor Accident Claims Tribunal (I), Kangra at Dharamshala, H.P., upon, MACP No. 12-N/II/2011, as stood, cast therebefore, under, the provisions of Section 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as the Act), (i) AND, whereunder, compensation amount comprised, in, a sum of Rs.12,30,120/- alongwith interest accrued thereon, at the rate of 7.5% per annum, and, commencing from, the date of petition till realization thereof, stood, assessed, vis-a-vis, the dependents of the deceased, one Om Prakash, (ii) who met his end, in sequel to a collision which occurred inter se the offending vehicle bearing registration No. HP-69-0900, driven by Brij Lal, respondent No.7 herein, and, vehicle bearing No. HP38A-8427, driven by Ravinder Kumar, respondent No.8 herein. The apposite indemnificatory liability thereof, was, fastened upon the insurer of the offending vehicle, appellant herein.

2. The learned counsel appearing, for, the appellant/insurer, does not, contest the factum, of, occurrence of demise, of, the afore deceased Om Prakash, arising, from, a motor vehicle accident, and, purportedly in the manner as disclosed in the claim petition, and, also enunciated, in, the apposite postmortem report, borne in Ex.PW1/A, wherein, ante mortem injuries, as, noticed, on the body of the deceased, are, rather therein spelt out to be,a, sequel of a road side accident.

3. Be that as it may, the learned counsel appearing for the insurer/appellant herein, has with utmost vigour, made a serious attempt, to, dislodge, the affirmative findings rendered by the learned tribunal upon issue No.1, and, the disaffirmative findings recorded upon issue No.3. The principal reason which stands espoused by the learned counsel, for the insurer, to, make the afore submission before this Court, is, anvilled, (a) upon the factum of an FIR borne in Ex.PW2/A, standing lodged at the police station concerned, by Brij Lal, respondent No.7 herein, with ascriptions therein, vis-a-vis, Ravinder Kumar, respondent No.8 herein, being, the, tortfeasor, and, a report under Section 173 of the Cr. P. C., inconsonance therewith, rather standing instituted before the criminal court concerned. However, the afore lodging of the FIR, and, in sequel thereto, the, institution of a report under Section 173 of the Cr.P.C., before the criminal court concerned, would not either distract this Court nor create any hindrance, for this Court, to delve into, and, incisively scrutinize, the, testimony of, an, independent ocular witness, One Rattan Chand, to the occurrence, and, who stepped into the witness box as PW-5, (a) as, given dehors the afore, the MACT concerned, and, thereafter this Court, is/are both, under law, rather enjoined to record findings, independent, from the one rendered by the criminal court of competent jurisdiction, vis-a-vis, the factum of tort of negligence, being committed, by respondent No.7, or by respondent No.8, the respective drivers of the offending vehicle, and, of vehicle bearing No.HP-38A-8427. However, this Court, would be constrained to not mete, the, gravest and deepest reliance thereto, only upon, his testification borne in his examination-in-chief, and, the one borne in his cross-examination, rather unveiling qua his being not an eye witness to the occurrence, or upon there existing mutual inter se contradictions. A wholesome reading of the testification, rendered by afore PW-5 Rattan Chand, (b) unveils, that the relevant tort of negligence, in sequel whereto, the collision occurred inter se vehicle bearing No. HP-38A-8427, and, the offending vehicle, rather being a sequel, of, the rash, and, negligent manner of driving, of, the offending vehicle by respondent No.7, (c) and, when his afore testification, borne in his examination-in-chief remains unscathed, vis-a-vis, its vigour, even during the

course, of, an ordeal of an exacting cross-examination, (d) and, nor when therein occurs any suggestion with any echoing qua his not being, an, ocular witness to the occurrence, nor when obviously his deposition, borne in his examination-in-chief, is not, contradicted by his deposition comprised in his cross-examination, (e) thereupon, with witness Devinder Kumar, also testifying that on the fateful day, while his father, being a member of the Barat, hence, traveling in vehicle bearing No. HP-38A-8427, and, after a collision occurring inter se the afore vehicle, and, the offending vehicle, in sequel, to, the negligent manner of driving, of, the offending vehicle by its driver, rather injuries befalling, upon, his father, (f) and, whereafter he was taken for treatment to Nurpur, and, subsequent whereto he was referred for treatment to Pathankot, and, rather the afore succumbing, to the, injuries, hence, in the afore interregnum, (g) and, when the afore testification is unblemished, by any contradiction therewith, hence, erupting in his cross-examination, (h) thereupon, it is believable qua FIR borne in Ex.PW2/A, being lodged by Brij Lal, respondent No.7 herein, at the back of Ravinder Kumar, respondent No.8, (i) with, the further corollary qua no dependence therefrom, hence, being drawable, by the afore driver of the offending vehicle, upon, Ex.PW2/A, and, also upon, the report subsequent thereto filed under Section 173 of the Cr.P.C., before the criminal court concerned. Contrarily, it is to be concluded qua the tort of negligence, being aptly concluded, by the learned tribunal concerned, to stand committed by the driver of the offending vehicle, one Brij Lal, respondent No.7 herein, and, the findings rendered in the affirmative, upon, issue No.1, and, the findings rendered in the disaffirmative, upon issue No.3, rather being not amenable for any interference by this Court.

4. Furthermore, the learned tribunal, has not, committed, any error, while construing, the, per mensem income of the deceased Om Prakash, hence, being borne in a sum of Rs.13,159/-, and, its further making 1/4th deduction, vis-a-vis, his afore per mensem income, and, towards his personal expenses, and, thereafter its further, calculating the per mensem dependency of the deceased, in, a sum of Rs. 10,140/-, also does not suffer from any fallibility. Moreover, the application, of, a multiplier of 9, vis-a-vis, the sum calculated, under, the head “annual dependency”, and, thereafter its assessing total compensation borne in a sum of Rs.10,95,120/- also does not suffer from any perversity.

5. Furthermore, the quantification, of damages, by the learned Tribunal in a sum of Rs.1 lac, vis-a-vis, the claimant No.1, widow of the deceased, (i) under the head, “loss of consortium”, (ii) quantification, of a sum of Rs.25,000/-, vis-a-vis, the claimants, under the head, “Funeral Charges”, (iii) and quantification of a sum of Rs.10,000/-, vis-a-vis, the claimants, under the head “transportation charges”, is in, conflict with the mandate of the Hon'ble Apex Court rendered in ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** reported in ***2017 ACJ 2700***,, (iv) wherein, it has been expostulated, that reasonable figures, under conventional heads, namely, loss to estate, loss of consortium, vis-a-vis, the widow of the deceased, and, funeral expenses being quantified only upto Rs.15,000/-, Rs.40,000/-, and Rs.15,000/- respectively. Accordingly, in addition to the aforesaid amount of Rs.10,95,120/-, the claimants, are, entitled under conventional heads, namely, loss to estate, loss of consortium (only vis-a-vis the widow of the deceased), and, funeral expenses, sums of Rs.15,000/-, Rs.40,000/- and Rs.15,000/- respectively, as such, the total compensation to which the petitioners are entitled comes to Rs.10,95,120/- + Rs.15,000/- + Rs.40,000/- + Rs.15,000/-= Rs.11,65, 120/-(Rs. Eleven lakhs, sixty five thousand, and, one hundred twenty only).

6. For the foregoing reasons, the appeal filed by the insurer is partly allowed, and, the impugned award, is, in the aforesaid manner, hence modified. Accordingly, the claimants, are, held entitled to a total compensation of Rs.11,65, 120/-(Rs. Eleven lakhs,

sixty five thousand, and, one hundred twenty only), along with interest @ 7.5 % per annum, from, the date of petition till the date, of, deposit, of the compensation amount. The indemnificatory liability, vis-a-vis, compensation amount shall be of the insurer of the offending vehicle, i.e. appellant herein. The afore amount of compensation be apportioned amongst the claimants/respondents No.1 to 5 in the manner as ordered by the learned tribunal. The amount of interim compensation, if awarded, be adjusted in the aforesaid compensation amount, at the time of final payment. The shares of the minor children, shall remain invested, in FDRs, upto, the stage of theirs attaining majority. However, interest accrued thereon, shall be releasable vis-a-vis their mother, only when she explains, of, its being required, for, the upkeep and benefit of her minor children. All pending applications also stand disposed of. Records be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE ANOOP CHITKARA , J.

Pankaj Kumar .....Petitioner
Versus
State of Himachal Pradesh ....Respondent

Cr.MP(M) No. : 1075 of 2019
Reserved on : 18-06-2019
Decided on : 24th June, 2019

Code of Criminal Procedure, 1973 (Code) – Section 439 **– Narcotic Drugs & Psychotropic Substances Act, 1985 (Act) –** Sections 21 & 22 - Bail- Grant of – Recovery of heroine and codeine phosphate- Held, petitioner in custody since long- He is young man and deserves a chance to reform- Investigation is complete- He is local resident and his presence can always be secured to face trial- Petition allowed- Bail granted subject to conditions. (Paras 5 to 7)

For the petitioner: Mr. Anirudh Sharma and
Mr. Piyush Rathour, Advocates.
For respondent : Ms. Rita Goswami, Addl. Advocate General with
Ms. Divya Sood, Deputy Advocate General.

The following judgment of the Court was delivered:

Anoop Chitkara, Judge

The present petition is under Section 439 of the Code of Criminal Procedure, seeking regular bail in FIR No. 139/2018, dated 10-12-2018, registered at Police Station- Barotiwala, District- Solan, Himachal Pradesh, under Sections 21, 22-61-85 of the Narcotic Drugs Psychotropic Substances Act, 1985.

2. I have heard the counsel for the parties and also gone through the status report.

3. This matter was heard on 18-6-2019 and on 17-06-2019 ASI Jagat Ram, I/O Police Station- Barotiwala, District- Solan, HP, was present alongwith record and he had placed on record the status report.

4. The gist of the First Information Report and the investigation is as follows:

(a) That on 10-12-2018, S.I. Bahadur Singh incharge P.S. Barotiwala alongwith other police officials namely HC Balvinder Singh No. 151, C. Raman Kumar No. 589 and driver Home Guard Balwant in Government vehicle bearing registration No. HP12C-5442, were on patrolling duty, at place Himuda Colony, Bhatolikala near Timex Company.

(b) At that place, S.I. Pradeep Singh, Additional SHO, Police Station-Baddi alongwith SI Sanjay Kumar, HC Manoher No. 31 and C. Sunil No. 587 came in private vehicle.

c) At that spot S.I. Mukhvar Singh received a secret information that Pankaj Kumar (bail petitioner) is in possession of Psychotropic substances and Codine.

d) Thereafter, investigating Officer stated that they complied with the provisions of Section 42 (2) of the NDPS Act.

e) Independent witness Kundan Lal was associated and the police party reached at the address given in secret information.

f) Outside the quarter, one young man aged 25 years, met them. On inquiry he told his name as Pankaj Kumar.

g) Thereafter, I.O. has stated to have complied with the provisions of Section 50 of NDPS Act.

h) Thereafter, Dy. S.P. Sh. Khajana Ram also visited the spot and the room of the petitioner/accused was searched in his presence.

I) During the search of the room, 30 bottles of Kuff Care-T Codine Phosphate and Triplodine Hydrochloride syrup 50 ml were recovered.

j) Thereafter other proceedings at the spot were conducted.

h) Consequently, it is the case of the prosecution that 30 bottles of Kuff Care-T containing codin Phophate and Triplodine Hydroculoride syrup of 50 ml each were found and further, on personal search of the petitioner, 15.66 grams chitta (heroine) has been recovered.

h) After completing other procedural requirement of NDPS Act, the seized contraband was sent to FSL, Junga for chemical examination. Report of Chemical examiner, is as follows:

Heroin_ The exhibit stated as heroin in cloth parcel marked in the laboratory as A is a sample of Diacetly morphine (heroin) = 15.377 g 2. KUFFCARE-T Codeine phosphate is present in the exhibit in the stated as Kuffcare-T in cloth parcel marked in the laboratory as B=1.725 kg 3 ELECTRONIC BALANCE The exhibit stated as electronic balance in cloth parcel marked in the laboratory as C contain contents of Diacetyl morphine (heroin) 4. SYRINGE The exhibit stated as Syringe in cloth parcel marked in the laboratory as C. contain contents of Diacetyl morphine (Herion)

5. Keeping in view the facts of the case and entire evidence, I am of the considered opinion that the petitioner is entitled for bail grounds:

a) The petitioner is a young man of 24-25 years of age. I am of the considered opinion that one more chance can be afforded to the petitioner to reform.

b) Investigation is complete and police report under Section 173 Cr.P.C. stands filed in the Court of Special Judge, Nalagarh, Distt. Solan, HP.

C) Petitioner/Accused is in Judicial Custody since 10-12-2018, i.e. for more than six months.

d) He is a permanent resident of address mentioned in Memo of parties and hence his presence can always be secured to face trial.

6. In the result the present petition is allowed. The petitioner shall be released on bail in the present case, in connection with the FIR mentioned above, on his furnishing personal bond in the sum of Rs.10,000/- with one surety in the like amount to the satisfaction of the Ld. Special Judge/ Ld. Sessions Judge or Ld. Additional Sessions Judge, Solan District.

7. This Court is granting the bail subject to the conditions mentioned herein. The petitioner undertakes to comply with all directions given in this order and the furnishing of bail bonds by the petitioner in acceptance of all such conditions:

a. The Petitioner shall not hamper the investigation.

b) The petitioner undertakes not to threaten or browbeat the complainant or to use any pressure tactics.

c) The petitioner undertakes not to make any inducement threat or promise, directly or indirectly, to the investigating officer or any person acquainted with the facts of the case to dissuade him from disclosing such facts to the Court or any Police Officer or tamper with the evidence.

d) The petitioner undertakes to attend the trial and to appear before the Court on each and every date unless so exempted.

8. Any observation made herein above shall not be taken as an expression of opinion on the merits of the case and the trial Court shall decide the matter uninfluenced by any observation made herein above.

9. Petition is allowed in the aforesaid terms.

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

Pardeep Verma …Petitioner

Versus

Budh Dev Kalia …. Respondent

Cr.MMO No. 82 of 2019

Date of Decision 13th June, 2019

Negotiable Instruments Act, 1881 (Act)– Section 145 (2)– Application for summoning and examining witnesses by accused- Stage, when it would lie- Held, application for summoning witnesses by accused would lie after notice of accusation has been put to him and after affording opportunity to complainant to lead further evidence , if any, in support of his case and not before- First trial will commence and thereafter application is to be undertaken- Allowing accused on his very first appearance to move application under Section 145 of Act, is illegal. (Paras 29 to 32)

Negotiable Instruments Act, 1881 (Act)– Sections 145(2)–Whether provision mandatory?- Held, word 'shall' in Section 145(2) of Act clearly stipulates that when such application has been filed, court must allow it and summon person who can give evidence on affidavit on facts contained therein. (Paras 31 & 32)

Cases referred:

Atul Shukla vs. State of M.P. and another, Cr. Appeal No(s). 837 of 2019
J.V. Baharuni and another vs. State of Gujarat and another, (2014)10 SCC 494
Mandvi Cooperative Bank Ltd. vs. Nimesh B. Thakore, (2010)3 SCC 83
Meters and Instruments Private Ltd. and another vs. Kanchan Mehta, (2018)1 SCC 560
Omparkash Shivprakash vs. K.I. Kuriakose and others, (1999)8 SCC 633

For the Petitioner: Mr.Anup Rattan, Advocate.
For the Respondent: Mr. Karan Veer Singh, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.(Oral)

Present petition has been filed assailing the impugned order dated 16.1.2019 passed by Additional Chief Judicial Magistrate-I, Amb, District Una, whereby an application, filed on behalf of accused/petitioner under Section 145(2) of Negotiable Instrument Act ('NI Act' in short), has been dismissed which application had already been allowed by his predecessor Presiding Officer.

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

3. It is evident from the record that the petitioner/accused, after receiving the notice from the trial Court, had appeared in the Court on 17.1.2017. On that very first day, time, as prayed for, was granted to the petitioner/accused by the trial Court for filing an application under Section 145 of NI Act and this application, filed on 27.7.2017, was allowed on 15.3.2018, but instead of calling the witnesses for cross examination, the case was adjourned for Notice of Accusation on 18.6.2018. On 4.12.2018 again, the same order was repeated by the same Presiding Officer. Thereafter, Presiding Officer was transferred. Successor Presiding Officer again took up the same application for consideration on 16.1.2019 and vide impugned order passed on the same date, dismissed the application rejecting the request of petitioner/accused to summon and examine the witnesses, whose affidavits have been filed by the respondent/complainant in support of his case.

4 First,out of two points, raised by petitioner in the present petition, is that in an application, filed by the accused or prosecution under Section 145(2) of NI Act for summoning and examining any person giving the evidence on affidavit, the Court has no discretion to refuse to summon and examine such person as to the facts contained in the

affidavit filed by the said person. To substantiate his plea, judgment pronounced by the Apex Court in ***Mandvi Cooperative Bank Ltd. vs. Nimesh B. Thakore*** reported in ***(2010)3 SCC 83,*** has been referred.

5 Secondly, learned counsel for the petitioner, putting reliance upon the decision rendered by the Supreme Court in ***Cr. Appeal No(s). 837 of 2019, titled Atul Shukla vs. State of M.P. and another,*** has contended that in view of specific bar contained in Section 362 Cr.P.C, the Court in criminal case cannot alter, judgment or final order disposing a case and has submitted that once application under Section 145(2) of NI Act was allowed, it could not have been rejected by subsequent order passed by the same Court.

6 On perusal of record of the trial Court, it is noticed by this Court that the trial Judge has also ventured in discussing the merits of case on the basis of respective plea taken by accused and complainant in the application and reply thereto respectively, despite the fact that there was no occasion to discuss the same at this stage that too in an application filed under Section 145(2) of NI Act.

7. Besides above, it is also noticed that on the very first day of presence of accused, without resorting to record substance of accusation or putting Notice of Accusation or framing the charge, and recording response of accused thereto, the Magistrate had granted time to the accused to file an application under Section 145 of Negotiable Instrument Act that too without giving opportunity to the complainant to file/lead any further evidence, if any, he would have intended to bring on record after commencement of trial. For discussion hereinafter, I am of considered view that on this count trial Court has committed a mistake of law.

8. On the first point, raised in this case, the Apex Court in ***Mandvi Cooperative Bank's case,*** has held that two words i.e. 'may' and 'shall' in Section 145(2) NI Act have been used by the Legislature with reference to the 'Court' and with reference to the 'prosecution or accused' respectively and therefore, it is beyond doubt that in the event of an application made by the prosecution or accused, the Court would be obliged to summon the person giving evidence on affidavit in terms of Section 145(1) of NI Act without having any discretion in the matter and therefore, if an application is made under Section 145(2) of NI Act either by prosecution or by the accused, the Court must call the person, giving his evidence on affidavit, for examining him again as to the facts contained therein. Intention of Legislature, in this regard, is very clear as the Legislature has used two distinct and different words i.e. 'may' and 'shall' for two different situations and it is not made mandatory for the Court to summon and examine the persons filing the affidavit in all eventuality, but a discretion has been given to the Court to call such witnesses, if Court feels it necessary, but in the case of application filed by 'prosecution' or 'accused', by using word 'shall', it has been made mandatory to summon and examine such person.

9 In view of bare provision of Section 145(2) of NI Act and law laid down by the Apex Court, the trial Court has committed an illegality in dismissing the application filed by the petitioner/accused.

10 Considering second point raised by the petitioner, record reveals that the application in question, filed under Section 145(2) of NI Act on behalf of accused, had already been allowed by the Predecessor of the trial Judge on 15.3.2018. Undoubtedly, Section 362 Cr.P.C. is applicable in proceedings under Section 138 of NI Act which creates a legal impediment on the trial Court regarding the Court from altering or reviewing its judgment or final order, disposing of a case, which has been signed and thus Section 362

Cr.P.C. empowers the Court only to correct a clerical or arithmetical error. Vide order dated 15.3.2018/4.12.2018 Predecessor of the trial Judge had already disposed of application filed under Section 145(2) of NI Act, allowing the prayer of summoning and examining the persons who has filed the affidavit in evidence. Therefore, it was not open for the trial Judge to dismiss the same application vide order dated 16.1.2019 as it amounts to reviewing the order by reversing it which was passed by his Predecessor Presiding Officer which is impermissible under law and hence impugned order is liable to be set aside.

11 As noticed supra, learned trial Magistrate has also returned the findings stating that fair trial cannot be afforded at the cost of speedy trial particularly in view of summary procedure envisioned by the Legislature in enacting the NI Act 1881 and ideal justice or absolute justice in the name of fair trial cannot fail the intention of the Legislature.

12 Learned Magistrate has failed to consider that fair trial to the accused, particularly in those proceedings where the accused has to suffer severe consequences, always remained paramount consideration of the Legislature and judiciary. For the sake of speedy trial, principle of fair trial cannot be sacrificed.

13. As observed by the Apex Court in ***J.V. Baharuni and another vs. State of Gujarat and another*** reported in ***(2014)10 SCC 494*** "Speedy trial" and "fair trial" to a person are integral part of Article 21 of the Constitution of India and there is, however, qualitative different between the right to speedy trial and right of fair trial. Unlike a person right of fair trial, deprivation of the right to speedy trial does not per se prejudice him in prosecuting or defending himself. The right of speedy trial is in its very nature relative, which depends upon diverse circumstances and therefore, each case of delay in conclusion of a criminal trial has to be seen in the facts and circumstance of such case and right of speedy trial does not preclude the right of fair trial.

14 The trial Judge has also failed to notice the provisions of Section 143 of NI Act, which not only provides the adoption of procedure provided for summary trial in the provisions of Sections 262 to 265 (both inclusive) of Cr.P.C. but also provides that in case of conviction in a summary trial under this Section, sentence of imprisonment can be awarded only upto one year with or without fine upto Rs.5000/- and therefore, when, at the commencement of, or in the course of, a summary trial under this section, it appears to the Magistrate that the nature of the case is such that a sentence of imprisonment for a term, exceeding the term for which Magistrate has been empowered to impose in summary trial may have to be passed or that it is for any other reason undesirable to try the case summarily, the Magistrate shall after hearing the parties, record an order to that effect and thereafter recall any witness who may have been examined, and proceed further to hear or rehear the case in the manner provided by the Cr.P.C., which clearly indicates that Legislature envisioned not only the speedy trial but also the fair trial as the proceedings under Section 138 of NI Act are not purely civil in nature but it also leads to the curtailment of personal liberty of person as the Magistrate has been empowered to pass the sentence of imprisonment on the conclusion of proceedings initiated under NI Act and for this reason only the Apex Court in ***Mandvi Cooperative Bank Ltd. Case*** (referred supra) has also observed that it is not difficult to see that Sections 143 to 147 lay down a kind of a special code for the trial of offences under Chapter XVII of NI Act and these Sections were inserted in the Act by Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 to do away with all stages and processes in a regular criminal trial which normally cause inordinate delay in its conclusion and also to make the trial procedure as expeditious as possible without in any way compromising on the right of accused for a fair trial. Therefore, right of the accused for having a fair trial can never be ignored by any Court particularly where it leads to curtailment of personal liberty.

15 Considering its own judgments passed in ***Mandvi Cooperative Bank Ltd. And J.V. Baharuni's cases*** along with various other judgments, object of introducing Chapter XVII in the NI Act and the scheme to be followed by the Magistrate in a case thereunder has also been discussed and explained by the Apex Court in judgment rendered in ***Meters and Instruments Private Ltd. and another vs. Kanchan Mehta*** reported in ***(2018)1 SCC 560,*** which is the basis for findings rendered hereinafter.

16. The Apex Court, in ***Omparkash Shivprakash vs. K.I. Kuriakose and others*** reported in ***(1999)8 SCC 633,*** while dealing with similar provision of Section 16-A of the Prevention of Food Adulteration Act 1954, empowering the Judicial Magistrate of first Class to try the offence under Section 16(1) of the said Act in summary way, has observed that Chapter XXI of Cr.P.C deals with summary trial wherein Section 262 Cr.P.C. provides that procedure, specified for trial of summons cases, shall be followed for summary trial, but subject to some variations as necessary keeping in view provisions of special Code dealing with the case, and Chapter XX of Cr.P.C. is titled as "Trials of summons cases by Magistrates" wherein Section 251 of Cr.P.C. is a commencing provision which requires that on appearance of accused or bringing him before the Magistrate, the particulars of offence shall be stated to him and he shall be asked whether he pleads guilty or not and therefore, it has been held that if the Magistrate opts to hold summary trial 'trial' of offence under the said Act begins when the Magistrate asks the accused whether he pleads guilty or not as envisaged in Section 251 of the Code. It is further held that evidence in a 'trial' can be adduced only after recording the plea of accused as envisaged in the said Section.

17 Similarly, Section 143 of NI Act empowers the Court to try the cases summarily by applying Sections 262 to 265 (both inclusive) of Cr.P.C. 'as far as may be' applicable. Procedure for trial of summons case as provided in Sections 251 to 259 Cr.P.C. contained in Chapter XX of Cr.P.C., in view of provisions of Section 262 Cr.P.C., is to be followed in summary trial with variations keeping in view provisions of Sections 263 to 265 Cr.P.C. and in trial under NI Act, it shall be subject to further variations in consonance with provisions of NI Act. Section 251 Cr.P.C. provides that immediately on appearance of accused before the Magistrate, the particulars of the offence, of which he is accused, shall be stated to him and he shall be asked whether he pleads guilty or has any defence to make, but it would not be necessary to frame a formal charge. Therefore, trial in case of summary trial under NI Act shall also commence after asking the accused as to whether he pleads guilty or has any defence to make as envisaged in Section 251 Cr.P.C. In case of regular trial, other than summary trial and summons case trial, trial shall begin on framing of charge under provisions contained in Chapter XVII of the Cr.P.C.

18 Procedure of Section 262 of Cr.P.C. provides that procedure specified in Cr.P.C. for trial of summons case shall be followed except as provided in Sections 263 to 265 Cr.P.C. Section 263 Cr.P.C. provides the manner in which record in summary trial is to be maintained and in it Section 263 (f) of Cr.P.C. provides that after entering the necessary information as envisaged to Section 263(a) to 263 (e), the Magistrate has to record the offence complained of and the offence (if any), proved and thereafter to record the plea of accused and his examination, (if any), and then to record the findings and sentence or other final order with date on which the case terminated, whereas Section 264 Cr.P.C. provides that in every case, tried summarily, in which the accused does not plead guilty, the Magistrate shall record the substance of the evidence and a judgment containing a brief statement of the reasons for the finding. Therefore, as also held by the Apex Court in ***J.V. Baharuni's and Meters and Instruments Private Ltd.'s cases,*** the Magistrate is not expected to record evidence in a summary trial which he would have been, otherwise, required to record in a regular trial but to record substance of evidence and his judgment

should also contain a brief statement of reasons for findings and not elaborated reasons which otherwise he would have been required to record in regular trials. Section 143 of NI Act further qualifies that provision of Sections 262 to 265 of Cr.P.C. shall apply to summary trials under NI Act 'as far as may be'. Therefore, provisions of Sections 262 to 265 Cr.P.C. are to be applied with variation so as to follow the procedure adhering to provisions of NI Act.

19. Sub-section (2) of Section 262 Cr.P.C. provides that no sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under Chapter XXI of Cr.P.C. But provisions of first proviso to Section 143 of NI Act empowers the Magistrate to pass a sentence of imprisonment upto one year and an amount of fine exceeding Rs.5000/- on conviction in a summary trial. Therefore, limit to impose the sentence as provided under Section 262 (2) of Cr.P.C. is not applicable in the summary trial under NI Act but it shall be governed by second proviso of Section 143 of NI Act.

20. Second proviso to Section 143 of NI Act also empowers the Magistrate, if it appears to him, keeping the nature of case, that a sentence of imprisonment for a term exceeding the term provided under first proviso may have to be passed or that, for any other reason, it is undesirable to try the case summarily, to recall the witness who may have been examined and to proceed to hear or re-hear the case in the manner provided by the Cr.P.C. but after hearing the parties and recording the order to that effect. It gives discretion to the Magistrate either to proceed summarily or otherwise for a regular trial, as warranted in the facts and circumstances of the case.

21. Referring ***Mandvi Cooperative Bank Ltd.'s case*** the Apex Court in, ***J.V. Baharuni's and Meters and Instruments Private Ltd.'s cases (supra)*** has further observed that procedure of summary trials, to be adopted under Section 143 of NI Act, is subject to the qualification 'as far as possible' and it leaves sufficient flexibility of a procedure to be adopted by the Magistrate so as not to affect the quick flow of trial process and therefore Section 143 of NI Act coupled with the provisions of Section 145 of NI Act allows for the evidence of complainant to be given on affidavit in any inquiry, trial or other proceedings under the Cr.P.C. Section 2(g) of Cr.P.C. defines that inquiry means every inquiry other than a trial, conducted under Cr.P.C. by the Magistrate or the Court. Trial has not been defined anywhere in Cr.P.C. As held by the Apex Court in ***Omparkash's case*** for the purpose of present case, if Magistrate decides to try the case as summary trial or summons case trial then it has to commence on production or presence of accused under Section 251 Cr.P.C. on recording substance of accusation or putting Notice of Accusation to the accused as the case may be and proceedings before that are inquiry by the Magistrate.

22. Section 145 of NI Act provides filing of evidence of complainant on affidavit with further provision that the said evidence may, subject to all just exceptions, be led in evidence in any inquiry, trial or other proceedings under the Cr.P.C. Therefore, in a case under Section 138 of NI Act, the Magistrate is empowered to accept the evidence of complainant on affidavit even before the commencing of trial during its preliminary inquiry at the time of taking the cognizance of the offence under NI Act. The rider that the said affidavit shall be subject to all just exceptions means that the evidence, so filed on affidavit, shall be evidence 'admissible' under the Indian Evidence Act and further provision for reading the said affidavit in evidence in any inquiry, trial or other proceedings empowers the Magistrate not to ask for fresh affidavit on or after commencing of trial but to read the same affidavit in evidence again after the commencement of trial if the accused does not plead guilty.

23. Section 145(2) of NI Act provides for summoning and examining any person giving evidence on affidavit as to facts contained therein, if the Courts think fit to do so or on application of prosecution or the accused. In NI Act there is a slight departure to the procedure provided for a summary trial in Cr.P.C. where Magistrate has to record substance of evidence only and in a case under the NI Act, parties may file their evidence on affidavits and complainant or any other person giving evidence on affidavit 'may' be called by the Court suo moto, or 'shall' be summoned and examined on application of prosecution or the accused.

24. Section 143-A of NI Act, empowers the Court trying an offence under Section 138 of NI Act to order the drawer of cheque to pay interim compensation to the complainant, where drawer pleads not guilty to the accusation made in the complaint in summary trial or summons case trial or upon framing of charge in any other case. In summary case, charge is not framed. Therefore, in a 'regular trial' Magistrate has further option either to proceed with summons case trial or any other trial other than summary trial or summons trial.

25 As held by the Apex Court in ***J.V. Baharuni's case*** there is no straitjacket formula to try the cases falling under NI Act and the law provided therefor is so flexible that it is upto the prudent judicial mind to try the case summarily or otherwise based on the facts and circumstances of the case and the Courts while dealing with matters under NI Act should keep in mind that difference between the summary and summons trials for the purpose of NI Act is very subtle but has grave repercussion in the case of mistaken identification of trial and therefore, it is desirable from the Magistrate to mention specifically that as to whether trial is being conducted as a summons case or summary case.

26 As discussed hereinabove, combined reading of provisions of Chapter XVII of NI Act and Sections 262 to 265 of Cr.P.C. contained in Chapter XXI of Cr.P.C. coupled with the provisions of Chapter XX of Cr.P.C. indicates that for trying a case under NI Act the Magistrate, on presence of accused before him, after taking cognizance of an offence on complaint under Section 138 of NI Act, on the basis of evidence in the shape of affidavit and documents, has to decide the nature of trial i.e. summary trial under Section 143 of NI Act or regular trial as provided under second proviso to Section 143 of NI Act to be conducted in case and has to ask the accused whether he pleads guilty or has a defence to make by recording substance of accusation or putting notice of accusation or framing of charge as the case may be and response of accused thereto and thereafter, Magistrate will follow the following course depending upon particular eventuality.

A. Summary trial

(I) In case, accused, on putting substance of accusation, pleads guilty, the Magistrate after recording his plea shall convict him thereon in consonance with other relevant provisions of law including Sections 262 to 265 of Cr.P.C. dealing with summary trial.

(II) In case of continuing the trial as a summary trial for not pleading guilty by accused, as provided under Section 262 Cr.P.C. read with provisions of Section 143 of NI Act, the Magistrate has to follow the scheme of trial of summons case as provided under Chapter XX of Cr.P.C. But the Magistrate has not to follow the letters of provisions of Chapter XX but the scheme thereof, because Section 262 Cr.PC. providing procedure for summary trial states that for a summary trial, the procedure specified in Cr.P.C. for trial of summons case shall be followed with exceptions contained in Chapter XXI dealing with summary trials and further Section 143 of NI Act also provides that provisions of Sections 262 to 265 shall also apply to summary trial under NI Act 'as far as may be'. Therefore,

intent of Legislature is that Scheme of Chapter XX of Cr.P.C. dealing with trial of summons case shall be applicable to summary trials 'in principle' only which means that after presence of accused before the Magistrate, in response to the process issued against him after taking cognizance of offence by the Magistrate, he has to be informed about accusation against him but it would not be necessary to frame a formal charge or put a Notice of Accusation to him as required in a summons case but the Magistrate has to record in his order, the fact of putting the substance of accusation to him and substance of response of accused thereto and thereafter, before considering the evidence already filed by way of affidavit by complainant, to call the complainant for filing any further evidence, if any, and to call for evidence by accused in rebuttal thereto including summoning and examining any person giving evidence on affidavit as provided under Section 145 of NI Act. Adopting aforesaid procedure there would be substantial compliance of Section 254 of Cr.P.C. After completing this process, the Magistrate shall return his findings either acquitting or convicting the accused as provided under Sections 263 and 264 Cr.P.C.

B. Regular trial (trial other than summary trial)

In case the Magistrate resorts to the provisions of second proviso of Section 143 of NI Act and decides to proceed further for a trial other than summary trial then he has to follow the provisions provided for such trial under Cr.P.C. in letter and spirit and to conclude the regular trial by complying such provisions religiously.

(I) In case of summons case, trial, on appearance or bringing of accused before the Magistrate, before proceeding further, it would be necessary to put Notice of Accusation to accused as provided under Section 251 Cr.P.C. Thereafter, Magistrate shall proceed as per provision of Chapter XX of Cr.P.C, but definitely with variance, for adhering to the provisions of Chapter XVII of the NI Act.

(II) In case of regular trial, other than summary and summons case trial, the Magistrate has to frame charge against the accused, as provided in Chapter XVII of Cr.P.C. particularly under Section 211 Cr.P.C. Thereafter Magistrate has to follow procedure provided for such trial in Cr.P.C., of course with variations in consonance with provisions of NI Act.

27. In case where Magistrate, at first instance, decides to conduct summary trial, he is also empowered to switch over from summary trial to regular trial at any stage i.e. at the commencement or in the course as provided under second proviso to Section 143 of NI Act.

28 Magistrate, under Section 138 of NI Act, is empowered to impose sentence of imprisonment for a term extendable upto two years and to impose fine twice the amount of the cheque or with both.

29 In the present case, cheque amount is Rs.6,50,000/- and therefore Magistrate is empowered to impose fine upto Rs.13,00,000/-. It appears that Magistrate was intending to follow procedure for regular trial as a summons case and perhaps, therefore only, vide orders dated 15.3.2018 and 4.12.2018, the trial Magistrate had ordered to list the matter for 'Notice of Accusation' to accused. Though the Magistrate has not recorded any such reason for adopting the procedure of a 'summons case trial' instead of trying the case summarily which ought to have been done by the said Magistrate prior to ordering for listing the case for Notice of Accusation, however, the Apex Court, in the cases referred supra, has observed that the procedure adopted by the Magistrate will indicate that as to whether case was tried summarily or in a regular way, therefore, in present case, it can be inferred that

Magistrate has intended to opt for regular trial as the case was fixed for Notice of Accusation.

30 Further, the Magistrate has taken the cognizance of the case on the basis of preliminary evidence and other evidence filed by complainant with complaint and had summoned the accused for 17.1.2017. On 17.1.2017 accused was directed to furnish the personal and surety bonds which were furnished by accused and attested and accepted by Magistrate and thereafter time was granted, as prayed for, by accused, for filing an application under Section 145 of NI Act for summoning the complainant for examination. Subsequent thereto, the application was filed on 27.7.2017 which was considered and allowed on 15.3.2018 and 4.12.2018. On that day, after allowing the said application, case was ordered to be listed for Notice of Accusation to the accused.

31 It is evident from record that on the very first day of appearance of accused neither charge was framed nor Notice of Accusation was put to him or it was recorded that substance of accusation was communicated to him for his response as to whether he pleads guilty or has any defence to make. After putting the substance of accusation/Notice of Accusation to the accused, in case of not pleading guilty by him, the Magistrate would have either recorded substance of accusation to follow the procedure in summary trial or would have followed procedure for regular trial after putting notice of accusation or framing the charge as the case may be and thereafter would have asked the complainant to lead any further evidence, if any, in support of his case. Keeping in view the fact that the Magistrate had proposed Notice of Accusation indicating that he was intending to follow regular trial procedure the occasion would have arisen to the accused to invoke the provisions of Section 145(2) of NI Act to pray for summoning and examining the persons who might have given evidence on affidavit, only after filing/leading any other further evidence by the complainant not prior to that. At the first, trial will commence thereafter application is to be undertaken. In given facts and circumstances, procedure adopted by the trial Court is amounting to putting the bullock behind the cart.

32 The trial Court has committed patent illegality in allowing the application under Section 145 of NI Act on 15.3.2018/4.12.2018 as well as in disallowing the same application on 16.1.2019. Serious mistake committed by the trial Court is not mere irregularity but illegality. Therefore, orders dated 15.3.2018 and 14.3.2018 allowing the application and order dated 16.1.2019 rejecting the same application filed under Section 145 of NI Act are set aside with direction to the trial Court to consider this application after putting the Notice of Accusation to accused and calling for further evidence, if any, to be filed/led on behalf of complainant in support of his case.

33 Petition is allowed in aforesaid terms with direction to parties to appear before the trial Judge on ***8.7.2019*** whereafter the trial Judge shall proceed further in accordance with law as discussed above. Record be sent back immediately.

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

Shri Purushotam Lal and another ....Petitioners.

-Versus-

Shri Ramesh Chand .....Respondent.

CMPMO No.: 67 of 2019

Date of Decision: 18.06.2019

Code of Civil Procedure, 1908- Order IX Rule 7– **Limitation Act, 1963 (Act)**- Section 5- Setting aside ex-parte order- Limitation and condonation of delay- Held, procedure is hand maiden of justice and its purpose is to further cause of justice and not to create hurdles in course of delivery of justice- Dismissal of application for setting aside ex-parte order simply on ground that it was filed after period of 30 days and there was no prayer for condonation of delay improper- Trial court could have provided opportunity to file application under Section of Act for condonation of delay- Order of trial court set aside. (Paras 4 & 5)

For the petitioner: Mr. Rajiv Rai, Advocate.
For the respondent: Mr. Dalip Kumar, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition, the petitioners have prayed for setting aside order dated 01.12.2018, passed by the Court of learned Civil Judge, Court No. IV, Hamirpur in CMA No. 325 of 2017, Civil Suit No. 198/2013, vide which, an application filed by the present petitioners under Order 9 Rule 7 of the Code of Civil Procedure (hereinafter referred to as 'the Code') for setting aside *ex parte* proceedings dated 30.05.2017, has been dismissed.

2. It is a matter of record that the present petitioners, who are the defendants before the learned Trial Court, were ordered to be proceeded against *ex parte* on 30.05.2017, when no one appeared on their behalf before the learned Trial Court. It is also a matter of record that after proceeding against the petitioners *ex parte*, learned Trial Court fixed the case for the purpose of *ex parte* arguments for 06.10.2017. It is also a matter of record that the case was not heard on 06.10.2017 and on the request of plaintiff, the same was adjourned for the purpose of arguments for 29.12.2017 and on the said date, an application under Order 9 Rule 7 of the Code stood filed by the present petitioners praying for setting aside of order dated 30.05.2017 vide which they were proceeded against *ex parte*. Said application was dismissed by the learned Trial Court, *inter alia,* by holding that the same was filed beyond the period of 30 days and the same was not supported by an application praying for condonation of delay.

3. I have heard learned counsel for the parties.

4. What weighed with the Court while dismissing the application, as already mentioned above, is the fact that there was no prayer for condonation of delay in filing the application under Order 9 Rule 7 of the Code. In my considered view, learned Trial Court has adopted a slightly hypertechnical attitude while dealing with the application. It can not be said that there was an inordinate delay on the part of the petitioners in filing the application for setting aside the *ex parte* order. As I have already mentioned above, on 30.05.2017 after proceeding against the petitioners as *ex parte,* learned Trial Court had ordered the listing of the case for *ex parte* arguments for 06.10.2017. No arguments took place on the said date and the case was adjourned for 29.12.2017 and on the said date, an application was filed by the present petitioners for setting aside the *ex parte* order. Learned Trial Court could have given an opportunity to the present petitioners to file an application under Section 5 of the Limitation Act and had the present petitioners failed to avail the opportunity, then learned Trial Court could have had passed appropriate orders on the

application filed under Order 9 Rule 7 of the Code. But, simply because the application was filed beyond the period of 30 days and there was no application accompanying the same praying for condonation of delay, the Court should not have adopted a hypertechnical approach, because it is settled position of law that procedure is the handmaiden of justice and the purpose of the procedure is to further the cause of justice and not to create hurdles in the course of delivery of justice. Accordingly, this petition is allowed. Impugned order dated 01.12.2018, vide which an application filed by the petitioners under Order 9 Rule 7 of the Code was dismissed, is set aside. Order dated 30.05.2017 vide which the petitioners/defendants were ordered to be proceeded against *ex parte* is recalled. The petitioners/defendants are permitted to join the proceedings in the Civil Suit. This is subject to the petitioners' paying cost to the tune of Rs.10,000/- to the respondent/plaintiff.

5. This Court has been informed that the petitioners/defendants before the learned Trial Court have to lead their evidence. It is clarified that learned Trial Court shall give one opportunity to the petitioners/defendants to lead their evidence and for this purpose, Court Assistance shall also be permitted. If after grant of such opportunity, the petitioners fail to lead their evidence, then no further opportunity shall be granted by the learned Court below. These directions, but natural, are subject to the factum of the cost being paid by the petitioners to the respondent on the next date of hearing by way of a Demand Draft. Learned Trial Court is further directed to make an endeavour to decide the Civil Suit as expeditiously as possible.

6. Parties through counsel are directed to appear before the learned Trial Court on ***22nd July, 2019.***

Petition stands disposed of in above terms, so also pending miscellaneous applications, if any.

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BEFORE HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Rafiq Mohammad ... Petitioner.
Versus
State of Himachal Pradesh ...Respondent

Cr.MP(M) No.729 of 2019
Reserved on : 19.6.2019
Date of decision : 21st June,2019

Code of Criminal Procedure, 1973 – Section 438 - Pre-arrest bail in rape case– Availability- Circumstances- Held, there is dispute between accused and complainant party- FIR registered after about three months of alleged incident- No explanation for delay- Parties arrived at compromise but terms thereof do not refer to any such incident of rape- Accused, a young person- No purpose would serve by sending him to custody- Bail grnated subject to conditions. (Paras 7 to 9)

For the Petitioners : Mr. R.L. Chaudhary and Mr. H.R. Sidhu, Advocates.
For the Respondent : Ms. Ritta Goswami, Additional Advocate General and Ms. Divya Sood, Deputy Advocate General for State.

The following judgment of the Court was delivered:

Anoop Chitkara, Judge

The present petition is under Section 438 of the Code of Criminal Procedure, seeking anticipatory bail in F.I.R. No.07/2019, dated 26.4.2019, registered at Women Police Station, Sadar Bilaspur, District Bilaspur, H.P., under Sections 376, 506, 34 of the Indian Penal Code.

2. ASI Suman Lata, from Women Police Station, Sadar Bilaspur, District Bilaspur, H.P., was present on the last date, when the matter was heard. She had brought the police file. I have seen the status report, which is on record.

3. I have heard Mr. R.L. Chaudhary and Mr. H.R. Sidhu, learned counsel for the petitioner and Ms. Ritta Goswami, learned Additional Advocate General for the respondent/State. Learned counsel for the petitioner states that the accused had joined the investigation as and when the Investigating Officer so directed him. Learned Additional Advocate General did not dispute this averment.

4. The gist of the First Information Report and the investigation is as follows:

(a) That the victim (name withheld) gave a written complaint to the Superintendent of Police, Bilaspur, in which she wanted F.I.R. under Sections 376, 506, 354 of the Indian Penal Code to be registered against Rafiq Mohammad, the present bail petitioner and one Akbar @ Rinku,.

(b) She stated that on 5.1.2019 at around 9:00 pm. (night), she had gone with her husband to drop him to the vehicle in which he was taking the buffaloes to Kurali market in Punjab. He left, but however, she did not accompany him up to Kurali and she returned back to her home from a lonely forest road.

(c) On the way, in an isolated place, the accused were hiding and on seeing the victim, they came towards her.

(d) The accused Rafiq mohammad, the present bail petitioner, caught hold of the victim from both her arms and then opened the sting of her Salwar, thereafter, he penetrated his penis in her vagina and committed rape upon her. The victim raised hue and cry and then Akbar @ Rinku, gagged her mouth with his palm and warned her that if she raises commotion then she would be killed and her dead body would be buried on some side of the road.

(e) After committing rape and indecent assault, the accused persons left from the spot. While going back, they threatened her by calling her name that if she would tell this incident to anyone, then she would not be spared.

(f) They kept on threatening her repeatedly and on 6.4.2019, she told the entire incident to her husband.

(g) Thereafter, she alongwith her husband and father-in-law went to Police Station, Jhanduta to get the F.I.R. registered. However, the Police did not register any F.I.R. on 10th, 11th and 12th of April, 2019 and to the contrary instigated the villagers to create pressure on the victim. Due to this pressure, she entered into compromise with them.

(h) The accused persons threatened her openly by calling her name that she could do nothing to them. They also threatened her that they would again commit rape upon her. She stated that it would put her honour at stake, therefore, she asked for registration of the present F.I.R. Hence, F.I.R. under Sections 376, 506, 34 of the Indian Penal Code was registered.

5. The petitioner, in his bail petition, has annexed Annexure P-1 which is a compromise between the victim and the accused persons. In this compromise, the accused persons have asked for forgiveness from the victim. However, what was the fault for which they were asking for forgiveness, is not mentioned. It is further mentioned that in future, they would live with love and affection and will not nurture any grudge against each other.

6. Vide Annexure P-2, the petitioner has also placed on record the proceedings of the Panchayat dated 20.4.2019. In this context, there is reference of the previous compromise dated 12.4.2019 between the parties, in which some money transaction is also mentioned. Surprisingly, the Panchayat was also giving reference of a sum of Rs.5,00,000/- to be paid through cheque. It was further mentioned in this compromise that all the intellectuals of the Panchayat wanted to ascertain the truthfulness of the dispute. To ascertain that, they used the time tested method of oath before, their holy book 'Kuran'. But, when Kareem and Saleem (husband of the victim), were asked to swear on the 'Kuran' then they ran away from the spot. Because of this conduct, the Panchayat presumed that these boys are innocent. The Panchayat also asked that there is no need to pay a sum of Rs.5,00,000/- and it is further stated that the allegations of scuffle and beatings are false.

7. The most material evidence which can be gathered from reading of Annexure P-2, is that there is no mention of any rape, rather in the last portion of Annexure P-2, the proceedings of Panchayat, there is a mention of scuffle due to assault. Even, in Compromise (Annexure P-1), there is no mention of rape. There is no doubt that this kind of Kangaroo Panchayat, has no place in the eyes of law. This is a matter of great shame that still Panchayats sit over the Investigation Agencies and Judiciary and try to control and decide those matters between the parties which are beyond their jurisdiction and scope. Neither, anyone can look into such Annexures for whatsoever purpose, nor I am inclined to look into such Annexures.

8. On the first look, all the allegations appear to be very serious in nature. However, in the light of the fact that there is dispute between the complainant and the accused, her credibility can be ascertained only when she is put to cross examination during trial. I am satisfied that no purpose will be served if the bail petitioner is sent to judicial custody. Therefore, I am inclined to grant bail to the petitioner, on the following grounds.

a) In the status report, there is no mention of previous criminal history of the bail petitioner.
b) The bail petitioner is only 22 years of age. At such a young age to send him to judicial custody, would be making him confine with the hardened criminals. It might have traumatic psychological effect on him.
c) The incident was of 5.1.2019 and even if everything is believed, then there is no believable explanation that why for the first time, she went to the Police Station, only on 10.4.2019, i.e. after 3 months.
d) As per the allegations of the prosecutrix, she had narrated the incident to her husband on 6.4.2019, so this delay creates some doubt and at least makes out a case for bail.

e) The petitioner is a native and permanent resident of address stated in Memo of Parties. Therefore, his presence can always be secured. I am of the considered view that, *prima facie*, petitioner has made out a case for grant of bail. His custodial interrogation is not required at all.

9. In the result, the present petition is allowed. In the event of arrest of the petitioner, he shall be released on bail, in connection with the FIR mentioned above, on his furnishing personal bond in the sum of Rs.5,000/- with one surety in the like amount to the satisfaction of the Arresting Officer.

10. This Court is granting the protection subject to the conditions mentioned in this order. The petitioner undertakes to comply with all directions given in this order and the furnishing of bail bonds by the petitioner is acceptance of all such conditions:

a) The petitioner is directed to join the investigation as and when called by the Investigating Officer. It shall be open for the Investigating Officer to call him as and when he feels such a necessity. The petitioner undertakes to appear before the Investigating Officer as and when directed to do so. However, whenever the investigation takes place within the boundaries of the Police Station or Police Post, then the Petitioner shall not be called before 9 A.M and shall be let off before 5 p.m.

b) The Petitioner shall neither influence nor try to control the investigating officer, in any manner whatsoever.

c) The petitioner undertakes not to contact the complainant, to threaten or browbeat her or to use any pressure tactics.

d) The Petitioner undertakes not to make any inducement threat or promise, directly or indirectly, to the investigating officer or any person acquainted with the facts of the case to dissuade him from disclosing such facts to the Court or any Police Officer or tamper with the evidence.

e) The Petitioner shall not hamper the investigation.

f) In case of the launching of the prosecution, the petitioner undertakes to attend the trial and to appear before the Court which issues the summons or warrants and shall furnish fresh bail bonds to the satisfaction of such Court.

g) In case the petitioner tries to contact the victim or her family members or to influence them or threaten them, then either the victim or the State shall have complete rights to bring such incident to the notice of this Court by filing an application for cancellation of bail under Section 439 (2) of the Code of Criminal Procedure.

11. Any observation made herein above shall not be taken as an expression of opinion on the merits of the case and the trial Court shall decide the matter uninfluenced by any observation made herein above.

Petition stands allowed in the aforesaid terms.

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

Rajinder Singh ..Applicant/Review Petitioner.

Versus

Het Ram Bakhirta and others ....Respondents.

C.M.P.(M)No. 716 of 2019 in
Review Petition No. 71 of 2019.
Date of decision: 19.6.2019.

Administrative Law- Expression 'fraud'- Meaning and effect – Held, in Administrative law meaning of fraud has been extended to failure to disclose all relevant and material facts which one has a positive duty to disclose- It is deliberate act or omission to mislead other to gain undue advantage- Effect of fraud is that it renders proceeding or transaction as nullity. (Para 10)

Limitation Act, 1963 (Act)- Sections 3 & 17- Time barred suit- Filing of, whether amounts to fraud upon defendant?- Held, mere filing of time barred suit is not a fraud as there are provisions in Act which entitle party to seek enlargement of time by furnishing a fresh cause of action. (Para 17)

Case referred:

S.P. Changalvaraya Naidu vs. Jagannath, 1994 (1) SCC 1

For the Applicant/Review Petitioner : Mr. Rajeshwar Thakur, Advocate.

For the Respondents : Nemo.

The following judgment of the Court was delivered:

***Tarlok Singh Chauhan, Judge* (Oral).**

CMP(M) No. 716 of 2019

By medium of this application, the applicant/ petitioner has sought condonation of delay of 1 year, 8 months and 8 days that has crept up in filing of the review petition.

2. It appears that the applicant/petitioner simply wants to ensure that the respondents are in someway or other harassed and driven to unnecessary and unwarranted litigation. Even when the petitioner had earlier approached this Court by way of CMP(M) No. 836/2016 in RSA No. 402/2017, decided on 13.9.2017, the review of which order is sought by way of instant petition. This Court had clearly observed therein that the applicant resorted to falsehood as is evident from para-6 of the said order, which reads as under:

> *"6. At the outset, I may observe that the applicant has resorted to falsehood while filing the application seeking condonation of the delay. Why I observe so is because in the appeal so filed by the applicant before the learned first appellate Court, the notice issued to respondents No.2 and 3 were received back un-served as is evident from the order passed on 28.3.2006, when for the first and last time, Mr. Jagdish Rajta, Advocate, had put in appearance on behalf of the applicant. However, thereafter, it would be noticed that it is Mr.*

S.L. Ranjta, Advocate, who had put in appearance on behalf of the applicant and also took steps for the service of the un-served respondents in the appeal, meaning thereby that not only the applicant was pursuing the litigation before the learned first appellate Court, but he had also been imparting instructions to Mr. S.L. Ranjta, Advocate, as the un-served respondents came to be duly served on the steps taken by the applicant as is evident from the order passed b the learned first appellate court on 13.6.2007."

3. It was thereafter that the Court proceeded to dismiss the application for limitation without entering into the factual matrix of the issues raised in the appeal.

4. Even this petition is highly time barred and has been filed after 1 year, 8 months and 8 days of the passing of the impugned order. Even if this fact is ignored, I really fail to understand as to how the respondents could be said to have committed a fraud in filing the suit for specific performance as is now contended by the petitioner, more particularly, when the same was decreed in his/their favour by the trial Court and the appeal filed against the same by the present applicant/petitioner also stood dismissed.

5. Here first of all the meaning of fraud is required to be considered. Normally, the meaning of fraud is to cheat the person with a view to gain something. The meaning of fraud is required to be elaborated hereunder :

"Fraud means an intrinsic, collateral act, and fraud of an egregious nature would vitiate the most solemn proceedings of court of justice. Fraud is an act of deliberate deception with a design to secure something, which is otherwise not true. The expression fraud involves two elements, deceit and injury to the person deceived. It is a cheating intended to get an advantage."

6. Word 'fraud' means deliberate deception, treachery or cheating which is intended to gain certain advantage.

7. 'Fraud' means and includes any of the following acts committed by a party to a contract with his connivance, or by his agent with intent to deceived another party thereto or his agent, or to induce him to enter into the contract.

8. Now, 'fraud' is defined in Section 17 of the India Contract Act, 1872, which runs thus:

" 'Fraud' means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:

(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent,

***Explanation**:- Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person*

keeping silence to speak, or unless his silence is, in itself, equivalent to speech."

9. 'Fraud' is false representation by one who is aware that it was untrue with an intention to mislead the other who may act upon. It to his prejudice and to the advantage of the representor.

10. In Administrative Law, it has been extended to failure to disclose all relevant and material facts which one has a positive duty to disclose. It is thus understood as deliberate act or omission to mislead other to gain undue advantage. 'It consists of some deceitful practice of wilful device, resorted to with intent to deprive another of his right or in some manner to do him an injury' (Black's Law Dictionary). Effect of fraud on any proceeding, or transaction is that it becomes nullity. Even the most solemn proceedings stand vitiated if they are actuated by fraud. Such being the nature and consequence of it the law requires not only strict pleading of it but strict proof as well.

11. A "fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. (See: ***S.P. Changalvaraya Naidu v. Jagannath (1994 (1) SCC 1).***

12. In Webster's Third New International Dictionary "fraud" in equity has been defined as an act or omission to act or concealment by which one person obtains an advantage against conscience over another or which equity or public policy forbids as being prejudicial to another.

13. In Black's Legal Dictionary, "fraud" is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or surrender a legal right; a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury.

14. It is defined in Oxford Dictionary as, 'using of false representations to obtain an unjust advantage or to injure the rights or interests of another'.

15. In Webster it is defined as, 'deception in order to gain by another's loss; craft; trickery, guile; any artifice or deception practiced to cheat, deceive, or circumvent another to his injury.

16. From dictionary meaning or even otherwise fraud arises out of deliberate active role of representator about a fact, which he knows to be untrue yet he succeeds in misleading the representee by making him believe it to be true. The representation to become fraudulent must be of fact with knowledge that it was false.

17. Judged in light of the aforesaid, this Court has no hesitation to conclude that the plea of fraud is absolutely fallacious and cannot be accepted as the mere filing of a time barred suit (even if that be so) by itself cannot termed be a 'fraud' as there are adequate provisions under the law which entitle a party to seek enlargement of time or enlarge the time period by furnishing a fresh cause of action.

18. This is precisely what has been done in the instant case and it is only thereafter that the decree came to be passed in favour of the respondent/plaintiff.

19. Normally, this Court in cases of the present kind would not hesitate to not only dismiss the petition but would also proceed to impose exemplary costs, however, since

no notice of this application/petition has been issued to the opposite side, therefore, the Court with great reluctance restrains itself from imposing any costs. Since there is no merit in this application, the same is dismissed.

Review Petition No. 71 of 2019

20. In view of the dismissal of the application under Section 17 of the Limitation Act for condonation of delay in filing the Review Petition, this Review Petition cannot be held to be legally and validly constituted and, therefore, dismissed as such. Pending application(s) if any, also stands disposed of.

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

Ram Gopal ...Petitioner
Versus
Vidya Devi .... Respondent

Cr.MMO No. 550 of 2018
Date of Decision 13th June, 2019

Code of Criminal Procedure, 1973 (Code)- Section 125(5) & 127(2)– Maintenance- Enhancement by Magistrate- Order upheld by Sessions Judge in revision- Petition against- Petitioner challenging order of enhancement on ground that wife is living in adultery- Held, order of enhancement of maintenance cannot be challenged on ground of adultery of wife- Petitioner should have recourse to 125(5) and 127(2) of Code- Petition under Section 482 of Code not maintainable on such ground. (Paras 11 to 14)

For the Petitioner: Mr.Y.K. Thakur Advocate with Mr.Deepak Advocate.
For the Respondent: Mr. B.L. Soni Advocate with Mr.Ashish Kumar, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.(Oral)

Present petition has been filed seeking the following relief:-

"1. Quash the (Annexure P-1) dated 1.11.2018 passed by the learned District and Sessions Judge, Sirmaur at Nahan, whereby the maintenance order at the enhanced rate of Rs.5000/- (Annexure P-2) passed on 6.6.2018 by learned Chief Judicial Magistrate, Sirmaur at Nahan in case bearing No. 335/4 of 2013 titled as Vidya Devi vs. Ram Gopal" which stands upheld; and also (Annexure P-2) passed by the learned CJM, Sirmaur at Nahan whereby the maintenance order dated 6.6.2018 was passed against the petitioner (respondent below):

By taking into account, consideration the DNA Profile Test Report dated 26.12.2016 (Annexure P-4) and judgment and decree dated 31.8.2017 rendered in a Civil Suit beairng No. 134/1 of 2009

titled as Ram Gopal vs. Vidya Devi and others (Annexure P-5 and P-5(colly)

Or

In the alternative, with a further prayer to issue directions to the learned CJM Sirmaur at Naha to allow the petitioner (respondent below) to place the DNA profile test report dated 26.12.2016 (Annexure P-4) and judgment and decree dated 31.8.2017 rendered in a Civil Suit No. 134/1 of 2009 titled as Ram Gopal vs. Vidya Devi and others (Annexure P-5 and P-5(Colly) on record and consider the case in the light of the same and decide in accordance with law.

2 Vide order dated 6.6.2018, passed in application/petition filed under Section 127 Cr.P.C. by respondent/wife, learned Chief Judicial Magistrate has enhanced the maintenance allowance in favour of the respondent and has awarded Rs.5000/- per month maintenance payable to her.

3 Revision petition preferred by the petitioner under Section 397 Cr.P.C. stands dismissed by learned Sessions Judge vide impugned order dated 1.11.2018.

4 The only ground taken for filing the present petition is that there is a DNA Profiling Test Report indicating that the petitioner herein is not biological father of children, claimed to have born out of wedlock of petitioner and respondent, and the said DNA report, though has been placed on record as a piece of evidence in Civil Suit No. 134/1 of 2009 titled as Ram Gopal vs. Vidya Devi, which stands decided on 31.8.2017, but could not be placed on record before learned Chief Judicial Magistrate or learned Sessions Judge during adjudication of claim of enhancement of maintenance allowance put forth by the respondent/wife. It is further case of petitioner that after dismissal of aforesaid suit, the petitioner has preferred a Civil Appeal No. 100 of 2017 titled Ram Gopal vs. Vidya Devi, which is pending adjudication before learned Additional District Judge, Sirmaur at Nahan.

5. It is also case of the petitioner that DNA Profiling Test Report, received from the H.P. State Forensic Science Laboratory, Junga, is establishing that respondent/wife is living in adultery and therefore, the impugned order dated 6.6.2018 passed by learned Chief Judicial Magistrate enhancing the amount of maintenance and also order dated 1.11.2018 passed by learned Sessions Judge, affirming the said enhancement, deserve to be quashed after taking into consideration the DNA Profiling Test Report.

6 It is the case of the petitioner that at the time of adjudication of proceedings qua awarding maintenance or enhancing the maintenance allowance, the DNA report could not be produced and now the said order of enhancing maintenance passed by trial Court stands confirmed by learned Sessions Judge and therefore, the petitioner has no remedy except filing the present petition for redressal of his grievance based on DNA report.

7 Learned counsel for the petitioner has also contended that enhancement has been awarded by learned Magistrate from the date of filing of petition, which has been affirmed by learned Sessions Judge, by ignoring the fact that there is no delay in adjudication of said application on the part of petitioner, rather proceedings were delayed on account of conduct of respondent/wife.

8 Learned counsel for the respondent submits that merely on the basis of DNA Profiling Test Report being relied upon by the petitioner, it cannot be said that it has been established on record conclusively that the respondent/wife is living in adultery and the petitioner has to prove not only the DNA Profiling Test Report in appropriate proceedings but

also contents and conclusion thereof in accordance with law so as to establish his plea so as to repel the claim of respondent. It is also submitted that as the civil suit filed by petitioner has been dismissed, production of DNA report therein is of no help to the petitioner.

9 Learned counsel for the respondent has controverted the plea raised on behalf of the petitioner stating that in any case, the respondent was entitled for enhancement of maintenance from the date of filing of petition, and thus it hardly matters that the petition has been decided within one year or thereafter.

10 I find that the contention of the petitioner that he has no other remedy except filing present petition for addressing issue raised in present petition, is misconceived. Chapter IX of Criminal Procedure Code deals with maintenance of wives, children and parents and it provides a complete procedure for the disputes relating to such maintenance.

11. Section 125(4) of Cr.P.C. provides that no wife shall be entitled to receive an allowance for maintenance or interim maintenance and expenses of litigation, as the case may be, from her husband under Section 125 Cr.P.C., if she is living in adultery. Section 125(5) Cr.P.C. provides the efficacious and alternative statutory remedy to the petitioner, which reads as under:-

> ***"125(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order."***

12 Further, Section 127(2) Cr.P.C. also empowers the Magistrate to cancel or vary any order made under Section 125 Cr.P.C. when it appears to the Magistrate that it is necessary to do so in consequence of any decision of a competent Civil Court, which reads as under:-

> ***"127(2) Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under Section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly."***

13. Petitioner is relying upon a report to set aside impugned orders passed by learned Magistrate and learned Sessions Judge, which was never placed before them. As noticed above, law provides a remedy to the petitioner to approach the trial Magistrate with such report, which has not been availed by him.

14 As discussed supra, particularly, in view of specific provision of Sections 125(5) and 127(2) Cr.P.C., providing statutory alternative efficacious remedy to the petitioner, petitioner is not entitled for invoking jurisdiction of this Court either under Section 482 Cr.P.C. or Article 227 of Constitution of India and accordingly, it is dismissed with liberty to the petitioner to have recourse to appropriate remedy as available to him under law. Needless to say that claim and counter claim of the parties, including the evidentiary value of the DNA Profiling Test Report, have not been adjudicated on merits by this Court and all such contentions available to the parties are to be adjudicated by the competent Court in accordance with law as and when occasion arises to do so. Petition stands disposed of including all pending miscellaneous application(s), if any.

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BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA, J

Ram Kumar .....Petitioner
Versus
State of Himachal Pradesh ...Respondent

Cr.MP(M) No. 588 of 2019
Decided on : 18.06.2019

Code of Criminal Procedure, 1973 - Section 439 – Regular bail in case registered for kidnapping, rape and for offences under Protection of Children from Sexual Offences Act etc.- Grant of- Circumstances- Held, FIR disclosing case of elopement of victim with some unknown person- In first statement recorded under Section 164 of Code, victim stating of her having gone with her own volition and without any pressure from accused as her parents wanted to get her marriage solemnized against her will- But subsequently changing her stand and getting another statement recorded that accused made her to go with him and also sexually assaulted- Victim changing her stands- Accused in custody since long- Investigation complete and trial yet to commence- Bail granted subject to conditions. (Paras 5, 6 & 11)

Cases referred:
Dataram Singh vs. State of Uttar Pradesh & Anr., Criminal Appeal No. 227/2018, decided on 6.2.2018
Prasanta Kumar Sarkar vs. Ashis Chatterjee and Another, (2010) 14 SCC 496
Sanjay Chandra vs. Central Bureau of Investigation, (2012)1 SCC 49

For the Petitioner : Mr. Rajesh Kumar Parmar, Advocate.
For the Respondent: M/s Ashwani Sharma & Sanjeev Sood, Additional Advocate Generalswith Mr. Sunny Dhatwalia, Assistant Advocate General.
ASI Yog Raj, P.S. Ramshehar, Baddi, Distt. Solan, is present in person.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge *(oral)*

Bail petitioner, namely, Ram Kumar, who is behind the bars w.e.f. 13th September, 2018, has approached this Court in the instant proceedings filed under Section 439 of the Code of Criminal Procedure (for short 'Cr.P.C.) for grant of regular bail in case FIR No. 31/2018, dated 18.08.2018, under Sections 363 & 376 of the Indian Penal Code (for short 'IPC') and Section 6 of the Protection of Children from Sexual Offences Act (for short 'POSCO Act') and Section 6 3(1) W of the Scheduled Castes and Tribes (Prevention of Atrocities) Act, (for short 'SC/ST Act'), registered at Police Station, Ramshehar.

2. Sequel to order dated 29.5.2019, ASI Yog Raj has come present alongwith the record. Mr. Ashwani Sharma, learned Additional Advocate General, has also placed on record status report, prepared on the basis of the investigation carried out by the Investigating Agency. Record perused and returned.

3. Close scrutiny of record/status report reveals that FIR, detailed above, came to be lodged at the behest of complainant Bant Ram, who got recorded his statement recorded under Section 154 Cr.P.C., alleging therein that on 17th August, 2018, victim/minor/prosecutrix (hereinafter referred to as 'prosecutrix') went missing and he has suspicion that some unknown person made her to elope with him. On the basis of the aforesaid statement having been made by the complainant, formal FIR, as detailed hereinabove, came to be lodged against unknown person under Section 363 IPC. Subsequently, on 25th August, 2018, police recovered prosecutrix from Women Police Station, Baddi. Statement of the prosecutrix was got recorded under Section 164 Cr.P.C. in the Court of learned Judicial Magistrate 1st Class, Nalagarh, wherein she stated that her parents wanted to marry her against her wishes and they were not ready to solemnize her marriage with bail petitioner-Ram Kumar. She further stated before the Magistrate that on 16th August, 2018, at about 4.30. a.m., she went to Gamberpul from her house, from where she went to Mandi. She categorically stated in her statement that no wrong has been committed upon her by bail petitioner-Ram Kumar. Subsequently, on 6th September, 2018, prosecutrix again got recorded her statement to the police that on 17th August, 2018, bail petitioner came to her house whereafter they both went to Sunder Nagar. Till 24th August, 2018, both petitioner and prosecutrix stayed at the house of person, namely, Meena, who happened to be friend of prosecutrix. Allegedly, during this period, bail petitioner, sexually assaulted prosecutrix against her wishes.

4. On the basis of the aforesaid statement having been made by prosecutrix, case under Section 376 IPC, Section 6 of POSCO Act and Section 3(1) W of SC/CT Act came to be lodged against the present bail petitioner. On 13th September, 2018, fresh statement of prosecutrix was got recorded under Section 164 CR.P.C, where she alleged that bail petitioner made her run from her house and thereafter, sexually assaulted her against her wishes. Investigation in the case is complete and challan stands filed in the competent Court of law. The evidence is yet to commence.

5. Having heard learned Counsel representing the parties and perused the material available on record, this Court finds force in the argument of Shri Rajesh Kumar Parmar, learned Counsel representing the petitioner that prosecutrix had prior acquaintance with the bail petitioner and they were known to each other for a quite considerable time. Similarly, this Court finds that initially prosecutrix in her statement recorded under Section 164 Cr.P.C., categorically stated that she with her own volition and without there being any pressure from bail petitioner, had gone to Mandi. In her statement, she categorically stated that bail petitioner committed no wrong with her and since her parents were averse to her marriage with bail petitioner, she ran from her house. Subsequently, on 6th September, 2018, prosecutrix took u-turn and stated in her statement made under Section 164 Cr.P.C that she was made to run from her house by bail petitioner, who during her stay also sexually assaulted her against her wishes. But this Court having carefully perused material adduced on record is convinced and satisfied that at no point of time, bail petitioner compelled prosecutrix to join his company. She with her own volition, ran away from her house alongwith bail petitioner. Though, in the case in hand, record reveals that at the time of alleged incident, the age of the prosecutrix was 17years 4 months, but having noticed conduct of prosecutrix, it cannot be concluded that she was incapable of understanding the consequences of her being in the company of bail petitioner, who admittedly, after having received information that case has been registered against him, dropped her at Women Police Station, Baddi.

6. Though, aforesaid aspects of the matter are to be considered and decided by the Court below on the totality of evidence collected on record, but having perused the

record, this Court sees no reason to allow bail petitioner, who is already behind the bars for about 9 months, to incarcerate in jail for an indefinite period, especially when guilt, if any, of him is yet to be proved, in accordance with law by prosecution by leading cogent and convincing evidence. Moreover, the investigation, in the present case is complete and nothing remains to be recovered from the petitioner, as such, no such fruitful purpose would be served, if freedom of the petitioner is curtailed for an indefinite period. Further, no material, whatsoever, has been placed on record by the Investigating Agency to show that in the event of grant of bail, petitioner may flee from justice.

7. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, ***Dataram Singh vs. State of Uttar Pradesh & Anr***.,decided on 6.2.2018, has categorically held that a fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby, that a person is believed to be innocent until found guilty. Hon'ble Apex Court further held that while considering prayer for grant of bail, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Hon'ble Apex Court further held that if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimized, it would be a factor that a judge would need to consider in an appropriate case. The relevant paras of the aforesaid judgment are reproduced as under:

> ***2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.***
>
> ***3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.***
>
> ***4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain***

whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.

5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons

8. The Hon'ble Apex Court in ***Sanjay Chandra versus Central Bureau of Investigation*** (2012)1 Supreme Court Cases 49; held as under:-

" The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of

disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

9. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise, bail is not to be withheld as a punishment. Otherwise also, normal rule is of bail and not jail. Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

10. The Hon'ble Apex Court in ***Prasanta Kumar Sarkar v. Ashis Chatterjee and Another*** (2010) 14 SCC 496, has laid down the following principles to be kept in mind, while deciding petition for bail:

- ***whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;***
- ***nature and gravity of the accusation;***
- ***severity of the punishment in the event of conviction;***
- ***danger of the accused absconding or fleeing, if released on bail;***
- ***character, behaviour, means, position and standing of the accused;***
- ***likelihood of the offence being repeated;***
- ***reasonable apprehension of the witnesses being influenced; and***
- ***danger, of course, of justice being thwarted by grant of bail.***

11. Consequently, in view of the above, present bail petition is allowed. Petitioner is ordered to be enlarged on bail subject to his furnishing personal bond in the sum of `1,00,000/- (rupees one lac only) with one surety in the like amount each, to the satisfaction of the learned trial Court, with following conditions:

- ***He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;***
- ***He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;***
- ***He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade her from disclosing such facts to the Court or the Police Officer; and***
- ***He shall not leave the territory of India without the prior permission of the Court.***

12. 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.

13. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this application alone.

14. The bail petition stands disposed of accordingly.

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

Raman Kumari and another ....Appellants.
Versus
Sh. Manjeet Singh and another ... Respondents.

FAO No. 155 of 2019
Decided on: 30.4.2019

Motor Vehicles Act, 1988 – Section 166– Motor accident- Death case- Claim application by legal representatives- Tribunal dismissing application for want of prosecution but while doing so also making observations on merits of case- Appeal against- Facts revealing that Tribunal had granted four opportunities to claimants to lead evidence but they did not adduce any evidence resulting in dismissal of application for non-prosecution- Held, when Tribunal had dismissed application for non-prosecution, it should not have ventured to make any observation on merits of case- Claimants had lost sole bread earner of their family- One more opportunity granted to them to lead evidence- Order of Tribunal set aside- Matter remitted to Tribunal. (Paras 3 & 4)

For the appellants. : Ms. Anjali Soni Verma, Advocate.
For the respondents : Ms. Parul Sarta, Advocate for respondent No.1.
Mr. Jagdish Thakur, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. *(Oral)*

CMP(M) No. 898 of 2017

By way of this application, a prayer has been made for condonation of 25 days' delay in filing the appeal. A perusal of the application demonstrates that there is cogent explanation as to why appeal could not be filed within the prescribed period. Even otherwise, as the delay in filing the appeal is not inordinate, in the interest of justice, the application is allowed and delay in filing the appeal is condoned. The application stands disposed of.

FAO No. 155 of 2019

2. By way of this appeal the appellants, who are claimants before learned Tribunal have assailed order dated 27.2.2017 vide which learned Tribunal has dismissed the claim petition filed by present claimants under Section 166 of the Motor Vehicles Act, 1988, inter alia, on the ground that as despite four opportunities having been granted to the

claimants, no evidence was led by them, therefore, there was no occasion to accept their request for grant of one more opportunity. Besides this, learned Tribunal has also made an observation that as deceased himself was driving the vehicle which resulted in the unfortunate accident, therefore, the petition was not maintainable.

3. I have heard learned counsel for the parties and have also gone through the impugned order. It is not in dispute that despite four opportunities having been granted to the claimants by learned Tribunal to produce their evidence, they failed to produce the same, therefore, the dismissal of the petition for non compliance of previous orders per se cannot be faulted with. However, taking into consideration the peculiar facts of this case wherein as stated by learned counsel for the appellants, the claimants have lost their sole bread earner, in my considered view, in this case, one more opportunity should be granted to the claimants to lead their evidence by modifying the impugned order to this extent. As far as the observation of learned Tribunal that the petition was not maintainable, as the accident occurred on account of the driving of the deceased itself, in my considered view, there was no occasion for the learned Tribunal to have had made said observation because once it had dismissed the case for non-prosecution then the learned Tribunal should not have ventured to make any observation on the merits of the case.

4. Accordingly, this appeal is partly allowed by modifying order dated 27.2.2018 to the extent that one more opportunity on self responsibility is hereby granted to the claimants to lead their evidence subject to payment of costs of `10,000/- which shall be paid within a period of three weeks from today to the H.P. High Court Bar Association. The parties shall appear before learned Tribunal on 24.6.2019 and subject to costs having been paid, claimants shall be granted one more opportunity to lead their evidence on self responsibility. It is clarified that if claimants again fail to lead their evidence, then order dated 27.2.2017 shall automatically become operative.

The appeal stands disposed of in above terms, so also pending miscellaneous applications, if any.

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

CWP No.: 8419 of 2010 a/w
CWP No. 4993 of 2011
Reserved on: 16.04.2019
Decided on: 12.06.2019.

CWP No. 8419 of 2010

Smt. Rani Sharma and others ....Petitioners.
Versus
State of Himachal Pradesh and another ...Respondents.

CWP No. 4993 of 2011

BATA India Limited ....Petitioner.
Versus
Presiding Officer, Industrial Tribunal-cum-
Labour Court, Shimla and others ...Respondents.

Industrial Disputes Act, 1947 (Act) – Sections 2(k) & 10 – 'Industrial dispute'- What is? - Whether dispute regarding transfer of workman from one station to another, is an industrial dispute? Held, individual dispute of workman cannot termed to be an industrial dispute unless workmen as a body or considerable section of them makes common cause with individual workman- 'BS' and 'SK' were individually espousing their cause of illegal transfer by employer before Government- It was their individual dispute and no reference could have been sent by Government to Labour Court under Section 10 of Act for adjudication- Award of Labour Court on such reference set aside being void abinitio. (Paras 17 to 19, 26 & 32 to 35)

Cases referred:

Central Provinces Transport Service Ltd. Nagpur vs. Raghunath Gopal Patwardhan, AIR 1957 SC 104

D.N. Banerji vs. P.R. Mukherjee and others, AIR 1953 SC 58

Management of Messers Hotel Samrat vs. Government of NCT & Ors, WP(C) No. 6682/2002

The Bombay Union of Journalists and others vs. The Hindu, Bombay and another, AIR 1963 SC 318

CWP No. 8419 of 2010

For the petitioners	:	M/s Jiya Lal Bhardwaj and Sanjay Bhardwaj, Advocates.
For the respondents	:	M/s Dinesh Thakur and Sanjeev Sood, Additional Advocate Generals with Mr. R.P. Singh, Deputy Advocate General for respondent No. 1.
	:	M/s Naresh Gupta and Anil Bhat, Advocate for respondent No. 2.

CWP No. 4993 of 2011

For the petitioners	:	M/s Anil Bhat and Naresh Gupta, Advocates.
For the respondents	:	M/s Dinesh Thakur and Sanjeev Sood, Additional Advocate Generals with Mr. R.P. Singh, Deputy Advocate General for respondent No. 1.
	:	Mr. Sanjay Bhardwaj, Advocate for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

As common issues of law and facts are involved in both these writ petitions, they are being disposed of by a common judgment.

2. Both these petitions have been filed against the award passed by the Court of learned Presiding Judge, H.P. Industrial Tribunal-cum-Labour Court, Shimla, in Reference No. 36 of 2006, titled as Baldev Sharma and another vs. The Area Manager, Bata India, vide which, learned Tribunal while answering the Reference made to it by the appropriate Government, granted the following relief to the petitioners therein:

> *"As a sequel to my findings on the aforesaid issues, the claims of the petitioners are allowed and their transfer as per order dated 22.11.2004, is cancelled and set aside. The respondent is directed to re-consider their transfer from Parwanoo depot, which now stands closed, strictly in accordance with the Standing orders/Rules and if possible, they be adjusted/transferred*

to the nearest depot from Parwanoo. Besides, it is also ordered that they (petitioners) be reinstated in service with seniority and continuity alongwith back wages @ 50%. Consequently, the reference stands answered in favour of the petitioners and against the respondents. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion be consigned to records."

3. CWP No. 4993 of 2011 has been filed by Bata India Limited, i.e. the employer, whereas CWP No. 8419 of 2010 has been filed by the claimants before the learned Court below. During the pendency of the petition, claimant/ petitioner Baldev Sharma died and his legal representatives were brought on record.

4. Briefs facts necessary for the adjudication of these petitions are as under:-

5. Baldev Sharma and Suresh Kumar (hereinafter referred to as workmen) were the employees of Bata India Limited (hereinafter referred to as Company). Baldev Sharma was engaged as a Sales Assistant in the year 1974 and Suresh Kumar was engaged as Packer in the year 1979. Since 1990, both were working at Parwanoo Wholesale Depot of the Company. Vide order dated 22.11.2004, Baldev Sharma was transferred from Wholesale Depot Parwanoo to Chennai Depot. Vide same order, Suresh Kumar was transferred from Parwanoo Depot to Kochhi Depot of the employer in the State of Kerala.

6. Feeling aggrieved, the workmen made representations to the Company for cancellation of their transfer on the ground that the transfer was in violation of the Standings Orders and Rules framed for the Depot employees by the Company, as per which, an employee could not be transferred from one State to another State without his will and consent. As no action was taken on their representations, a Demand Notice was issued by the workmen dated 14.09.2005 addressed to the concerned Labour Inspector.

7. As the dispute could not be resolved, a Civil Suit was also filed by the workmen in the Court of learned Civil Judge (Jr. Divn.) Kasauli. In the meanwhile, Labour Inspector referred the dispute to the Labour Commissioner and thereafter, the appropriate government made the following Reference before learned Industrial Tribunal-cum-Labour Court:

"Whether the transfers of Shri Baldev Sharma workman and transfers of Shri Suresh Kumar Prashar workman from wholesale Depot, Bata India Ltd., Plot No. 25, Sector-1, Parwanoo, District Solan, HP to Tamil Naidoo and further nonpayment of wages to the aforesaid workmen contrary to the orders dated 5.8.2005 passed by the Hon'ble Civil Judge (Senior Division), Kasauli, District Solan, HP and against the rule no. 2-A page 22 of Standing Orders and Rules Depot employees of Bata India Ltd. Calcutta is proper and justified? If not, for what relied of service benefits and compensation the above aggrieved workmen are entitled to"? "

Said Reference stands answered in terms already enumerated herein-above.

8. Whereas the workmen have challenged the award on the ground that they were entitled to payment of full back wages alongwith interest, the award has been challenged by the Company *inter alia* on the ground that the Reference made to the learned Industrial Tribunal-cum-Labour Court was erroneous and could not have been made by the appropriate government and therefore, the award passed by the learned Industrial Tribunal-cum-Labour Court is void *ab initio* and not sustainable in law.

9. I have heard learned Counsel for the parties at length and also gone through the impugned award as well as the record of the case.

10. As the issue raised by the Company pertains to the legality of the award under challenge, I will first deal with the contentions of the employer.

11. Learned Counsel for the petitioner-Company argued that the very Reference made by the appropriate government to the Industrial Tribunal-cum-Labour Court was bad in the eyes of law as there was no Industrial Dispute on which any Reference could have been made by the appropriate Government to the Court concerned. He argued that under the Industrial Disputes Act, an individual dispute raised by a workman cannot be treated to be an Industrial Dispute within the meaning of Section 2(k) of the Act and the only exception are the disputes which are covered under Section 2(A) of the Industrial Disputes Act. As per him, the dispute qua the transfer order was not raised either by a substantial number of employees or by the Management as is required under the Industrial Disputes Act and this extremely important aspect of the matter was ignored both by the appropriate Government while making the Reference as well as by learned Tribunal while answering the Reference. He has further argued that both the appropriate Government as well as learned Tribunal erred in not appreciating that even otherwise once the workman had invoked the jurisdiction of civil Court at Kasauli where they had assailed the transfer order, therefore also, simultaneously on the same issue, they could not have invoked the provisions of the Industrial Disputes Act especially when the matter was still pending before the learned Civil Court. On these grounds, he submitted that as both the Reference made by the appropriate Government and the award passed by the learned Tribunal were not sustainable in law, the same were liable to be quashed and set aside.

12. On the other hand, learned Counsel for the workmen argued that as the private respondents were admittedly workmen, therefore, the transfer order could have been assailed under the provisions of Industrial Disputes Act and there was no bar that because earlier a civil suit stood filed assailing the said transfer order, therefore, an Industrial Dispute with regard to the same could not be raised by the workmen. He has further argued that there is no bar that individual workman aggrieved by the act of an employer can not in his own capacity raise an Industrial Dispute. He also argued that as the aggrieved persons were workman and employer was an industry, therefore, the dispute between them per se had to be decided as per the mechanism provided under the Industrial Disputes Act.

13. Learned Additional Advocate General submitted that as a Demand Notice was raised by the workmen, the Authorities had no option but to deal with the same as per the provisions of the Industrial Disputes Act and this is exactly what was done by the authorities in the present case.

14. I have given a careful consideration to the respective contentions of the learned Counsel for the parties. 15. Under the Industrial Disputes Act, an Industrial Dispute has been defined in Section 2(k) as under:-

> *"Any dispute or difference between employers and workmen or between workmen and workmen, connected with the employment or non-employment or the terms of employment, or with the conditions of Labour of any person."*

16. Section 2-A of the Industrial disputes Act, *inter alia* provides that the dismissal etc. of an individual workmen is to be deemed to be an Industrial Dispute. As per this Section where any employer discharges, dismisses, retrenches or otherwise terminates the services of an individual workman, any dispute or difference between that workman and his employer connected with, or arising out of, such discharge, dismissal, retrenchment or

termination shall be deemed to be an Industrial Dispute notwithstanding that no other workman nor any union of workmen is a party to the dispute.

17. Admittedly, in the present case, the grievance raised by the workmen under the Industrial Disputes Act did not pertain to their discharge, dismissal, retrenchment or termination from service. They were in fact aggrieved by their transfer.

18. It is an admitted position that in the case in hand "dispute" was raised by both the workmen in their personal capacity and the same was not espoused by substantial number of employees of the employer/Company or by the Management.

19. It is settled law that under Section 10 of the Industrial Disputes Act, the appropriate government can refer to a Tribunal or Labour Court only an Industrial Dispute. In other words, if there is no Industrial Dispute, the same cannot be referred by the appropriate Government to a Tribunal or Labour Court.

20. I have also carefully perused the record of the learned Labour Court. There are two separate claim petitions on record, one preferred by the workmen Baldev Sharma, who was ordered to be transferred from wholesale Depot Parwanoo to Chennai Depot and the other by workmen Suresh Kumar Parashar, who was ordered to be transferred from Wholesale Depot, Parwanoo to Kochhi Depot in the State of Kerala.

21. It is apparent from the contents of the claim petitions so filed by the workmen that they had initially assailed the transfer order in the Court of learned Civil Judge (Junior Division), Kasauli and the operation of the transfer order was stayed by the said Court on 22.11.2004.

22. The prayer made in the respective claim petitions was that impugned transfer order passed by the Company be quashed and set aside as the same was contrary to the Standing Orders/Rules for depot employees and the employer be directed to pay the wages/salary to the workmen as claimed by them.

23. Alongwith the claim petitions, the Demand Notice vide which purportedly an 'Industrial Dispute' was raised by the petitioners is also appended, which is dated 14.09.2005.

24. A perusal of the same demonstrates that the dispute was raised by the petitioners themselves individually and their cause was neither espoused by the Management or substantial number of employees of the employer/company.

25. By way of its reply filed to the claim petition, the company denied the claim of the workmen. A perusal of the same demonstrates that company took preliminary objection with regard to the maintainability of the claim petition *inter alia* on the ground that the workmen was having no locus to file and maintain the same and further that as the workmen had already filed a civil suit on the same because, therefore, also the proceedings initiated under the Industrial Disputes act were not maintainable. By way of rejoinder, workmen reiterated their claim and denied that the proceedings initiated under the Industrial Disputes Act were not maintainable.

26. Be that as it may, the fact of the matter still remains that in the present case, no 'Industrial Dispute' as is envisaged under Section 2(k) of the Industrial Disputes Act was raised either by the Management or by a substantial number of employees of the company concerned. It was an individual dispute raised by the workmen feeling aggrieved by the '**order of transfer**' passed by the Company. In these circumstances, the appropriate Government while making the Reference to the learned Labour Court erred in not

appreciating that as there was no 'Industrial Dispute' raised before it as is envisaged under Section 2(k) of the Act, it could not have had made any Reference for adjudication to the Industrial Tribunal-cum-Labour Court.

27. A five Judge Bench of Hon'ble Supreme Court in **D.N. Banerji vs. P.R. Mukherjee and others**, AIR 1953 Supreme Court 58, has held that the word Industrial Dispute convey the meaning to the ordinary mind that the dispute must be such as would affect large groups of workmen and employers ranged on opposite sides on some general questions on which each group is bound together by a community of interest.

28. A four Judge Bench of Hon'ble Supreme Court in **Central Provinces Transport Service Ltd. Nagpur vs Raghunath Gopal Patwardhan**, AIR 1957 Supreme Court 104 has held as under:-

> *"8. The question whether a dispute by an individual workman would be an industrial dispute as defined in S. 2(k) of the Act XIV of 1947, has evoked considerable conflict of opinion both in the High Courts and in Industrial Tribunals, and three different views have been expressed thereon: (I) A dispute which concerns only the rights of individual workers, cannot be held to be an industrial dispute. That was the opinion expressed in* Kandan Textiles v. Industrial Tribunal*(1). There, Rajamannar C. J. observed that though the language of the definition in S. 2(k) was wide enough to include such a dispute, the provisions of* S. 18 *suggested that something more than an individual dispute between a worker and the employer was meant by an industrial dispute. The other learned Judge, Mack J., was more emphatic in his opinion, and observed that the Act was "never intended to provide a machinery for redress by a dismissed workman". It became, however, unnecessary to decide the point, as the court came to the conclusion that the reference it self was bad for the reason that there was no material on which the Government could be satisfied that there was a dispute. The views expressed in* Kandan Textiles v. Industrial Tribunal *(supra) were approved in* Manager, United Commercial Bank Ltd. V. Commissioner of Labour*(2); but here again, the observations were obiter, as the point for decision was whether a right of appeal conferred by s. 41 of the Madras Shops and* Establishments Act *XXXVI of 1947 was taken away by implication by Act XIV of 1947. The question, however, arose directly for decision in J. Chowdhury v. M. C. Banerjee(3), in which the order of the Government referring the dispute of a dismissed employee to the adjudication of a Tribunal was attacked as incompetent, and it was held by Mitter J., following the observations in* Kandan Textiles V. Industrial Tribunal *(supra) that the dispute in question was not an industrial dispute, and that the reference was, in consequence, bad.*
>
> *(II) A dispute between an employer and a single employee can be an industrial dispute as defined in S. 2(k). That was the decision in* Newspapers Ltd., Allahabad v. State Industrial Tribunal, U.P*. (i). In that case a reference of a dispute by a dismissed employee and the award of the Tribunal passed on that reference were attacked as bad on the ground that the dispute in question was not an industrial dispute within S. 2(k) of Act XIV of 1947, and it was held by Bhargava J., that an industrial dispute could come into existence even if the parties thereto were only the employer and a single employee and that the reference and the award were, in consequence, valid. A similar decision was*

given by a Full Bench of the Labour Appellate Tribunal in Swadeshi Cotton Mills Company Ltd. v. Their Workmen(1) 1953-1 Lab L J 757 (F).

(III) A dispute between an employer and a single employee cannot per se be an industrial dispute, but it may become one if it is taken up by the Union or a number of workmen. That was held by Bose J., in Bilash Chandra Mitra v. Balmer Lawrie & Co.(2), by Ramaswami and Sarjoo Prosad JJ., in New India Assurance Co. v. Central Government Industrial Tribunal(3) and by Balakrishna Ayyar J., in Lakshmi, Talkies, Madras v. Munuswami and others(4) and by the Industrial Tribunals in Gordon Woodroffe & Co. (Madras). Ltd. v. Appa Rao(5) and Lynus & Co. v. Hemanta Kumar Samanta(6).

9…….The preponderance of judicial opinion is clearly in favour of the last of the three views stated above, and there is considerable reason behind it. Notwithstanding that the language of S. 2(k) is wide enough to cover a dispute between an employer and a single employee, the scheme of the Industrial Disputes Act does appear to contemplate that the machinery provided therein should be set in motion, to settle only disputes which involve the rights of workmen as a class and that a dispute touching the individual rights of a workman was not intended to be the subject of an adjudication under the Act, when the same bad not been taken up by the Union or a number of workmen."

29. The Hon'ble Supreme Court in The Bombay Union of Journalists and others vs. The Hindu, Bombay and another, AIR 1963 Supreme Court 318, while referring to the judgment of the Hon'ble Supreme Court in Central Provinces Transport Service Ltd. Nagpur (supra) has reiterated that the applicability of the Industrial Disputes Act to an individual dispute as distinguished from a dispute involving a group of workmen is excluded, unless the workmen as a body or a considerable section of them make common cause with the individual workman.

30. The Hon'ble High Court of Delhi in WP(C) No. 6682/2002, titled as Management of Messers Hotel Samrat vs. Government of NCT & Ors and the connected matter, has held as under:-

9. Section 10 of the Industrial Disputes Act authorizes the appropriate Government to refer to a Tribunal or Labour Court only an industrial dispute. If there is no industrial dispute, the same cannot be referred. As per Labour Jurisprudence, the dispute between an individual and the management cannot be an industrial dispute unless it is covered under Section 2A of the I.D. Act. Thus in order to be an industrial dispute, it must satisfy the definition of Section 2(k) of the I.D. Act. In J. H. Jadhav v. Forbes Gokak Ltd. , Supreme Court observed as under:

The definition of "Industrial Dispute" in Section 2(k) of the Act shows that an Industrial Dispute means any dispute or difference between an employer and employers or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of the employment or with the condition of labour, of any person. The definition has been the subject matter of several decisions of this Court and the law is well settled. The locus classicus is the decision in the Workman of Dharampal Premchand (Saughandhi) v. Dharampal Premchand (Saughandhi) where it was held that for the purposes of Section 2(k) it must be shown that (1) the dispute is connected with employment or non employment of a workman.(2) the dispute between a single workman and his employer was

sponsored or espoused by the Union of workmen or by a number of workmen. The phrase "the union" merely indicates the Union to which the employee belongs even though it may be Union of a minority of the workmen, (3) the establishment had no union on its own and some of the employees had joined the Union of another establishment belonging to the same industry. In such a case it would be open to that Union to take up the cause of the workmen if it is sufficiently representative of those workmen, dispute the fact that such Union was not exclusively of the workmen working in the establishment concerned. An illustration of what had been anticipated in Dharam Pal's case is to be found in the Workmen of Indian Express Newspaper(Pvt.) Ltd. v. Management of Indian Express Newspaper Private Ltd. *where an 'outside' union was held to be sufficiently representative to espouse the cause.*

10. Thus, in order to give jurisdiction to the appropriate Government to refer the dispute and to the Tribunal/Labour Court to adjudicate the dispute, it was essential for the workman to show that his individual dispute for regularization was sponsored or espoused by a union of the workmen.

12. ..... The dispute between an individual workman and the employer can be treated as an industrial dispute only where the workmen as a body or a considerable section of them, make common cause with the individual workman and espoused his demand....."

31. Thus, it is evident from the case law referred to herein-above that an individual dispute cannot be termed to be an Industrial Dispute unless the workmen as a body or considerable section of them make common cause with the individual workman.

32. Coming back to the facts of this case. As already discussed above, it is not in dispute that the case of the workmen was not taken up with the appropriate Government either by appreciable number of employees or by the Management. In other words, the cause of the workmen was not espoused either by number of workmen or by the Management. The cause was independently espoused by both the workmen in their individual capacity before the appropriate Government. Such dispute, which was individually raised by the workmen feeling aggrieved by the issuance of the transfer order, by no stretch of imagination, could have been referred to Industrial Tribunal-cum-Labour Court by the appropriate Government under Section 10 of the Industrial Disputes Act. That being so, adjudication upon the said Reference by the learned Labour Court, which stands assailed by way of the writ petition filed by the employer, is *per se* void *ab initio* and not sustainable in the eyes of law.

33. In order to give an opportunity to the learned Counsel for the workman to demonstrate that an Industrial Dispute qua transfer orders could have been individually espoused by them under the Industrial Disputes Act, sufficient time was given, but he could not substantiate in law that such a dispute could have been individually raised by them and subsequently referred by the appropriate government by way of a Reference for adjudication to the Industrial Tribunal-cum-Labour Court.

34. Thus, as it is apparent that no individual Industrial Dispute could have been raised by the workmen against the transfer order, the Reference made by the appropriate Government on the demand notice of the workmen was bad in law and not in consonance with the provisions of Section 2(k) of the Industrial Disputes Act. As a natural corollary, the adjudication of the said Reference by the learned Tribunal by way of award dated 04.08.2010 in Reference No. 36 of 2006 is also thus void *ab initio* and not sustainable in law.

35. Accordingly in view of discussion held herein-above, both the Reference made by the appropriate Government as well as the award dated 04.08.2010 passed in Reference No. 36 of 2006, titled as Baldev Sharma and another vs. The Area Manager, Bata India, by learned Tribunal are quashed and set aside. Consequently, the writ petition filed by the Company, i.e. CWP No. 4993 of 2011, is allowed whereas the writ petition filed by the workmen, i.e. CWP No. 8419 of 2010, is dismissed. No orders as to costs.

The petitions stand disposed of in above terms of, so also pending miscellaneous application(s), if any.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J

Rattan Singh ...Petitioners/Judgment Debtors.
Versus
Roop Lal ....Respondent/Decree holder.

Civil Revision No. 269 of 2017.
Reserved on : 29th April, 2019.
Decided on : 30th May, 2019.

Code of Civil Procedure, 1908 – Section 47 – Execution of decree- Objections thereto- Executing court dismissing objections of judgment debtor (JD) and issuing warrant of possession –Petition against- JD submitting that his time barred appeal is pending before First Appellate Court for consideration on application for condonation of delay- And Executing court ought not to have issued warrant of possession- Held, Executing court cannot go behind decree- High Court cannot interfere in application which is sub-judice before Appellate Court and when appeal is not validly constituted- Petition dismissed. (Paras 4 & 5)

For the Petitioners : Mr. Sanjeev Kuthiala, Sr. Advocate with Mr. Hitesh, Advocate.
For the Respondent: Mr. Romesh Verma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant petition, is, directed against the verdict recorded by the learned Executing Court, upon, Execution Petition No. 2-10 of 2017, titled as Roop Lal vs. Rattan Singh and another, on 14.11.2017, verdict whereof, is, embodied in Annexure P-6, wherethrough, the learned executing Court, hence, directed the issuance of warrants of possession, vis-a-vis, the suit property.

2. The order directing the issuance of warrants of possession, vis-a-vis, the suit property, is, in pursuance to a conclusive, and, binding judgment and decree rendered by the learned Civil Judge (Junior Division), Court No.1, Ghumarwin, District Bilaspur, , upon, Civil Suit No. 239-1 of 2010, and, upon counter claim No. 592-1 of 2016/11, (I) wherethrough, the respective suit(s) of the plaintiff, for rendition of a decree for permanent prohibitory injunction, and, in the alternative, hence, for vacant possession of the suit

khasra numbers, rather stood decreed, whereas, the defendants' counter claim, was rejected. The afore renditions, apparently, for want of any validly constituted appeals being raised therefrom by the aggrieved defendant, before the learned First Appellate Court concerned, do, obviously acquire conclusivity, and, binding force, (ii) thereupon, the afore renditions were required to be put to coercive realization. In aftermath, the orders impugned before this Court, acquire an aura of validation, and, do not merit any interference from this Court.

3. However, the learned counsel appearing for the petitioners/JDs, (a) has contended that, though, the Jds/petitioners hence belatedly assailed, the afore rendered judgment, and, decree, by the learned trial Court, rather before the learned First Appellate Court Court, and, appended therewith, an application cast under the provisions of Section 5 of the Limitation Act, for condoning the delay in filing the apposite appeal, yet dehors, the afore being subjudice, before the learned First Appellate Court concerned, (b) rather did not preclude, the learned executing court to mete deference thereto, whereas, it omitting to mete any credit thereto, hence, renders the impugned order, to suffer, from, a grave fallibility. The afore submission cannot be accepted, (c) given the learned counsel appearing for the DH/respondent herein, making a valid submission before this Court, that, the aggrieved JDs/petitioners, rearing a time barred appeal, against the afore rendition, before the learned First Appellate Court, and, the application appended therewith, and, cast under the provisions of Section 5 of the Limitation Act, also yet pending adjudication, (d) and, he further submits, that, till, the afore application constituted, under the provisions of Section 5 of the Limitation Act, is, allowed, and, thereafter the appeal is ordered to be registered, (e) and, whereafter the execution, and, operation, of the impugned renditions therebefore is stayed, hence thereupto rather the impugned verdict, cannot be, interfered by this Court.

4. The afore submission addressed before this Court the learned counsel appearing, for the respondent/DH, has immense merit, and, is required to be accepted, (I) as, until the time barred appeal reared against the conclusive and binding rendition, rendered by the learned trial Court, is, after an affirmative decision standing recorded, upon, an application appended therewith, and, cast under the provisions of Section 5 of the Limitation Act, is accepted, or set aside, (ii) and, or during, the pendency of the afore rather validly constituted, and, registered civil appeal, the learned First appellate Court, upon, an application cast therebefore, under, the provisions of Order 41, Rule 56 of the CPC, hence, stays the operation and, execution of the impugned rendition, (iii) rather thereupto the conclusive and biding rendition, recorded by the learned trial Court rather enjoins, meteing, of, credit thereto, by the learned executing Court. However, since, the afore appeal remains, not, validly constituted nor registered nor any stay stands granted by the learned First Appellate Court, against, the operation, and, execution of the afore binding, and, conclusive judgment, and, decree, thereupon, hence, the order impugned before this Court is not required to be interfered with.

5. Be that as it may, the further submission made by the learned counsel appearing for the aggrieved Jds/petitioners, is, that (i) given the occurrence of a settlement inter se the contesting litigants, and, as borne in Annexure P-5, (ii) thereupon, credit is to be meted thereto. However, the afore submission is again rudderless, as, the executing court, upon, meteing credence, if any, vis-a-vis, Annexure P-5, and, as may have been placed therebefore, would rather proceed to infract the trite canons, rather enjoined to be meted obedience, (iii) cannon(s) whereof, is embodied in the factum qua the learned executing Court being barred, to go behind the decree put before it, for its coercive execution, (iv) and, it being also concomitantly estopped, to, modify or reverse the judgment and decree, put before it, for its coercive execution, (v) whereas, upon the learned Executing Court, even

without the operation, and, execution of the judgement and decree, remaining stayed, by the learned First Appellate Court, nor the judgment, and, decree rendered by the learned trial Court, being either reversed or set aside, (vi) rather omitting to hence put the binding, and, conclusive judgment and decree to coercive enforcement, and, execution, hence, would infract, the afore requisite canon(s), (vii) and, thereupon in its not meteing any deference, to Annexure P-5, purportedly comprising a settlement occurring inter se the contesting litigants, it has rather not transgressed, the domain of its jurisdiction, (viii) whereas, reiteratedly, upon its meteing deference thereto, hence, it would definitely proceed to untenably modify or reverse the judgment, and, decree(s) put before it, for its coercive execution. Resultantly, the instant petition, is, a gross abuse, of, the process of court, and, is liable to dismissed.

6. In view of above discussion, there is no merit in the present petition, and, it is dismissed accordingly. In sequel, the order impugned before this Court is maintained and affirmed. All pending applications also stand disposed of. No order as to costs.

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

Smt. Rita Devi and others .....Appellants.

Versus

Sh. Ashish Malhotra and others ....Respondents.

FAO No. 236 of 2018.
Reserved on : 6th May, 2019.
Decided on : 30th May, 2019.

Motor Vehicles Act, 1989 – Sections 166 – Motor accident – Death case- Income of deceased- Determination- Claimants appealing against award of Tribunal and praying for enhancement of compensation by contending that deceased was mechanic and salary record tendered in evidence ought to have been relied upon by Tribunal- Insurer alleging salary record as forged- Held, salary record of deceased duly proved by employer indicating that he was working as motor mechanic and drawing salary of Rs.12000/- PM- No suggestion to employer that record regarding attendance and salary of deceased is forged- Deceased had regular income and it could not have been computed by Tribunal on basis of wages of unskilled worker. (Para 2)

Case referred:
National Insurance Co. Ltd. vs. Pranay Sethi and others, 2017 ACJ 2700

For the Appellants:	Mr. H.S. Rangra, Advocate.
For Respondents No. 1:	Mr. G.S. Rathore, Advocate.
For Respondent No. 2:	Nemo.
For Respondent No.3:	Mr. B.M. Chauhan, Sr. Advocate with Mr. Amit Himalvi, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The claimants/appellants herein, have, instituted the instant appeal before this Court, wherethrough, they, seek enhancement of compensation, as assessed, vis-a-vis, them, under, the impugned award pronounced by the learned Motor Accident Claims Tribunal-III, Mandi, H.P., upon, Claim Petition No. 20/2015, whereunder, compensation amount comprised, in, a sum of Rs.10, 12,400/- alongwith interest accrued thereon, at the rate of 7.5% per annum, and, commencing from, the date of petition till realization thereof, stood, assessed, vis-a-vis, them, and, the apposite indemnificatory liability thereof, was, fastened upon the insurer/ respondent No.3 herein.

2. The learned counsel appearing for the claimants/appellants herein has contended with much vigour (i) that despite the claimants hence averring, in, the petition qua their predecessor-in-interest, working, as a motor mechanic, for, the last more, than 12 years, in Sunny Automobile, and, his drawing therefrom hence per mensem salary, borne, in, a sum of Rs.12,000/-, (iii) AND also the claimant concerned, as also the owner of the afore entity, rendering apt testifications, in, tandem therewith, and, also adducing into evidence, the, salary certificate borne in Ex.PW4/A, (iv) hence, the afore per mensem rearings, of, income by the deceased, rather was enjoined to borne in mind, by the learned tribunal concerned, (v) whereas, the learned tribunal concerned, rather discarding the afore apposite testified claim, and, its taking into consideration, the, minimum wages of a unskilled worker, for, hence calculating the per mensem income, of, the deceased, has, rather under-assessed, compensation, vis-a-vis, the claimants. On the other hand, the learned counsel for the insurer, has contended, with great enthusiasm before this Court, that no reliance, can be placed, upon, Ex.PW4/A, by the learned tribunal, for, garnering therefrom, the income of the deceased, in a sum of Rs.12,000/- per mensem, as, it is fictitiously drawn, and, also for want of adduction into evidence, rather the salary register or attendance register hence renders it, to beget the stain of fraudulence. However, the afore contention addressed before this Court, by the learned counsel for the insurer, is, grossly unmeritworthy, as, PW-4, Sunny Kumar, the owner of Sunny Automobile, whereat the deceased was working, as, a Motor Mechanic, while stepping into the witness box, and, during the course of his examination-in-chief, rather tendered into evidence, Ex.PW4/A, (a) and, upon his being subjected, to, the ordeal, of, a scathing cross-examination, by the counsel, for the insurer, yet during course(s) whereof, (b) no suggestion stood meted, to him, with any articulation therein qua PW-4 not being authorised to prepare, and, draw Ex.PW4/A, (c) and, his not working with the entity concerned, (d) and, also with no suggestion being meted, to him qua Ex.PW4/A, not being issued, from any related thereto records, as, maintained with the entity concerned, especially, from, the, salary register or the attendance register. Furthermore, with no suggestion being meted to him, that, the afore register being also not maintained, with, the entity concerned, whereas, the meteings, of, afore suggestion(s), to PW-4, during, the course of his being held, to, cross-examination, by the learned counsel for the insurer, was a dire necessity, (e) for, hence thereafter ensuring rather upsurgings emanating from PW-4 either in affirmation or in contradiction(s), to, the afore suggestion(s), (f) and, when even thereafter PW-4 could also he constrained, to, through the aegis of the Court hence, produce the afore register(s), before the Court concerned, for rendering proof, qua Ex.PW4/A being ridden or not ridden, with any aura of fictitiousness. However, wants, of, all the afore endeavours, begets a conclusion, qua the counsel for the insurer, acquiescing qua Ex.PW4/A being issued by PW-4, while his obviously holding the capacity to issue it, (g) and, also its issuance emanating, from, all compatible therewith records, as, maintained at the afore entity. Moreso, when thereafter, the counsel for the insurer, did not, make any strivings, to elicit the afore records, from the entity concerned. Consequently, it was inappropriate, for, the learned tribunal concerned, to not take into consideration, the, income of the deceased, as, borne in Ex.PW4/A, thereupon, the aforesaid sum of Rs.12,000/-, is enjoined to be computed, as the, per

mensem income of the deceased, from, his apposite avocation, as a Motor Mechanic. Consequently, the per mensem income of the deceased is calculated at Rs.10,700/-.

4. The deceased, is, in the postmortem report, is reflected to be aged 36 years, at the relevant time. With the Hon'ble Apex Court, in case titled as ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** reported in ***2017 ACJ 2700***, the relevant paragraph No.61, extracted hereinafter:

> "61. In view of the aforesaid analysis, we proceed to record our conclusions:-
>
> (i) The two-Judge Bench in Santosh Devi should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.
>
> (ii) As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.
>
> (iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.
>
> (iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.
>
> (v) For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 30 to 32 of Sarla Verma which we have reproduced hereinbefore.
>
> (vi) The selection of multiplier shall be as indicated in the Table in Sarla Verma read with paragraph 42 of that judgment.
>
> (vii) The age of the deceased should be the basis for applying the multiplier.
>
> (viii) Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years. "

expostulating (i) that where the deceased concerned, was a self employed or on a fixed salary, as is, the apt employment, of, the deceased, (a) thereupon, hikes or accretions, on anvil of future incremental prospects, vis-a-vis, the salary drawn by him, at the time

contemporaneous, to, the ill fated mishap, from his employer, being also meteable thereto. However, before applying the mandate of the aforesaid relevant paragraph, borne in the judgment supra, it is significant to also bear in mind, the age of the deceased, (ii) since the postmortem report reflects, the deceased being aged 36 years, at the relevant time, hence with the afore extracted paragraph, mandating, of, accretions towards future incremental prospects, vis-a-vis, the salary last drawn by the deceased, being pegged upto 40% thereof, besides being tenably meteable, vis-a-vis, the apposite last drawn salary. Consequently, after meteing 40% increase(s), vis-a-vis, the apposite last drawn salary, thereupon, the relevant last drawn salary, of, the deceased, is recoknable to be Rs.16,800/-, [Rs.12,000/- (last drawn salary of the deceased)+Rs.48,00/-[40% of the last drawn salary). Significantly, the number of dependents, of, the deceased, are, four, hence, ¼th deduction is to be visited, upon, a sum of Rs.16,800/-, hence, after making, the, apt aforesaid deduction, vis-a-vis, the afore sum, the per mensem dependency, comes to Rs.12,600/-. In sequel whereto, the annual dependency, of the dependents, upon, the income of the deceased, is computed, at Rs.12,600/- x 12=Rs.1,51,200/-. After applying thereto, the apposite multiplier of 15, the total compensation amount, is assessed in a sum of Rs.1,51,200/- x 15=Rs.22,68,000/- (Rs. Twenty two lakhs sixty eight thousand only).

5. However, the quantification, of damages, by the learned Tribunal in a sum of Rs.1 lacs vis-a-vis, the widow of deceased, (i) under the head, loss of consortium, (ii) and quantification, of compensation, borne in a sum of Rs.50,000/-, vis-a-vis, claimants No.2 and 3, under the heads " loss of care and guidance", and, quantification of compensation in a sum of Rs.20,000/- under the head "funeral charges", is (a) in, conflict with the mandate of the Hon'ble Apex Court rendered in **Pranay Sethi's** case (supra), (b) wherein, it has been expostulated, that reasonable figures, under conventional heads, namely, loss to estate, loss of consortium vis-a-vis the widow of the deceased, and, funeral expenses being quantified only upto Rs.15,000/-, Rs.40,000/-, and Rs.15,000/- respectively. Consequently, the award of the learned tribunal is interfered, to the extent aforesaid, of, its determining compensation, under, the aforesaid heads vis-a-vis the widow of the deceased, as also, vis-a-vis the other claimants. Accordingly, in addition to the aforesaid amount of Rs.22,68,000/-, the claimants, are, entitled under conventional heads, namely, loss to estate, loss of consortium, vis-a-vis, the widow of the deceased, and, funeral expenses, sums of Rs.15,000/-, Rs.40,000/- and Rs.15,000/- respectively, as such, the total compensation to which the appellants/claimants are entitled comes to Rs.22,68,000 + Rs.15,000/- + Rs.40,000/- + Rs.15,000/-= Rs.23,38,000/-(Rs. Twenty three lakhs, thirty eight thousand only).

6. For the foregoing reasons, the appeal filed by the claimants is allowed, and, the impugned award, is, in the aforesaid manner, hence modified. Accordingly, the claimants/appellants, are, held entitled to a total compensation of Rs.23,38,000/-, along with interest @7.5%, from, the date of petition till the date, of, deposit, of the compensation amount. The indemnificatory liability, vis-a-vis, the afore compensation amount, shall be, of the insurer of the offending vehicle, i.e. respondent No.3 herein. The amount of interim compensation, if awarded, be adjusted in the aforesaid compensation amount, at the time of final payment. The aforesaid amount of compensation be apportioned in the manner as ordered by the learned tribunal. The shares of the minor children, shall remain invested, in FDRs, upto, the stage of theirs attaining majority. However, interest accrued thereon, shall be releasable vis-a-vis their mother, only when she explains, of, its being required, for, the upkeep and benefit of her minor children. 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.

Sanjeev Gupta .....Petitioner.
Vs.
Sh. Pawan Sahni and others .....Respondents.

COPC No.: 54 of 2019
Date of Decision: 21.06.2019

Constitution of India, 1950- Article 215– Contempt of court– Proof of- In civil revision High Court directing petitioner (tenant) to vacate premises within four months from date of order- Thereafter, landlord was to initiate and complete construction within one year after obtaining statutory sanctions- Tenant filing contempt petition and alleging disobedience of earlier orders by landlord by not starting and completing construction within time- Held, facts show that tenant himself had not complied with spirit of order and not vacated premises in time- Subsequent part of said order of which contempt is alleged stood rendered ineffective on his failure to vacate premises in terms of order- Petitioner has no locus standi to file contempt petition- Petition dismissed. (Paras 3 to 5)

For the petitioner: Mr. Anirudh Sharma, Advocate.
For the respondents: Mr. K. D. Sood, Senior Advocate, with M/s Het Ram Thakur and Sukrit Sood, Advocates.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

Petitioner herein alleges contempt of the order dated 17.03.2016, passed by this Court in Civil Revision No. 23 of 2016, as per which, the petitioner had stated before the Court that he shall be vacating the demised premises within a period of four months from the date of the order, i.e., 17.03.2016 and thereafter, the landlord was to commence construction within a period of six months from the date the premises were vacated and complete the same within a period of one year after obtaining statutory permissions.

2. The contention of learned counsel for the petitioner is that despite the fact that the premises stand vacated by the petitioner, however, neither the construction has been commenced within a period of six months nor the same has been completed within a period of one year.

3. On a query of the Court, learned counsel for the petitioner has fairly submitted that premises were not vacated by the petitioner in terms of order dated 17.03.2016. Meaning thereby, the petitioner himself had not complied with the spirit of order dated 17.03.2016.

4. Mr. K.D. Sood, learned Senior Counsel for the respondents has submitted that the premises were got vacated by the landlord by virtue of the orders which were passed by the learned Executing Court in execution of the Order passed by the learned Rent Controller on 04.10.2017 and present petitioner had not vacated them as per order of this Court dated 17.03.2016.

5. Having heard learned counsel for the parties, in my considered view, the petitioner has no locus to file and maintain the present petition. As the petitioner himself had not complied with order dated 17.03.2016 passed by this Court, the subsequent part of the said order, contempt of which is alleged, stood rendered in effective. Initial onus was upon the petitioner to have had vacated the premises in terms of order dated 17.03.2016 and thereafter, had the respondent not complied with the subsequent directions contained in the said order, then obviously this Court would have gone into the issue as to whether there is any willful disobedience of the Court order or not. However, in view of the facts narrated hereinabove, said situation did not arise in the present case, as the petitioner himself did not vacate the premises in terms of order dated 17.03.2016. Accordingly, as there is no merit in this petition, the same is dismissed, so also pending miscellaneous applications, if any. Notice is discharged.

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

Sanjeev Kumar .....Petitioner
Versus
Janki Khanna and others ....Respondents

CMPMO No.229/2019
Date of decision: June 17, 2019

Code of Civil Procedure, 1908 – Order XVII - Rules 2 & 3 – Closure of evidence by court orders- challenge thereto- Held, more than twenty opportunities were given to petitioner to lead his evidence but despite that no evidence was led by him- Much indulgence was given to him by court- Order closing his evidence is not perverse- Petition dismissed. (Para 2)

For the petitioner : Mr. Vivek Sharma, Advocate.
For respondent No.2 : Ms. Shradha Karol, Advocate

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral)

By way of this petition, petitioner has prayed for the following relief:

> "It is therefore, most respectfully prayed that this petition may kindly be allowed and order dated 16.4.2019 passed by the learned Senior Civil Judge, Shimla in Civil Suit No.32-1 of 2018/2009 may kindly be set aside and petitioner may kindly be afforded one last and reasonable opportunity to produce his entire evidence in the interest of justice and fair play on such terms and conditions as this Hon'ble Court may deem just and proper in the facts of the case".

(21) It is not in dispute that more than 20 opportunities were granted to the petitioner to lead his evidence. Despite that no evidence was led by him. The very fact that 20 opportunities were given to the petitioner by the learned trial Court raises eye brows as to why so much indulgence was shown to the petitioner by the Court. Be that as it may, as despite sufficient opportunities, petitioner has not led any evidence, no indulgence can be

shown to him because prima facie there is no perversity with the order vide which the evidence has been closed.

Petition is dismissed, so also pending application(s), if any.

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

Santosh Kumari .....Appellant.

Versus

State of Himachal Pradesh and others .....Respondents.

LPA No. 530 of 2011.
Date of decision: 27.06.2019.

Constitution of India, 1950- Articles 14 & 16- Office Memorandum dated 27.03.2001 and OM No. 20020/7/80-Estt.(D) dated 29.5.1986- Seniority of person taken on deputation pursuant to his absorption- Held, regular service on same or equivalent grade rendered in parent department would be counted for fixing seniority in the department, he was absorbed- Person appointed earlier on regular basis in parent department cannot be given seniority from date of absorption in department in which he was on deputation. (Paras 5 & 6)

Case referred:

Sub-Inspector Roop Lal and another vs. Lt. Governor through Chief Secretary, Delhi and others, (2000) 1 SCC 644

For the Appellant : Mr. Ramesh Kaundal, Advocate.

For the Respondents: Mr. Vikas Rathore and Mr. Vinod Thakur, Additional Advocate Generals with Mr. Bhupinder Thakur, Deputy Advocate General and Mr. Ram Lal Thakur, Assistant Advocate General, for respondent No.1.
Mr. Raj Kumar Negi, Advocate, for respondent No.2.
Mr. Lovneesh Kanwar, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral)

Aggrieved by the order passed by the learned Single Judge on 13.10.2011 whereby the writ petition filed by writ petitioner/respondent No.3 herein came to be allowed, the appellant has filed the instant appeal.

2. Facts lie in a narrow compass.

3. The parties shall be referred to as the writ petitioner and appellant.

4. The writ petitioner was initially appointed on regular basis as Junior Scale Stenographer on 06.05.1988 with the Directorate of HIPA, whereas, appellant was

appointed as Junior Scale Stenographer in H.P. Subordinate Services Selection Board, Hamirpur. The services of both of them were placed on deputation with the Himachal Pradesh Subordinate Services Selection Board (for short 'the Board') on different dates. The appellant joined the Board on 09.12.1998, whereas, writ petitioner joined on 12.03.1999. Eventually, both of them were absorbed by the Board on 01.05.2001.

5. However, the appellant was assigned seniority over and above the writ petitioner, constraining him to file the Original Application before the learned Tribunal which on closure of the Tribunal was transferred to this Court and registered as CWP(T) No. 12497 of 2008. Admittedly, the seniority so assigned to the appellant was solely on the basis of O.M. No.20020/7/80-Estt.(D), dated May 29, 1986, wherein it was provided that in case a person, who is initially taken on deputation and absorbed later, his seniority in the grade in which he is absorbed would normally be counted from the date of absorption.

6. The aforesaid instructions came up for consideration before the Hon'ble Supreme Court in ***Sub-Inspector Roop Lal and another*** *versus* ***Lt. Governor through Chief Secretary, Delhi and others, (2000) 1 SCC 644*** wherein it was held that the words "whichever is later" occurring in the Office Memorandum dated May 29, 1986, were violative of Articles 14 and 16 of the Constitution of India and hence these words are quashed from the memorandum. It was by virtue of implication of the aforesaid judgment that the official respondents themselves substituted the term "whichever is later" by the term "whichever is earlier" by issuing Office Memorandum dated 27.03.2001 which now reads as under:-

> *"Subject: Seniority of persons absorbed after being on deputation.*
>
> *The undersigned is directed to say that according to our O.M. No.20020/7/80-Estt.(D), dated May 29, 1986(copy enclosed) in the case of a person who is initially taken on deputation and absorbed later (i.e. where the relevant recruitment rules provide for "transfer on deputation/transfer") his seniority in the grade in which he is absorbed will normally be counted from the date of absorption. If he has, however, been holding already(on the date of absorption) the same or equivalent grade on regular basis in his parent department, such regular service in the grade shall also be taken into account in fixing his seniority, subject to the condition that he will be given seniority from the date he has been holding the post on deputation,*
>
> *OR*
>
> *the date from which he has been appointed on a regular basis to same or equivalent grade in his parent department, whichever is later"*
>
> *2. The Supreme Court has in its judgement dated December 14, 1999 in the case of Shri S.I. Roop Lal & others vs. Lt. Governor through Chief Secretary, Delhi, JT 1999(9) SC 597 has held that the words "<u>whichever is later</u>" occurring in the Office Memorandum dated May 29, 1986 and mentioned above are violative of Articles 14 and 16 of the Constitution and, hence, those words have been quashed, from that Memorandum. The implications of the above ruling of the Supreme Court have been examined and it has been decided to substituted the term "whichever is later" occurring in the Office Memorandum dated May 29, 1986 by the term "<u>whichever is earlier</u>".*
>
> *3. It is also clarified that for the purpose of determining the equivalent grade in the parent department mentioned in the Office Memorandum dated May 29, 1986, the criteria contained in this Department Office Memorandum No.14017/27/75-Estt(D)(pt) dated March 7, 1984 (copy enclosed), which lays down the criteria for determining analogous posts, may be followed.*

4. These instructions shall take effect from December 14,

1999 which is the date of the judgment of Supreme Court referred to above.

5. In so far as personnel serving in Indian Audit and Accounts Departments are concerned, these instructions are issued in consultation with the Comptroller and Auditor General of India. However, these orders (in keeping with paragraph 4 of the Office Memorandum dated May 29, 1986 as referred to above) will not be applicable to transfers within the Indian Audit and Accounts Department which are governed by orders issued by the C&AG from time to time.

6. The above instructions may be brought to the notice of

all concerned for information, guidance and necessary action."

7. This position has not even been disputed by learned counsel for the appellant and the only contention put-forth is that since the writ petitioner was not eligible for being appointed in accordance with the rules, therefore, once his appointment itself was illegal, then his services could not have been placed on deputation and under no circumstance could he be assigned seniority over and above the appellant, rather his appointment itself was liable to be set aside.

8. However, we find from the records that this is not even the pleaded case of the appellant and when put to notice, the learned counsel for the appellant, would invite our attention to the supplementary affidavit filed by her before this Court on 08.10.2010 in which she has tried to rake up this issue. But then, it would be noticed that the supplementary affidavit has been filed without leave of the Court and obviously, therefore, the writ petitioner had no opportunity of meeting the points so disclosed in the said supplementary affidavit and grave prejudice would be caused to him in case we grant leave at this stage.

9. It is more than settled that the *lis* of the instant kind has to be decided on the basis of the pleadings i.e. petition, reply and rejoinder if filed after permission from the Court and by way of supplementary pleadings that may have been introduced by way of affidavit, supplementary affidavit and counter-affidavit etc., provided again the same have been filed with the express leave and permission of the Court or else all such affidavits have to be excluded from consideration at the time of hearing of the petition.

10. If at all the appellant wanted to alter her defence, then the only course open to her was to have either sought permission to amend the reply and could not have been permitted to surreptitiously introduce an entirely different case by way of supplementary affidavit that too to file without obtaining leave of the Court or at best the remedy was to have filed a separate petition assailing therein the appointment of the writ petitioner.

11. In view of the aforesaid discussion and for the reasons stated above, we find no merit in this appeal and the same is accordingly dismissed, leaving the parties to bear their own costs. All pending applications also stand disposed of.

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

Seema Thakur .....Petitioner/Plaintiff.

Versus

Tarsem Lal ....Respondent.

CMPMO No. 4 of 2019.
Reserved on: 17th May, 2019.
Date of Decision: 30th May, 2019.

National Legal Services Authority (Lok Adalat) Regulations, 2009– Rule 17– Withdrawal of suit by Counsel before Lok Adalat in absence of plaintiff- Effect- Plaintiff challenging award of Lok Adalat by alleging that she never engaged services of counsel who made suffer statement that matter stood compromised between parties and suit should be withdrawn- Facts revealing that power of attorney executed by plaintiff in favour of advocate who made statement before Lok Adalat for withdrawal of suit on record- Signatory advocate had authority to make statement regarding withdrawal of suit- Statement of advocate made in absence of party is valid- Award cannot be set aside on this ground- Petition dismissed. (Paras 4 & 5)

For the Petitioner: Mr. Ajay Shandil, Advocate.
For the Respondent: Mr. Virender Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Through the instant petition, the petitioner herein/plaintif.f in Civil Suit No. 102/1 of 2017, challenges the order recorded thereon, on 22.04.2018, by the Chairman, National Lok Adalat, Theog, whereunder, on anvil of a statement, rendered by the learned counsel, for the plaintiff qua hence the lis engaging the litigating parties rather being compromised, hence, strived for permission, being granted, for, the apposite suit being withdrawn, hence, in consonance therewith, constrained the making, of, an order dismissing the plaintiff's suit hence as withdrawn.

2. The learned counsel appearing for the aggrieved plaintiff/petitioner herein, has made a challenge, upon, the statement rendered, on behalf of the plaintiff, by one Munish Sharma, Advocate, (I) on the score that the afore Munish Sharma, Advocate, was never engaged, as, counsel, for, prosecuting the plaintiff's suit, and, concomitantly, was, disabled to render any statement, before the Chairman, National Lok Adalat, Theog, qua the lis engaging the parties being comprised, and, the requisite permission for withdrawing the suit, being rather espoused or granted. (ii) For want of appearance of the plaintiff before the Chairman, National Lok Adalat, Theog, on 22.04.2018, and, also for want of, the, tendering, therebefore, of, the compromise deed recorded inter se the contesting litigants, rather rendering the afore order being ingrained with a vice of misrepresentation, and, fraud, and it being amenable, for, being set aside.

3. Naturally, only upon, evident proof, being adduced, vis-a-vis, the afore espousal reared before this Court, rather would enable this Court to make interference(s) with the impugned award, rendered by the Chairman, National Lok Adalat, Theog, as dehors the afore grounds being validly proven, hence the award of the Chairman, National Lok Adalat, Theog, acquires statutory binding force, and, conclusivity, and, hence, is neither challengeable nor interfereable by this Court.

4. The afore initial ground reared by the petitioner, that she, had never engaged one Munish Sharma, as her counsel, to prosecute the apposite civil suit, is, prima facie rid

of truth, (a) as, a perusal of the power of attorney, makes evident upsurging qua the signatures of one Munish Sharma, being borne therein, and, along with signatures of one Suresh Verma, Advocate, (b) and, with the petitioner not making any echoing in the petition, that, her signatures which are also borne in the apposite power of attorney, not being appended in contemporaneity, with, both the afore counsel also appending their signatures thereon, (c) and, hence, the want of afore echoings, may not rear any inference qua one Munish Sharma, Advocate, signing the power of attorney, behind the back of the petitioner herein, (d) rather it galvanizes a conclusion qua the petitioner engaging both Munish Sharma, and, Suresh Verma, Advocates as her counsel, to prosecute the apposite civil suit. Concomitantly also both the afore counsel, being capacitated, to, render hence statement(s) before the Court, and, also before the Chairman, National Lok Adalat, Theog, which rendered the impugned order, on a statement made before it, by Mr. Munish Sharma, Advocate.

5. Be that as it may, nowat, the further contention raised by the petitioner herein (i) that for want of hers, hence, recording a statement before the Chairman, National Lok Adalat, Theog, also for want of a compromise deed being tendered before the Chairman, National Lok Adalat, Theog, thereupon, the apposite statement rather in consonance wherewith, hence the impugned verdict, stand(s), recorded by Chairman, National Lok Adalat, Theog, are/is, both rather wanting, in, any aura of legality. However, the afore submission also cannot be accepted, as, upon the apposite lis, prior to 24.4.2018, inasmuch, as on 23.03.2018, the learned Senior Civil Judge, Theog, had ordered for its listing, before the National Loki Adalat, on 24.04.2018, (ii) visibly hence a period of one month elapsed since the trial court ordering for listing, the matter, before the National Lok Adalat, and, the impugned verdict being recorded, (iii) and, when the plaintiff/petitioner herein does not make any echoing, in the instant petition, that, the conjoint statement, of, the learned counsel(s) appearing for the contesting parties, and, rendered on 23.03.2018, wherethrough they strived for the matter being listed before the National Lok Adalat, given the lis being compromised inter se the contesting parties, (iv) rather being rendered without any intimation, to her or without her consent, (v) and, also when the petitioner herein, reiteratedly does not, rear any articulation that the counsel concerned, on 23.3.2018, and, besides prior thereto, and, in the interregnum from 23.3.2018 and, 24.2.2018, inasmuch, as either Shri Munish Sharma, Advocate, or Sh. Suiresh Verma, Advocate not making any apt correspondence(s), with her, hence, unfolding therein qua theirs/his asking her or hers thereafter meteing or not meteing any instructions, to the afore counsel, qua hers entering into any compromise with the defendant, vis-a-vis, the lis engaging them, (iv) whereas, the afore echoings were necessarily required, for hers being rather validly bestowed, with any leverage to contend, that, the apposite statement recorded, on 22.4.2018, and, in concurrence wherewith, the impugned verdict, was recorded, rather being gripped with a vice of misrepresentation or fraud, (v) emanating from one Munish Sharma, Advocate without any settlement occurring inter se her, and, the defendant, his rather making a statement qua the lis being compromised inter se the contesting parties. Consequently, hence, wants thereof, fillip an inference, that one Munish Sharma, was purveyed the requisite information by the plaintiff, to, make the apposite statement before the Chairman, National Lok Adalat, Theog, and, the further corollary thereof is qua the impugned verdict being validly made, given, its bearing concurrence therewith.

6. In view of the above, there is no merit in the instant petition, and, it is dismissed accordingly. The impugned order 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.

Shakti Chand ....Petitioner.
Versus
Saroop Singh ... Respondents.

CMPMO No 474 of 2017
Decided on: 26.4.2019

Code of Civil Procedure, 1908 (Code) – Order VIII Rule 1 – Written statement- Time limitation in filing and extension thereof- Held, when written statement is not filed within 90 days of service and no application for extension of time is filed, Court is justified in striking of defence – Court cannot come to rescue of party who is not vigilant about its rights. (Para 3)

For the petitioner : Mr. Tarun Sharma, Advocate.
For the respondent : Mr. Romesh Verma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J *(Oral)*

By way of this petition, the petitioner has assailed order dated 5.9.2017, passed by the Court of learned District Judge, Hamirpur in CMA No. 56/2017, in Civil Appeal No. 86 of 2015 titled as Shakti Chand Vs. Saroop Singh, vide which an application filed under Order 41 Rule 27 of the CPC by the petitioner, stands dismissed by the learned appellate Court.

2. I have heard learned counsel for the parties and have also gone through the impugned order as well as application which was filed before learned appellate Court under Order 41 Rule 27 of the CPC.

3. Production of additional evidence in appellate Court in appeal is permissible under the provisions of Order 41 Rule 27 of CPC, *inter alia*, provided that the party seeking to produce additional evidence establishes that notwithstanding the exercise of due diligence, such evidence was either not in its knowledge or despite exercise of due diligence, the same could not be produced by it at the time when the decree appealed against was passed.

4. The averments as were mentioned in the application filed under Order 41 Rule 27 of CPC which was filed before learned appellate Court read as under:-

> *"Application U/o 41 rule 27 of CPC read with section 151 CPC for granting permission to take on record the certified/attested copy by way of additional evidence of Jambandi for the years of 2011-12 & Family Partition statements (Khangi Taksim) dt. 12-6-1991, due to the reasons assigned below.*
>
> *Sir,*
>
> *The applicant/appellant submits as under:-*

1. That the above titled appeal is pending before this Hon'ble court & is fixed for today.(An affidavit is duly attested herewith).

2. That the documents captioned in the head note of the application were handed over to the advocate engaged in the lower but under some bobafide mistake, he did not place it on the record & it remained with his brief.

3. That the applicant/appellant intends to produce on record the said documents, which would also be very helpful for this court to decide the case properly and effectively to impart justice to the parties.

It is therefore prayed that the present application may kindly be allowed and the documents mentioned above may kindly be ordered to be taken on the record in the interest of justice."

5. The application is as cryptic and vague as it could have been and there is not even a whisper therein as to why the documents which were intended to be placed on record by way of the application could not be produced earlier before the learned trial Court. The reason given that the documents stood handed over to the counsel engaged in the Lower Court but under some bonafide mistake, he could not place on record and it remained with his brief does not inspires confidence. There is no affidavit filed of the counsel to substantiate the contents made in the application filed under Order 41 Rule 27 of the CPC. As this Court is satisfied that the application filed by the petitioner before appellate Court was not fulfilling the ingredients of Order 41 Rule 27 of the Code of Civil Procedure and as there is no perversity or jurisdictional error committed by learned appellate Court vide order which stands impugned by way of this petition, the same is dismissed being devoid of merit. Interim order stands vacated. Parties through their learned counsel are directed to appear before learned appellate Court on 13.5.2019.

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

Shamsher Singh ....Petitioner.

-Versus-

HDB Financial Services Ltd. and another .....Respondents.

CMPMO No.: 269 of 2019
Date of Decision: 14.06.2019

Arbitration and Conciliation Act 1996 - Section 8(1) – Direction for referring matter to Arbitrator- Validity- On facts, agreement containing specific clause envisaging that in event of dispute between parties, same shall be settled by way of arbitration- Dispute arising from contract in question- Held, trial court right in directing parties to refer matter to Arbitrator- No perversity in order- Petition dismissed- Order of trial court upheld. (Para 5)

For the petitioner: Mr. R. S. Chandel, Advocate.
For the respondents: Nemo.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition filed under Article 227 of the Constitution of India, the petitioner assails order dated 05.03.2019, vide which, an application filed under Section 8 of the Arbitration and Conciliation Act, 1996 by the respondents herein, has been allowed by the Court of learned Civil Judge, Court No. 3, Shimla.

2. It appears that a suit was filed by the present petitioner before the Court of learned Civil Judge, Court No. 3, Shimla. The present respondents were impleaded as defendants in the said suit. Before filing the written statement, the respondents filed an application under Section 8 of the Arbitration and Conciliation Act for referring the matter to the Arbitrator, on the ground that the issue raised in the suit could not be adjudicated by way of a Civil Suit, as there was an agreement between the parties, which *inter alia* envisaged that in the event of any dispute between them, the same shall be settled by way of arbitration. A perusal of the impugned order demonstrates that the learned Court below while allowing the said application, held that plaintiff had neither denied the existence of agreement, nor the factum of having taken loan from the defendants, but his only defence was that nothing was due from him to the defendants. After taking into consideration the said stand of the plaintiff, learned Court below allowed the application by holding that as there was an Arbitration Clause in the agreement entered into between the parties, the suit was liable to be returned back to the plaintiff for filing the same before the Arbitral Tribunal as per procedure. Feeling aggrieved, the plaintiff/petitioner has filed this petition.

3. I have heard learned counsel for the petitioner.

4. At the out-set, I may state that neither a copy of the plaint, nor the reply, if any, filed by the present petitioner to application filed by the respondents/defendants under Section 8 of Arbitration and Conciliation Act stands appended with the present petition. On a query of the Court, response of the learned counsel for the petitioner was that after notice is issued and response submitted by the respondent, then the necessary documents shall be filed by the petitioner. The Court deprecates this kind of practice, because it is incumbent upon the petitioner to place on record all relevant documents at the first instance and it is not the discretion of the petitioner to place documents on record in a piecemeal.

5. Be that as it may, having perused the documents on record, this Court is of the view that there is no perversity in the impugned order. Learned Court below has rightly allowed the application so filed under Section 8 of the Arbitration and Conciliation Act, because as there is an agreement entered into between the parties and the agreement envisages that in the event of any dispute, the same shall be referred for Arbitration, no perversity can be attributed to the order passed by the learned Trial Court, which on the strength of the terms of the Arbitration Clause in the agreement, has returned the plaint back to the plaintiff, so that the same could be filed before the Arbitral Tribunal as per procedure.

6. In view of the observations made hereinabove, as there is no merit in the present petition, the same is dismissed, so also pending miscellaneous application(s), if any.

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BEFORE HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Shanta Bahadur ... Petitioner.

Versus

State of Himachal Pradesh ...Respondent

Cr.MP(M) No.948 of 2019
Reserved on : 10-06-2019
Date of decision : 19th June, 2019

Code of Criminal Procedure, 1973- Section 439 – **Narcotic Drugs and Psychotropic Substances Act, 1985 (Act) –** Sections 2(iii) (a), 20 & 37- Recovery of charas weighing 1 Kg. 210 gms.- Regular bail- Grant of- Accused seeking bail on ground that resin contents of recovered stuff bring it below commercial quantity and rigors of section 37 of Act will not apply- Held, charas is the separated resinous part derived from the flowering tops and leaves of cannabis plants- Law does not make any distinction between charas in crude form vis-à-vis charas in purified form- When charas is in crude form, entire recovered stuff and not the percentage of resin alone in it is to be taken into consideration for determining its quantity- Contraband recovered from accused falls in commercial quantity and rigors of section 37 of Act will apply- Petition dismissed. (Para 9)

Case referred:
State of H.P. vs. Mehboon Khan (FB), 2014 (2) RCR (Criminal) 447

For the Petitioner : Mr. Maan Singh, Advocate.
For the Respondent : Ms. Ritta Goswami, Additional Advocate General,
Ms. Divya Sood, Deputy Advocate General
and Mr. Manoj Bagga, Assistant Advocate General.

The following judgment of the Court was delivered:

Anoop Chitkara, Judge

The present petition is under Section 439 of the Code of Criminal Procedure for grant of bail in case FIR No. 91/19, dated 07-04-2019, registered under Section 20 of Narcotic Drugs and Psychotropic Substances Act, 1985 at Police Station Kullu, District-Kullu, HP.

2. This Court had issued notice to respondent vide order dated 23-05-2019 and on 10-06-2019 police had filed status report.

3. I have heard learned counsel for the petitioner as well as respondent and have also gone through the status report.

4. The case of the prosecution is that 1.210 kg Charas was recovered from the possession of the bail petitioner, which as per police is a commercial quantity under Section 20 (ii) (C) of Narcotic Drugs and Psychotropic Substances Act.

5. To the contrary, learned Counsel appearing for the petitioner, in paragraph no.5 of his petition, has submitted that although the total weight of the contraband allegedly recovered is 1.2 k.g., however, the percentage of resin would bring it below the commercial quantity. Resultantly, rigors of Section 37 of Narcotic Drugs and Psychotropic substances Act will not attract. The submission of the counsel for the bail petitioner is that percentage of resin is to be considered and not the entire bulk of 1.2 kg. He further submitted that if resin is considered then it would fall below 1 kg, which is less than commercial quantity.

6. In the status report, the reference has been made to report of Regional Forensic Science Laboratory, Junga. Expert after conducting Scientific Chemical Test, gave

his opinion as follows: “the quantity of purified of resin as found in the exhibit stated as Charas is 39.53% w/w. The exhibit is extract of cannabis and sample of charas”. Thus the net weight of purified resin comes to 440 grams (approximately).

7. *In State of H.P. v. Mehboon Khan (FB), 2014 (2) RCR (Criminal) 447*, holds as follows,

> “Para 55.
>
> 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 less 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 less 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."

8. In view of this pronouncement of full bench, the controversy is no more res-integra. The definition of charas as per mandate of Section 2 (iii) of the NDPS Act is :-

" 2 (iii) "cannabis (hemp)" means:-

(a)charas, that is, the separated resin, in whatever form, whether crude or purified, obtained from the cannabis plant and also includes concentrated preparation and resin known as hashish oil or liquid hashish;

(b) Ganja, that is, the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops),

(c) any mixture , with or without any natural material, of any of the above forms of cannabis or any drink prepared therefrom;

(iv) "cannabis plant" means any plant of the genus cannabis;"

9. It is clear that as per Section 2(iii) (a) of the NDPS charas is the resin in whatever form whether crude or purified, provided such resin has been obtained from the canabis plant. It is common knowledge that charas is made when resin is separated from flowering tops/ leaves of cannabis plant. That is why, Legislature, used the word "separated resin". Now when resin is separated from the flowering tops as well as leaves of the cannabis plant, it would be crude or purified, depending upon the procedure adopted for such process. If the process for separating resin is scientific and done in good chemical laboratory or done by experts using modern instruments, then the resin so separated would be very purified. To the contrary when the resin is separated from the leaves and flowers of cannabis plants by using old age traditions or manual process, like rubbing of body or hands or by splashing on wooden logs or through leather, then such resin would be in crude form. The legislature did not differentiate between the charas whether crude or purified. Therefore, the percentage of resin in cannabis alone is not charas and prima facie the entire cannabis irrespective of percentage of resin is charas.

10. Ms. Divya Sood, Deputy Advocate General has brought to the notice of this Court that one bail application no. Cr.MP(M) No. 613 of 2019, where the similar question is pending adjudication by a larger bench of this Court.

11. Be that as it may, the matter is subject matter of adjudication before the larger bench and it is for the larger bench to adjudicate upon this issue.

12. Therefore, it shall be open for the petitioner to file a bail petition, on the ground of percentage of resin, if the findings in the above referred matter are given in his favour by larger bench.

13. As on date, the petitioner has no case for bail because bulk quantity involved is more than 1 kg and resin alone cannot be taken to determine the quantity. Resultantly, the bail petition is dismissed.

14. Pending application(s), if any, also stand disposed of.

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

Shanti Ram ....Petitioner.
Versus
Kali Dass ... Respondent.

CMPMO No 289 of 2017
Reserved on 28.3.2019
Decided on: 28.5.2019

Code of Civil Procedure, 1908– Section 47– Objections to execution application- Non-framing of issues on such objections- Effect- Executing court dismissing objections of judgment debtor summarily without framing issues- Petition against- Held, Executing court is not obliged to determine each and every question raised merely because same stands raised for purpose of objection- When decree is based on various exhibits including report of Commissioner, then same merges with decree- Since decree attained finality, report of Commissioner cannot be challenged in execution proceedings- Decree not unexecutable- Petition dismissed. (Paras 5 & 9)

Cases referred:
Silverline Forum Pvt. Ltd. vs. Rajiv Trust and another, AIR 1998 SC 1754
Sohan Lal vs. Sadhu Ram, Latest HLJ 2003 (HP) 154

For the petitioner. : Mr. Ramakant Sharma, Advocate.
For respondent. : Mr. Ajay Sharma, Sr. Advocate with
Mr. Rakesh Chaudhary, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J *(Oral)*

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

"It is, therefore, most respectfully prayed that this petition may kindly be allowed and the impugned order, dated 2.6.2017 passed by the Ld. Civil Judge (Sr .Div.), Nadaun in Execution Petition No.4/2016 titled "Kali Dass Vs Shanti Ram" may kindly be quashed and set aside and the Execution Petition may kindly be dismissed, in the interest of justice."

2. Brief facts necessary for adjudication of the petition are that respondent-Kali Dass filed a suit for permanent prohibitory and mandatory injunction against present petitioner, i.e., Civil Suit No.219/2011 titled as Kali Dass Vs. Shanti Ram. Said suit was decreed by the Court of learned Civil Judge (Sr. Division), Nadaun, District Hamirpur, H.P. vide judgment and decree dated 6.6.2015 in the following terms:-

"In view of my findings on issue No.1 to 6, supra, the suit filed by the plaintiff is decreed with cost and defendant is restrained from raising any

construction or changing the nature of the suit land comprised in Khata No.9 min, Khatauni No.15, Khasra No.296 area measuring 0-00-80 Hectares situated in village Dhamandar, Mouza Saproh, Tehsil Nadaun, District Hamirpur (H.P.) till the same is partitioned by metes and bound. Further, plaintiff is also entitled for a decree of mandatory injunction by way of demolition of the structure as shown in site plan Ext.PW-2/E which is 28 feet in length and 13 feet in width. Site plan Ext. PW-2/E shall form part and parcel of decree. Decree sheet be prepared accordingly. Case file after completion be consigned to record room."

3. Decree holder filed an application for execution of the said decree. Present petitioner preferred objections against the same. Learned Executing Court vide order dated 2.6.2017 disposed of the objections of the present petitioner by dismissing them in the following terms:-

"4. I have heard the submissions of Ld. Counsel for both the parties and perused the record. It is clear from the record that the court has passed Judgment and decree dated 06-06-2015 against the J.D by which he was directed to demolish the structure as shown in the site plan Ext. PW-2/E which is 20 feet in length and 13 feet in width. It is well establish principle of law that a court executing a decree cannot go behind the decree. If the objections required examination or investigation of the facts executing court cannot entertain such objections. Executing court cannot question correctness or otherwise of the decree.

5. In this case also the J.D raised objections which have already taken into consideration by the court who pass the decree. The executing court can determine those questions which arise subsequent to the passing of the decree. In this case there is no such new facts have been arisen after the passing of the decree. The objections of the J.D are regarding the site plan Ext. PW-2/E which is part and parcel of decree dated 06.06.2015. Therefore, this question regarding the validity of site plan Ext. PW-2/E cannot be decided by the executing court. Therefore, I find no any triable issue in the objections of the J.D. Hence, I dismiss the objections without framing the issue and recording the evidence. Hon'ble High Court of Himachal Pradesh in a case Nagesh Versus Godouri 2011(2) Shimla Law Cases 183, held that executing court can dismiss the objections without recording the evidence and framing of issues when thee is no triable issue arose from the objections.

6. Thus, keeping in view the reasons assigned above objections of the J.D are dismissed. Consequently, warrant of possession is issued to the Collector with the directions to demolish the structure shown in the site plan Ext.PW-2/E in accordance with the judgment and decree dated 06.06.2015. The report of the warrant be sent back to this court on or before 18.8.2017."

4. Feeling aggrieved, the petitioner has preferred the present petition.

5. The order passed by learned Executing Court vide which objections filed by present petitioners, has been dismissed, has been primarily assailed before this Court on the ground that it was mandatory for learned Executing Court to have had framed Issues on the objections filed and thereafter the parties should have been directed to lead their witnesses

and in the absence of said procedure having been followed by learned Executing Court, the impugned order was not sustainable in law and liable to be quashed and set aside.

6. No other point was argued.

7. On the other hand learned Senior Counsel appearing for the respondent has argued that framing of Issues is not sine-qua-non *for deciding objections filed in an execution and it is not as if the Court is obliged to determine each and every question raised in the question merely because the same stand raised for the purpose of objection.*

8. I have heard learned counsel for the parties and have also gone through the order under challenge as well as other documents appended with the petition.

9. It is a matter of record that the decree passed in favour of the present respondent has attained finality. Prayer made in the execution petition was for issuance of warrant of possession against the judgment debtor and for demolition of structure as shown in site plan by Local Commissioner Ext. PW-2/E referred to in Column No.10 of the Execution Petition. A perusal of the objections filed to the said execution petition demonstrate that the correctness of the report of Local Commissioner has been questioned by way of objections and the execution of decree was resisted on the said ground. It is matter of record that Local Commissioner was appointed by learned trial court and after the report of Local Commissioner was proved on record, in accordance with law. Learned trial court passed its judgment relying upon various exhibits placed on record by the parties including the report of the Local Commissioner. The report of Local Commissioner has now merged in the judgment and decree passed by learned trial court. Said judgment and decree has attained finality. The report of Local Commissioner has not been set aside by any Superior Court of law. That being so, it was not incumbent upon the executing Court to have framed Issues on the basis of objections filed by present petitioners. Though it is correct that as per Section 47 of the CPC all questions arising between the parties in the suit in which decree has been passed as also those relating to the execution of the decree in issue are to be determined by the executing court, but whether or not Issues are to be framed while deciding the objections depends upon the nature and tenor of the objections in the facts of the case. In the present case in view of the nature and tenor of the objections it was not incumbent upon the learned executing court to have had framed any Issues. A perusal of the objections demonstrate that the same were probably filed with the intent to delay the execution.

10. Before the executing court is called upon to hold any inquiry upon the objections by framing Issues and by calling upon to lead the evidence, it is incumbent upon the judgment debtor to prima facie demonstrate that the decree is not executable and for that some legal and valid reasons the executing court is required to frame Issues and record evidence and thereafter decide the Issue. (See **Sohan Lal Vs. Sadhu Ram, Latest HLJ 2003 (HP) 154***)*

11. In ***Silverline Forum Pvt. Ltd. Vs. Rajiv Trust and another,*** *AIR 1998 Supreme Court 1754, Hon'ble Supreme Court has reiterated that while deciding objections in an execution petition, the adjudication need not necessarily involve a detailed inquiry or collection of evidence and court can make adjudication on admitted facts or even an averment resister. Hon'ble Supreme Court has further held that the Court can direct the parties to adduce the evidence for such determination if the court deems it necessary. This also in my considered view clearly demonstrates that whether or not Issues are to be framed and parties are to be directed to adduce evidence is a judicial call which has to be taken by the executing court and it is not something which can be termed to be mandatory as has been argued by learned counsel for the petitioner.*

12. Coming to the facts of this case again, in view of the decree passed by learned court in favour of present respondent and in the nature of objections which were filed to the execution petition, there was no need for the learned executing court for having had framed the Issues and learned executing court was in a position to decide the objections on the basis of the pleadings contained in the objections. This is exactly what has been done by learned executing court and on merit there is no infirmity with the order which has been passed by learned executing court.

In view of the findings returned here-in-above, as there is no merit in the petition, the same is dismissed. Pending miscellaneous applications, if any, also stand disposed of.

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

Shri Siddhartha Ray ....Petitioner.
Vs.
Shri Narinder Kumar .....Respondent.

CMPMO No.: 541 of 2017
Reserved on: 02.04.2019
Date of Decision: 18.06.2019

Code of Civil Procedure, 1908 – Order VII Rule 11 – Rejection of plaint- Lack of cause of action - Inference as to?- Plaintiff filing suit for declaration of title, cancellation of lease deed, confirmation of his possession and permanent prohibitory for restraining defendant from interfering in his possession over disputed property- Plaintiff alleging that lease deed purportedly executed in defendant's favour is result of fraud and mis-representation- Defendant filing application for rejection of plaint on ground that plaintiff had unilaterally revoked lease deed and thus he has no cause of action- Trial court dismissing application- Petition against- Held, execution of lease deed inter-se parties is not disputed- Subsequent revocation of same by plaintiff does not lead to inference that he has no cause of action to maintain suit- Allegations regarding execution of lease deed under fraud and mis-representation yet to be proved by way of evidence- Plaintiff has cause of action to lay suit- Petition dismissed. (Paras 11 to 13)

Case referred:
Liverpool & London Steamship Protection and Indeminity Association Ltd. vs. M.V. Sea Success, 2003 Law Suit (SC) 1156

For the petitioner: Mr. Bhupender Gupta, Senior Advocate, with Mr. Ajeet Jaswal, Advocate.
For the respondent: Mr. Ashwani Pathak, Senior Advocate, with Mr. V.S. Rathour, Advocate.

The following judgment of the Court was delivered:

***Ajay Mohan Goel, Judge**:*

By way of this petition, the petitioner/defendant has challenged order dated 18.10.2017 (Annexure P-5), passed by the Court of learned Civil Judge-II, Dharamshala, District Kangra in CMA No. 37 of 2017 in Civil Suit No. 33 of 2017, vide which, an application filed by the present petitioner under Order VII Rule 11 read with Section 151 of the Code of Civil Procedure for rejection of plaint, has been dismissed.

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

> Respondent before this Court has filed a suit for grant of decree of declaration to the effect that he is owner in possession of land and structure/building standing upon the suit land, situated in Mohal Dharamkot, Mauza and Tehsil Dharamshala, District Kangra and that lease deed dated 07.10.2016 executed between the parties is a result of misrepresentation, fraud and undue influence, as is also in contravention of the provisions of Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act and Indian Electricity Rules, 1956 and the same is thus liable to be set aside. Respondent/plaintiff has also prayed for consequential relief of permanent prohibitory injunction for restraining defendants from interfering with the ownership and peaceful possession of the plaintiff over the suit land and from changing the nature of the suit land etc. In the alternative, decree for mandatory injunction directing the defendant to restore the possession of the suit land as also structure/building standing thereon has been prayed for.

3. The case of plaintiff, in brief, is that he is owner in possession of the suit land. Defendant, who was a permanent resident of Kolkata (West Bengal) used to visit Dharamkot. Plaintiff is running a Home Stay over the suit land. He was approached by the defendant in the month of June, 2016 with the intention of taking one room with attached bathroom in the said Home Stay. Defendant took the said accommodation from the plaintiff for a tariff of Rs.300/- per day and stayed there for about one month and thereafter left the place. Afterwards, whenever defendant visited Dharamkot, he used to stay in the Home Stay of the plaintiff. When defendant again visited Dharamkot in September 2016 and stayed in the accommodation of plaintiff, he allured the plaintiff that if certain construction was added on the suit land, the same can increase the income of the plaintiff. Plaintiff being a simple villager, was convinced by what defendant stated. He was totally brain washed by the defendant, who even did not allow the plaintiff to consult his family members. Defendant got a site plan prepared and also got e-stamp paper for an amount of Rs.10,000/- without the knowledge of the plaintiff. Plaintiff believing the defendant, went with him to the office of Sub-Registrar, Dharamshala alongwith witnesses, where he was made to sign a lease deed dated 07.10.2016 without going through the contents of the same. He was convinced by the defendant that they were not supposed to disclose the details of the lease deed. After execution of the same, defendant started raising construction over the suit land in a haphazard manner with an intent of grabing the suit land. Plaintiff and his family members requested the defendant not to do so. Plaintiff also requested the defendant that no construction can be carried out without getting the plan properly sanctioned, however, defendant did not pay any heed to the request of the plaintiff. Electricity Department also issued a notice dated 21.12.2016 directing not to raise any construction over the suit land, as proposed construction of the building underneath LT line was in contravention of the provisions of Indian Electricity Rule, 1956 and was a punishable offence. After receipt of the notice from the Electricity Department, construction work undertaken at the instance of defendant was stopped when plaintiff through his mother Smt. Misro Devi filed an application in Police Station Mcleodganj. As per the plaintiff, he immediately cancelled/revoked the lease deed vide deed of revocation dated 22.12.2016. Defendant, on the basis of the alleged lease deed, was trying to dispossess the plaintiff from the peaceful

possession over the suit land and in this background, the suit stood filed praying for the reliefs already enumerated hereinabove.

4. During the pendency of the suit, petitioner filed an application under Order VII Rule 11 of the Code of Civil Procedure (hereinafter referred to as 'the Code') on the ground that the suit did not disclose any cause of action so as to bring any suit seeking declaratory decree. As per the petitioner, the suit was barred in view of the provisions of Section 34 of the Specific Relief Act, 1963, because suit for declaration could be filed by only those persons who are entitled to any right over any property and that right has been denied by the other party. As per the petitioner, he had not denied any right of the plaintiff and hence, plaintiff had no right whatsoever to claim the relief, as prayed for in the plaint. Plaintiff cleverly claimed a cause of action already annulled by the plaintiff himself. Defendant did not issue the notice dated 21.12.2016, as the same was issued by HPSEB, hence defendant was not liable to be sued in context to the same. Defendant's refusing to admit by way of a letter that a registered deed of lease can be unilaterally revoked by a deed of revocation is no cause of action to bring a suit when no relief of declaratory decree upholding the deed of revocation was sought. Plaintiff had not sought the relief of a declaratory decree in favour of deed of revocation dated 22.12.2016. As such, registered deed of lease dated 07.10.2016 was *prima facie* valid in law and, therefore, defendant had every right to attest mutation of it in his favour. Any unequivocal contention of the plaintiff that deed of lease dated 07.10.2016 was revoked, would not entitle him to any relief whatsoever. Plaint was vague with general averments of fraud, misrepresentation and undue influence filed with vexatious intentions.

5. This application has been rejected by the learned Court below vide order dated 18.10.2017. A perusal of the order demonstrates that Court dismissed the application *inter alia* on the ground that the plaint did disclose cause of action and the case of the plaintiff was to be proved or disproved after framing of issues and recording of evidence in the main case. The claim of the applicant (defendant) that plaintiff's case was weak, could not be taken into account at the said stage, as the plaint did disclose cause of action as per the requirement of Order VII Rule 11 of the Code and, therefore, plaint was not liable to be rejected.

6. Feeling aggrieved, the petitioner/defendant has filed this petition.

7. Learned Senior Counsel for the petitioner/defendant has vehemently argued that the impugned order was not sustainable in the eyes of law as when the very lease deed which was the genesis of the plaint stood unilaterally revoked by the plaintiff, he had no cause of action to file and maintain the suit. Mr. Gupta has further argued that in view of the revocation of the lease deed unilaterally by the plaintiff and further in view of the fact that as per the plaintiff, he was in possession of the property, learned Court erred in not rejecting the plaint as per the provisions of Order VII Rule 11 of the Code. According to Mr. Gupta, the plaint disclosed no cause of action against the defendant and the purported cause, spelled out in the plaint, was on the basis of an application filed by Smt. Misro Devi, mother of the plaintiff to the Police Station and incidentally mother of the plaintiff was not party to the suit. On these bases, Mr. Gupta argued that as plaint did not disclose any cause of action, learned Court erred in dismissing the application filed under Order VII Rule 11 of the Code by the petitioner.

8. On the other hand, Mr. Ashwani Pathak, learned Senior Counsel argued that there was no infirmity with the order passed by the learned Trial Court, because the plaint did disclose cause of action and as the plaintiff was seeking a declaration that he was owner in possession of the suit land, therefore, the plaint was not liable to be rejected. He argued

that the impugned order was a well reasoned order and the intention of defendant of first filing application under Order VII Rule 11 of the Code and thereafter the present petition is just to delay the *lis*.

9. I have heard learned counsel for the parties and have also gone through the impugned order as well as the other documents appended with the petition.

10. Order VII Rule 11 of the Code *inter alia* provides that the plaint shall be rejected where it does not disclose a cause of action. There is no definition of 'cause of action'. In legal parlance, the well accepted definition of cause of action is bundle of facts which a party has to prove in order to obtain a decree in its favour.

11. A perusal of the plaint demonstrates that the relief prayed therein by the plaintiff is for a declaration to the effect that he is owner in possession of the suit land and the lease deed dated 07.10.2016 executed between the parties, i.e., the plaintiff and defendant is a result of misrepresentation, fraud and undue influence and, therefore, the same is illegal, null and void and was liable to be cancelled, set aside/revoked. A consequential relief of permanent prohibitory injunction restraining the defendants from interfering and disturbing in the ownership and peaceful possession over the suit land of the plaintiff has also been prayed. A decree for restraining the defendant from changing the nature of the suit land/property and getting mutation of the same attested in its favour has also been prayed.

12. The genesis of the plaint is the purported execution of a lease deed between him and the defendant. Incidentally, the execution of the same has not been disputed by the petitioner, who is defendant in the suit. Whether the lease deed is a result of misrepresentation, fraud and undue influence or not, is an issue which is to be decided by the learned Court below on the basis of the evidence which will be led by the respective parties. The principal contention of the petitioner to support that the plaint was liable to be rejected under the provisions of Order VII Rule 11 of the Code is that in view of the subsequent unilateral revocation of lease deed by the plaintiff, no cause of action survives. In my considered view, this contention so made on behalf of the petitioner is not sustainable in law. When the execution of lease deed is not disputed, simply because the same might have been subsequently revoked by the plaintiff, does not lead to the conclusion that the plaintiff has no cause of action to maintain the suit or the plaint does not disclose any cause of action. Plaintiff has prayed for a decree of declaration that he is owner in possession of the suit land. He has also prayed for a decree of declaration that execution of the lease deed is a result of misrepresentation, fraud and coercion. He has also prayed for the relief of injunction against the defendant. Whether or not the plaintiff has a good case on merit, is not to be taken into consideration at this stage, because that obviously depends upon the evidence, which will be led by the parties in support of their respective contentions. However, upon perusal of the plaint, it cannot be said that the same does not disclose any cause of action whatsoever.

13. A perusal of the impugned order also demonstrates that learned Trial Court after taking into consideration the respective contentions of the parties and relying upon the judgment of the Hon'ble Supreme Court in ***Liverpool & London Steamship Protection and Indeminity Association Ltd.*** Vs. ***M.V. Sea Success***, 2003 Law Suit (SC) 1156 has held and rightly so that the plaint did disclose cause of action and case of the plaintiff was yet to be proved or disproved after framing of issues and recording of the evidence. Learned Trial Court has rightly held that at this stage, the Court is not to see whether the claim made by the plaintiff is likely to succeed or not and it merely has to satisfy itself that the allegations made in the plaint, if accepted as true, would entitle the plaintiff for the relief he

has claimed or not. In my considered view, taking into consideration the averments made in the plaintiff, assuming that there is some element of truth in the allegation of the plaintiff, then but obvious it can be *prima facie* concluded that it would entitle the plaintiff for the relief claimed for. However, final decision obviously will depend upon the pleadings and evidence which respective parties will lead.

14. In view of the observations made hereinabove, as this Court does not find any perversity in the order impugned by way of this petition, the same is dismissed. No order as to costs. Registry is directed to forthwith return back the record to the learned Court below. Miscellaneous applications, if any, also stand disposed of.

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

State of H.P. & ors. .....Petitioners.

Versus

Davinder Chauhan .....Respondent.

CWP No. 901 of 2019.
Decided on: 29.5.2019.

Constitution of India, 1950– Articles 14 & 16– Regularization of daily wagers- Government policy dated 03.04.2000- Held, Government policy of regularization of daily waged/ contingent paid workers required continuous sercice for 8 years with minimum of 240 days in each calendar year- Petitioner working as Receptionist on daily wage basis from 1994 onwards and had continuously worked for 240 days in each calendar year- He completed eight years continuous service and entitled for regularization as Receptionist from 2002- Order of Administrative Tribunal upheld- Petition challenging it dismissed. (Paras 3 to 6)

Cases referred

Gauri Dutt vs. State of H.P., CWP No. 778 of 2006, decided on 29.12.2007
Rakesh Kumar vs. State of H.P., CWP No. 2735 of 2010, decided on 28.7.2010

For the petitioners: Mr. J.S.Guleria, Dy. Advocate General.
For the respondent: Mr. Sunil Mohan Goel, Advocate.

The following judgment of the Court was delivered:

Justice Dharam Chand Chaudhary, ACJ (Oral).

Heard.

2. Order Annexure P-3 dated 18.12.2017 passed by H.P. State Administrative Tribunal in T.A. No. 2708 of 2015 is under challenge in this writ petition. The complaint, in a nut shell, is that the petitioners herein (respondents in the Transferred Application), had rightly ordered to regularize the services of the petitioner as Receptionist-cum-Complaint Attendant w.e.f. 4.1.2006 vide order dated 12.4.2010 in compliance to the judgment dated 17.7.2009 passed in CWP(T) No. 13708 of 2008 instituted previously by the respondent-writ petitioner while following the ratio of the judgment Annexure P-4 again rendered by a

Division Bench of this court on 29.12.2007 in CWP No. 778 of 2006 titled ***Gauri Dutt vs. State of H.P. and its connected matters***. Learned Tribunal, therefore, was not justified in issuing the direction to regularize the services of the respondent-writ petitioner as Complaint Attendant/Receptionist w.e.f. 1.1.2002. The impugned order Annexure P-3, as such, has been sought to be quashed and set aside.

3. Admittedly, the respondent-writ petitioner was engaged as Beldar on daily wage basis in the year 1992. He continued, as such, till 1993 and thereafter issued the muster roll of Receptionist, Class-III in the year 1994. He was regularized as Beldar vide order dated 4.1.2006. He accepted his regularization so ordered as Beldar without any protest. Subsequently, he however, preferred O.A. No. 1829 of 2006 in the H.P. State Administrative Tribunal and claimed regularization as Receptionist (Class-III) w.e.f. 4.1.2006 with all consequential benefits. On abolition of the Tribunal, the original application was transferred to this Court and registered as CWP(T) No. 13708 of 2008. The same came to be dismissed by a Division Bench of this Court vide judgment dated 17.7.2009 Annexure P-5. Since the respondent-writ petitioner had worked initially as Beldar and thereafter as Receptionist on daily wage basis and opted for his regularization as Receptionist, therefore, this Court vide judgment Annexure P-4 directed the respondents to consider regularization of the respondent-writ petitioner as Complaint Attendant/Receptionist in case the policy of regularization was in existence and being followed by them. The respondents, therefore, proceeded to regularize the services of the respondent-writ petitioner as Receptionist vide order dated 12.4.2010 Annexure P-8 to the writ/record of O.A w.e.f. 4.1.2006 and vide corrigendum dated 1.2.2012 Annexure P-10 sought to recover the amount, the respondent-petitioner had drawn as regular beldar. The respondent-writ petitioner, however, being aggrieved and dissatisfied thereby has assailed the order Annexure P-8 and P-10 initially in this Court by filing the writ petition which ultimately was transferred to the Administrative Tribunal and registered as T.A. No. 2708 of 2015. It is, this transferred application (T.A.) which has been decided vide impugned order Annexure P-3 dated 18.12.2017.

4. As a matter of fact, learned Tribunal has held the petitioner entitled to regularization as Complaint Attendant/Receptionist w.e.f. 1.1.2002 with all consequential benefits and also quashed the order Annexure P-10 whereby certain recoveries were sought to be effected qua the salary drawn by the petitioner on his regularization as Beldar w.e.f. 4.1.2006.

5. On hearing learned Addl. Advocate General and going through the record, we find that there is no dispute qua engagement of the respondent-writ petitioner as Beldar in the year 1992. There is no controversy so as to he worked as Beldar on daily waged basis till 1993 and in the year 1994, muster roll of Receptionist (Class-III) was issued to him and he continued as such till his regularization as Beldar vide order dated 12.4.2016 w.e.f. 4.1.2006. Thus, he accepted the offer of his regularization as Beldar w.e.f. 4.1.2006, however, simultaneously to get his grievance qua his regularization as Receptionist redressed, preferred O.A. No. 1829 of 2006 in the H.P. State Administrative Tribunal. On abolition of the Tribunal in the year 2008, the same was transferred to this Court and registered as CWP(T) No. 13708 of 2008. The same was disposed of by a Division Bench of this Court vide judgment dated 17.7.2009 Annexure P-5 to this Writ petition. As per this judgment, the petitioner was to be considered for regularization as Receptionist as per the policy being followed by the respondent-State as he had opted for regularization as Receptionist instead of Beldar. He, therefore, was ordered to be regularized as Receptionist w.e.f. 4.1.2006, however, not as per the policy prevalent because the Government has framed the Policy on 3.4.2000, further modified on 6.5.2000 and as per the same, the daily waged/contingent paid workers in all the departments, including Public Works were ordered

to be regularized on completion of 8 years of continuous service with a minimum of 240 days in each calendar year as on 31.3.2000. The petitioner, admittedly was working as Receptionist on daily waged basis from the year 1994 onwards. He, therefore, completed 8 years of service in the year 2001. Therefore, as per the policy dated 3.4.2000 read with order dated 6.5.2000 was entitled for regularization from the year 2002 because regularization policy circulated vide order dated 3.4.2000 read with order dated 6.5.2000 remained in force till 9.6.2006, when new policy came to be framed. Since the petitioner had acquired 8 years of service on daily waged basis as Receptionist with 240 days in each calendar year in the interregnum i.e. in the year 2001, therefore the respondents were under an obligation to regularize his services as Receptionist from the year 2002 in view of the ratio of the judgment of this Court in ***Rakesh Kumar vs. State of H.P., CWP No. 2735 of 2010, decided on 28.7.2010*** in which the policy circulated vide letter dated 3.4.2000 and 6.5.2000 were held to be in force till 9.6.2006, the day when new policy came to be introduced for regularization of the services of daily waged/contingent paid staff.

6. Learned Tribunal, therefore, has rightly followed the judgment of this Court in **Gauri Dutt's case** (supra) and also in **Rakesh Kumar's case** while allowing the transferred application vide impugned judgment Annexure P-3 to this writ petition. Order Annexure P-10 to the T.A. initiating thereby the proceedings to recover the amount the respondent-petitioner in the capacity of regular Beldar had drawn has rightly been quashed and set aside for the reason that the petitioner was eligible for being regularized as Receptionist, a Class-III post form the year 2002 and till then he had right to claim the wages of Receptionist. Being so, there is no occasion to the respondents-State to have initiated the proceedings to recover the so called excess amount from him.

Learned Tribunal has, therefore, neither committed any illegality nor any irregularity while allowing the Transferred Application. Otherwise also, the impugned order passed on 18.12.2017 has now been assailed in this Writ petition after a period over one year without there being any explanation to the delay so occurred. Therefore, in the peculiar facts and circumstances, as discussed hereinabove, no case is made out for interference by this Court with the impugned order at this stage. The impugned judgment, as such, cannot be said to be legally and factually unsustainable. The same rather is affirmed and this writ petition is dismissed in limine.

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

State of H.P. .....Appellant.
Versus
Basant Lal and another ....Respondents.

Cr. Appeal No. 474 of 2008.
Reserved on: 15th May, 2019.
Date of Decision: 30th May, 2019.

Indian Penal Code, 1860 - Sections 323 & 324 read with 34 - Causing injuries with sharp edged weapon in furtherance of common intention of each other- Proof- Appeal against acquittal of trial court- Held, entire case of prosecution based on testimonies of two eye witnesses- Both turning hostile during trial and not supporting prosecution case- Mere presence of signatures of these witnesses on alleged disclosure statement of accused leading

to recoveries, is insufficient to prove guilt of accused- Witnesses deposing differently as to the manner of assault i.e. PW2 stating about assault being made with danda whereas PW5 deposing that assault was made by pelting stones as well as regarding participation of different accused- Complainant denying assault upon him with danda- Medical evidence negating injuries with sharp edged weapon allegedly recovered during investigation- Appeal dismissed- Acquittal upheld. (Paras 9 to 11)

For the Appellant: Mr. Desh Raj Thakur, Additional A.G.
For the Respondents: Ms. Rohini Karol, Advocate vice Mr. Mandeep Chandel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal, stands, directed by the State, against, the pronouncement made by the learned Addl. Judicial Magistrate, Court No.1, Mandi, H.P., upon, Criminal Case No. 7-1/ 2004/54-II/2004, whereunder, the accused/respondents herein hence stood acquitted.

2. Briefly, stated the facts of the case are that on 22.8.2003, at about 8 P.M., at place Shasan, Police Station Balh, Tehsil Sadar, District Mandi, H.P., both the accused in furtherance of their common intention have given beatings to Dharam Singh by pelting stones and by danda blows, and, by iron gramala, and, as such the complainant has received injuries on his person. On the information given by the complainant, FIR was registered against the accused in the Police Station concerned, and, the police carried out the relevant investigations in the case.

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

4. The accused/respondents herein stood charged, by the learned trial Court, for, theirs committing offences, punishable under Sections 323 and 324 read with Section 34 of the IPC. In proof of the prosecution case, the prosecution examined 9 witnesses. On conclusion of recording, of, the prosecution evidence, the statement(s) of the accused, under, Section 313 of the Code of Criminal Procedure, were, recorded by the learned trial Court, wherein, the accused claimed innocence, and, pleaded false implication in the case.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of acquittal in favour of the accused/ respondents herein.

6. The appellant herein/State, stands aggrieved, by the findings of acquittal, recorded, by the learned trial Court. The 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 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 being replaced by findings of conviction.

7. On the other hand, the learned counsel appearing for the respondents, has, with considerable force and vigour, contended qua the findings of acquittal, recorded, by the learned trial Court, rather standing based, on a mature and balanced appreciation, by it, of

the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

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

9. Two purported eye witnesses to the occurrence, who respectively stepped into the witness box as PW-2 and PW-5, reneged from their previous statements recorded in writing, and, obviously failed to sustain the charge against the accused. The afore reneging of the afore witnesses, from, their previous statements, respectively recorded in writing, would not bestow any aura of validity, vis-a-vis, the verdict of acquittal recovered by the learned trial Court, unless, they in their respective cross-examinations, render echoings, rather sustaining the genesis of the prosecution case. The learned Additional Advocate General has made sinewed submission, before this Court, that with Ex.P-1, "Garmala", being taken into possession under memo borne in Ex.PW5/A, and, both the afore witnesses thereto hence failing to contest their respective signatures, as, embodied therein, (I) thereupon, the factum of their reneging from their previous statements recorded in writing, rather being eclipsed. However, the afore submission is also frail, as, a perusal of Ex.PW5/A makes clear, and, candid unveilings qua it being not construable either to a validly drawn disclosure statement, not it being construable to be the apposite recovery memo, wherethrough recovery of Ex.P-1, was, made, rather subsequent thereto. Since, Ex.PW5/A constituted the purportedly potent incriminatory piece of evidence, and, when, for, the prosecution being foisted, to, on anvil thereof, hence, validly espouse that it constituted, also both admissible, and, relevant piece of evidence, hence, cast a dire statutory necessity, upon, the Investigating Officer, to, record the statutorily ordained disclosure statement, as, rendered by the accused, during the course of his taking his custodial interrogation, and, thereafter, the, recovery(ies) of the afore weapon of offence, made, under, a, validly drawn recovery memo(s), reiteratedly would foist it with incriminating potency. However, reiteratedly, Ex.PW5/A omits to unveil qua it either being readable, as, the apposite disclosure statement or as the apposite recovery memo, wherethrough, the accused, at his instance, hence ensured, the, recovery of Ex.P-1, by the Investigating Officer. In aftermath, when, for afore reasons, neither the apposite disclosure statement, as, made by the accused, nor when Ex.P-1 stood recovered subsequent thereto, validly drawn recovery memo, thereupon, the purported recovery memo borne in PW5/A, cannot be construed, to be any potent permissible/admissible material piece of evidence, against, the accused. Contrarily, it is discardable, and, as aptly done by the learned trial Court, and, on its anvil also no findings of conviction, can be returned, against the accused.

10. Even otherwise, the prosecution case is wholly dependent upon the testifications, rendered by PW-2, and, PW-5, the purported eye witnesses to the occurrence. As afore stated, both have turned hostile, (i) dehors their reneging from their previous statements recorded in writing, (ii) and, dehors the factum of theirs appending their respective signatures, upon, Ex.PW5/A, rather, when the probative tenacity, of, the latter exhibit, is, for the reasons aforestated, hence, concluded to be wholly enfeebled, the further factum which enfeebles, any dependence, vis-a-vis, the testifications rendered, by the afore ocular witnesses, (iii) is grooved in the factum given theirs rendering testifications, vis-a-vis, the prosecution case rather with visible intra se contradictions. The requisite contradictions, as, exists in their testifications, as, recorded on oath, (iv) stand comprised in the factum that, though, PW-2, has testified qua the accused being armed with dandas, whereas, in contradictions thereto, PW-5 testifies qua the accused rather inflicting by pelting stones, hence, injuries, upon, the victim. Furthermore, PW-2 omits to ascribe specifically, vis-a-vis, accused Ghumbli Devi, any incriminatory role, of, hers hence inflicting

danda blows upon the victim, whereas, in contradiction thereto, rather PW-2 ascribes, vis-a-vis, the afore Ghumli Devi, an incriminatory role of hers inflicting danda blows, upon, victim Dharam Singh. The afore contradiction, is further, falsified by PW-6 Dharam Singh, deposing that no blows with dandas being inflicted upon his person, nor the afore dandas being taken into possession by the Investigating Officer, during, the course of his holding, the investigations into the offences. The sequel of the afore contradictions inter se the testifications of PW-2, PW-5 and, of the complainant, who stepped into the witness box ,as PW-6, is, qua the presence at the relevant site of occurrence, hence, of both the purported ocular witnesses to the occurrence, namely, PW-2 and PW-5, being belied, (v) and, further the medical legal evidence also negating the user of Ex.P-1 i.e. garmala in its hence causing the injuries upon the persons of the victim, hence, the erectable therefrom inference, is, qua the entire genesis of the prosecution case rested, upon, the evidence of the afore witnesses, getting jettisoned, and, capsized.

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

12. Consequently, there is no merit in the instant appeal, and, it is dismissed accordingly. In sequel, the impugned judgment is affirmed and maintained. All pending applications also stand disposed of. Records be sent back forthwith.

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

State of H.P. .....Appellant.
Versus
Mehar Singh and another ....Respondents.

Cr. Appeal No. 599 of 2008
Reserved on: 24th April, 2019.
Date of Decision: 30th May, 2019.

Indian Penal Code, 1860 - Sections 120-B, 419, 420 and 468– Fraud, forgery, use of forged documents under criminal conspiracy- Proof- Trial court convicting accused of obtaining loan from bank for purchase of tractor on forged documents under criminal conspiracy of each other- Appellate court allowing appeal and acquitting accused by setting aside their conviction- Appeal by State- Held, charges of forgery and use of forged documents cannot be proved by testamentary evidence- Rule of best evidence requires proof of said facts by forensic evidence- Signatures and thumb impression on loan applications and hypothecation documents found scribed/ thumb marked by accused "TR"- Prosecution proved its charges against accused- Appeal allowed- Acquittal set aside- Conviction and sentence restored. (Paras 9 to 11)

For the Appellants: Mr. Hemant Vaid, Mr. Desh Raj Thakur, Addl. Advocate Generals with Mr. Y.S. Thakur, and, Mr. Vikrant Chandel, Dy. A. Gs.
For the Respondent(s): Mr. Amit Singh, Advocate in Cr. Appeal No. 599 of 2008 and

Mr. Vijay Chaudhary, Advocate in Cr. A. No. 600 of 2008.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The extant appeal, stand, directed against the impugned verdict, recorded, by the learned Additional Sessions Judge, Mandi, upon, Cr. Appeal no. 7 of 2005, wherethrough, the learned Additional Sessions Judge, recorded findings of acquittal, upon, the accused.

2. The facts relevant to decide the instant case are that complainant Jhanu came to know that his share in land comprised in Khata/Khatauni No. 1 min/39, measuring 11-13-09 bighas, situated in muhal DPF, Sheel/468, Tehsil Karsog, was mortgaged by someone by preparing forged documents with HS.P. State Cooperative Agriculture and |Rural Development Bank Limited, Karsog branch, and, raised loan for Rs.2,70,000 from the said bank. Accused Mehar Singh, Devi Singh and Jhophu had moved forged application in the name of complainant Jhanu and accused Jhophu to the afore bank for loan to purchase tractor and they received cheque No.721777 of 17.12.1999 for Rs.2,35,000/- in favour of Yamuna Syndicate Limited near Court Mandi. Accused Mehar Singh and Devi Singh had signed the receipt on the cheque as witnesses and they affixed forged thumb impression of Jhanu on the documents, whereas, the complainant Jhanu neither moved the application for loan to the said bank nor he received the loan through cheque for purchasing tractor. The accused persons had forged documents in the name of complainant Jhanu and obtained loan of Rs.2,70,000/- from purchasing tractor. On 10.1.2000, the complainant Jhanu filed the complaint under Sections 120-B, 419, 420, 468, 471/34 IPC against accused Mehar Singh, Devi Singh and Jhophu before the learned Judicial Magistrate 1st Class, Karsog. The application was forwarded by the learned court to the SHO of police station Karsog for investigation under section 156 (3) of the Cr.P.C. Consequently, FIR against the accused persons was registered at the police station concerned, and, the police carried out the investigations in the case.

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

4. The accused/respondents herein stood charged by the learned trial Court, for, theirs committing offences hence punishable under Sections 419, 420, 468, 471, 120-B read with Section 34 of the IPC IPC. In proof of the prosecution case, the prosecution examined 11 witnesses. On conclusion of recording of the prosecution evidence, the statements of the accused, under, Section 313 of the Code of Criminal Procedure, stood recorded, by the learned trial Court, wherein, they claimed innocence, and, pleaded false implication in the case.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction upon the accused/respondents herein, for theirs, committing offences punishable under Sections 419, 420, 468, 471, 120-B, IPC read with Section 34 of the IPC. In appeal preferred therefrom, by the accused/respondents herein, before the learned Addl. Sessions Judge concerned, the latter reversed the apposite findings of conviction, and, consequent therewith imposition, of, sentences, by the learned trial Court, and, hence acquitted the accused, of, the afore charged offences.

6. The State of H.P. stands aggrieved by the findings of acquittal recorded by the learned Addl. Sessions Judge, Una. The learned Addl. Advocate General for the State has concertedly, and, vigorously contended qua the findings of acquittal, recorded by the learned Addl. Sessions Judge, Una, rather standing not based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by him, of the material on record. Hence, he contends qua the findings of acquittal warranting reversal by this Court, in, the exercise of its appellate jurisdiction, and, theirs being replaced by findings of conviction.

7. On the other hand, the learned counsel(s) appearing, for the accused/respondents, have, with considerable force, and, vigour, contended qua the findings of acquittal recorded by the learned Addl. Sessions Judge concerned, rather standing based on a mature and balanced appreciation, by him, of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

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

9. The learned trial Court had recorded findings of conviction, upon, the accused/respondents, herein for a charge framed, under, Sections 419, 420, 468, 471, 120-B, IPC read with Section 34 of the IPC, and, consequent therewith sentences, were, also imposed, upon, the accused. The complainant Jhanu reared allegations, qua, a forged mortgage deed, being executed by the accused, and, reiteratedly thereon his forged thumb impressions being made. In consequence thereto, the accused secured, a, loan, borne in a sum of Rs.2,70,000/-, from, the bank concerned, and, consequently, wrongful loss stood encumbered upon the complainant, and, wrongful gain stood secured by the accused. The most significant, and, crucial document(s), for determining the afore factum, are, the mortgage deed, borne in Ex.PW3/B, and, the joint application form, borne in Ex.PW3/C. The mortgage deed, borne in Ex.PW3/B, carries thereon, the purported forged/ disputed thumb impression, of, the complainant. However, Neela Dass Negi, Branch Manager of the Bank concerned, from whom, the relevant borrowings were made, stepped into the witness box as PW-3, and, therein testified qua the complainant making a complaint to him qua his, taking to append his signature on all documents, and, his not taking to append his thumb impressions, upon, any document. He has further testified, that, in the complaint made to him by afore Jhanu, he had contested, the, authenticity of his thumb impression borne, upon, Ex.PW3/B. However, the afore testification of PW-3 is not sufficient to constrain, a conclusion that hence the charged offences, being invincibly, hence, proven by the prosecution, (a) unless the best evidence comprised in the report of the FSL concerned , respectively borne in Ex.Px, and, in Py also lends corroboration thereto. A perusal of the afore reports makes imminent disclosure(s), that, the admitted signatures bearing marks S-9 to S-12, belonging, to Jhanu Ram, rather not bearing compatibility, with, the disputed signatures hence bearing mark Q-5. Further thereonwards, it is voiced therein, that, the afore signatures, being scribed by the accused. The afore best documentary evidence, does obviously, lend corroboration tot he testification of PW-3, and, when the report of the Finger Print Bureau, Phillaur, borne in Ex.Py, upon, the latter making, a, comparison of the admitted thumb impression, of, complainant Jhanu Ram, vis-a-vis, the disputed thumb impression of Jhanu Ram, and, also, upon, its making, a, comparison, inter se, the admitted, thumb impression of the accused, vis-a-vis, the disputed thumb impression, borne in Ex.PW3/B, hence, thereafter therein makes a firm opinion, that, the apposite comparison(s), rather unraveling qua the thumb impression borne on Ex.PW3/B, not tallying with the thumb impression of Jhanu Ram, rather theirs tallying with the thumb

impression(s) of Jhophu Ram, thereupon, the afore evidence clinches, the, charge framed against the accused.

10. For the reasons which have been recorded hereinabove, this Court holds that the learned Addl. Sessions Judge concerned, has not appraised, the entire evidence on record in a wholesome, and, harmonious manner, apart therefrom, the analysis of the material on record by the learned Addl. Sessions Judge concerned, suffers, from a gross perversity or absurdity of mis-appreciation, and, non appreciation of germane evidence on record.

12. Consequently, the instant appeal is allowed, and, the common verdict impugned, before this Court by the State, and, recorded by the learned Addl. Sessions Judge concerned, upon, Cr. Appeal No. 7 of 2005, is set aside, whereas, the verdict recorded by the learned Addl. Chief Judicial Magistrate, Karsog, upon, Police Challan No.60-II of 2002, is, affirmed and maintained. The learned trial Court is directed to forthwith execute the sentences imposed upon the respondents/accused. Records be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

State of H.P ... Appellant.

Versus

Neeraj Sharma ...Respondent

Cr.Appeal No. 44 of 2007
Reserved on : 12.6.2019
Date of decision : 17.06.2019

Code of Criminal Procedure, 1973 - Section 155(2) **- Indian Penal Code (IPC)** – Sections 186 & 189 – Non-cognizable offences- Investigation without orders of Magistrate- Effect- Held, offences under Sections 186 and 189 of Code are non-cognizable- Police cannot investigate such offences without orders of Magistrate concerned- Investigation carried out by Police without obtaining necessary orders of jurisdictional Magistrate, is illegal and non-est. (Paras 14 & 15)

Cases referred:

Basir-ul-Huq vs. State of West Bengal, AIR 1953 SC 293
Durgacharan Naik vs. State of Orissa, AIR 1966 SC 1775
RC Sharma vs. CBI :2010 SCC online Del 2485
State of H.P. vs. Vidya Sagar, 1997 Cri.L.J 3893

For the Appellant: Ms. Rita Goswami, Addl. A.G. with
Ms. Divya Sood, Dy. A.G. & Mr. Manoj Bagga,
Assistant Advocate General.

For the Respondent : Mr. Guljar Singh Rathore, Advocate.

The following judgment of the Court was delivered:

Anoop Chitkara, Judge

1. This case is based on commission of offences punishable under Sections 186 and 189 of the Indian Penal Code. It appears that this complaint by the Police was filed under Section 173 of the Cr.P.C. However, the format of the complaint does not mention whether it is specifically filed under Section 173 Cr.P.C. or was filed in the form of complaint under Section 190(b) of the Cr.P.C. It has been presented through Station House Officer, Police Station, Sadar, District Solan. Since, the learned Judicial Magistrate did not record the statement of the complainant under Section 200 Cr.P.C prior to recording his satisfaction under Section 204 Cr.P.C., hence, the learned Judicial Magistrate took it as a case based on police report under Section 173(2) Cr.P.C. Be that as it may, it would not affect the outcome of the verdict.

2. The gist of the complaint is as follows:

(a) that on 18th July, 2002 HHC Jai Kishan No. 349 and HC Rakesh Kumar No. 142 were deputed in "Police - Help Room" at bus stand Saproon.

(b) At about 10-05 a.m, two buses, one bound for Dharampur and another for Kasauli were parked and another bus number HP-51-3851 was also parked. At that time another bus bearing No. HP-14-2756, which was bound for Rajgarh came and the driver of the bus parked his bus in front of the other bus No. HP-51-3851.

(c) Because of this, the movement of people as well as movement of vehicle obstructed.

(d) To remove this hinderance, HC Rakesh Kumar No. 142 asked HHC Jai Kishan No. 349 to direct the driver of bus No. HP-14-2756 to move his bus ahead so that obstruction to traffic is not caused.

(e) when such directions were conveyed to the driver of the bus, then the owner of the bus Neeraj Sharma, who is respondent-accused, refused to move his bus and stated that he throws wads of currency notes on the police and despite that police is creating obstruction to him. Consequently, entry No.3 in daily diary report dated 18/07/2002, was exhibited as Ext.PA.

(f) After investigation, the complaint under Section 186 and 189 of the Indian Penal Code was filed.

3. Learned Chief Judicial Magistrate, Solan put notice of accusation to the accused/respondent, for commission of offences under Sections 186 and 189 IPC and proceeded to record statement of witnesses on oath.

4. After conclusion of trial, learned Chief Judicial Magistrate, Solan vide judgement dated 26.05.2006 in criminal complaint No. 335/2 of 2002 convicted the accused and sentenced him to pay fine of Rs.500/- under Section 186 and Rs.500/- under Section 189 IPC and in default of payment of fine amount sentenced him to undergo simple imprisonment for 15 days.

5. Feeling aggrieved, the convict-accused filed a criminal appeal before the Additional Sessions Judge, Solan, and vide judgement dated 1.11.2006 learned Addl. Sessions Judge, Solan, allowed the appeal and acquitted the accused of all the charged offences.

6. Now the State has filed the present appeal. A coordinate Bench of this Court granted leave to appeal under Section 378(3) of the Code of Criminal Procedure and thereafter the instant appeal registered and consequently admitted.

7. I have heard Ms. Rita Goswami, Addl. Advocate General assisted by Ms. Divya Sood, Dy. A.G. for the State and Mr. Gulzar Rathore, Advocate for the respondent and also gone through the entire record of the case. After applying my mind on facts as well as law my reasoning to arrive to the conclusion is as follows:-

8 (i) The learned Chief Judicial Magistrate failed to take notice of Section 195 Cr.P.C. wherein it is a mandatory direction that no Court shall take cognizance of any offences punishable under Sections 172 to 188 of the Indian Penal Code.

(ii) Section 186 IPC, defines punishment for obstructing any public servant in discharging his public functions and Section 195 Cr.P.C. says that cognizance could have been taken only if the complaint is made in writing and that no Court shall take cognizance of an offence under Section 186 IPC except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate

(iii) HHC Jai Kishan, who had confronted the accused appeared as PW-1 and states that the Rapat was entered by HC Rakesh Kumar, who appeared as PW-2.

(iv) Initially, it was PW-2 HC Rakesh Kumar, who had directed PW-1 Jai Kishan HHC to ask the driver to remove his bus and remove obstruction to traffic. Now, admittedly, daily diary entry was made by PW-2 Rakesh Kumar. The exception to file a complaint for violation of offence under Sections 172 to 188 IPC, is if the public servant concerned himself makes it or some other public servant to whom he is administratively subordinate. Now, there is no evidence that PW-1 was subordinate to PW-2, who is holding an identical rank. The prosecution did not tender into any evidence to prove this aspect. Even it is not the case of the prosecution that the complaint was made by PW-2 in the capacity of being administratively senior to PW-1. Therefore, in view of the express bar contained in Section 195 (1) (a) of the Cr.P.C the Court could not have taken cognizance under Section 186 Cr.P.C.

9. In the present case, the offences invoked were Section 186 IPC, which deals with obstructing public servant in discharging of public functions; and section 189 IPC, which deals with the situation when threat of injury in made to public servant. A bare perusal of the Daily Diary Report, Ex.PA, does not reveal that any threat was made to the police official. Thus, the police added section 189 IPC, simply with a view to take the case out of the ambit of Section 195 of the Cr.P.C.

10. In Basir-ul-Huq v. State of West Bengal, *AIR 1953 Supreme Court 293*, Hon'ble Supreme Court holds,

> "14. Though, in our judgment, Section 195 does not bar the trial of an accused person for a distinct offence disclosed by the same facts and which is not included within the ambit of that Section, it has also to be borne in mind, that the provisions of that Section cannot be evaded by resorting to devices or camouflages. The test whether there is evasion of the Section or not is whether the facts disclose primarily and essentially an offence for which a complaint of the court or of the public servant is required. In other words, the provisions of the Section cannot be evaded by the device of charging a person with an offence to which that Section does not apply and then convicting him of an offence to which it does, upon the ground that such latter offence is a minor offence of the same character, or by describing

> the offence as being one punishable under some other Section of the Indian Penal Code, though in truth and substance the offence falls in the category of Sections mentioned in Section 195, Criminal Procedure Code.Merely by changing the garb or label of an offence which is essentially an offence covered by the provisions of Section 195 prosecution for such an offence cannot be taken cognizance of by misdescribing it or by putting a wrong label on it."

11. In Durgacharan Naik v. State of Orissa, *AIR 1966 Supreme Court 1775*, the Hon'ble Supreme Court needed to deal with the question whether the prosecution of the accused therein for the offences under Sections 186 and 353, Indian Penal Code, in the absence of the complaint envisaged under Section 195(1)(a) of the Code of Criminal Procedure was valid and the Supreme Court Holds:

> "5. We pass on to consider the next contention of the appellants that the conviction of the appellant under Section 353, Indian Penal Code is illegal because there is contravention of Section 195(1) of the Criminal Procedure Code.which requires a complaint in writing by the process server or the A.S.I. It was submitted that the charge under Section 353, Indian Penal Code is based upon the same facts as the charge under Section 186, Indian Penal Code and no cognizance could be taken of the offence under Section 186 Indian Penal Code unless there was a complaint in writing as required by Section 195(1) of the Criminal Procedure Code.It was argued that the conviction under Section 353, Indian Penal Code is tantamount, in the circumstances of this case, to a circumvention of the requirement of Section 195(1) of the Criminal Procedure Code.and the conviction of the appellants under Section 353 Indian Penal Code by the High Court was, therefore, vitiated in law. We are unable to accept to this argument as correct. It is true that most of the allegations in this case upon which the charge under Section 353, Indian Penal Code is based are the same as those constituting the charge under Section 186, Indian Penal Code but it cannot be ignored that Sections 186 and 353, Indian Penal Code relate to two distinct offences while the offence under the latter Section is a cognizable offence, the one under the former Section is not so. The ingredients of the two offences are also distinct. Section 186, Indian Penal Code is applicable to a case where the accused voluntarily obstructs a public servant in the discharge of his public functions but under Section 353, Indian Penal Code the ingredient of assault or use of criminal force while the public servant is doing duty as such is necessary. The quality of the two offences is also different. Section 186 occurs in Ch. X of the Indian Penal Code dealing with Contempts of the lawful authority of public servants, while Section 353 occurs in Ch. XVI regarding the offences affecting the human body. It is well established that Section 195 of the Criminal Procedure Code.does not bar the trial of an accused person for a distinct offence disclosed by the same set of facts but which is not within the ambit of that Section."

12. In State of H.P. v. Vidya Sagar, *1997 Cri.L.J 3893*, a co-ordinate bench of this Court holds as follows:

> "13-A. Section 195(1)(a), Code of Criminal Procedure, on which reliance has been placed by the learned Magistrate, while acquitting the two accused, provides, inter alia, that no court shall take cognizance of an offence punishable under Sections 172 to 188, Indian Penal Code, except

> on the complaint in writing of the public servant concerned, or some other public servant to whom he is subordinate. The statute thus requires that without a complaint in writing of the public servant concerned, no prosecution for the offence under Section 186, Indian Penal Code, can be taken cognizance of. It does not further provide that if in the course of the commission of that offence other distinct offences are committed, the Magistrate is debarred from taking cognizance in respect of those offences."

13. There is another fatal defect in the prosecution case. A bare perusal of the notice of accusation reveals the accusation of only of non-cognizable offences. Both Sections 186 and 189 IPC, are Non-Cognizable Offences, which also means, that investigation could not have been carried out by the Investigation officer, without resorting to the provisions of Section 155(2) Cr.P.C.

> "Section 155 Cr.P.C. Information as to non-cognizable cases and investigation of such cases.
>
> (1) When information is given to an officer-in-charge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer the informant to the Magistrate.
>
> (2) No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial.
>
> (3) ….
>
> (4) …."

14. In the instant case, the police was legally bound to refer the complaint recorded in the DDR, Exhibit PA, to the concerned Judicial Magistrate under Section 155(2) CR.P.C. The investigation carried out the police without the express orders of the competent Judicial Magistrate is illegal, is without jurisdiction and non-est, having been done in total violation of Section 155(2) CR.P.C.

15. Therefore, it is established that the Investigating Officer instead of complying with the mandatory provisions of Section 155 CR.P.C., conducted investigation and opted to proceed with the matter and filed a docket, which may be read as a Police report under Section 173 (8) of CrPC or a Police Complaint under Section 190(2) CrPC. Thus the prosecution has invented a novel way to make non-cognizable offences as cognizable. This has been done to circumvent the Legislative intent to make to categories of cases, falling in separate classes, serious ones as Cognizable and Non-serious ones as Non-Cognizable.

16. This Court would not be a mute spectator to this illegal investigation.

17. A co-ordinate bench of this Court, in Cr. Appeal No. 160/2012 titled as State of H.P. vs Sat Pal Singh @ Satta & another, decided on 11.5.2009, took the similar view. The facts of that case, an enumerated in judgment, were that the accused therein were found transporting timber in a truck without a permit. An FIR under Section 379 IPC (cognizable) and Sections 41 & 42 of the Indian Forest Act (Non-cognizable) was

registered. Later on, it was found that the offence under section 379 IPC had not been committed.

18. In RC Sharma versus CBI :2010 SCC online Del 2485, an FIR was registered for the offences punishable under Section 120-B IPC read with Sections 193/201/214 read with Section 511 IPC, under which the accused were summoned and charges framed. CBI, thereafter, moved an application to alter the charges to section 214/34 IPC (non-cognizable) which was allowed. High court of Delhi quashed the entire proceedings under section 214/34 IPC upholding the rationale that allowing the police to first register a case for a non-existent cognizable offence and then to start investigations where the allegations disclosed only non-cognizable offences would tantamount to giving it a long hand to the police which is not permitted by the code of Criminal Procedure. It would in fact upset the entire scheme laid down in the code.

19. In view of the above discussion, I find that there is no merit in the appeal and hence the same is dismissed, so also pending applications, if any.

20. Bail bonds furnished by the accused are discharged. Records of the Court below be sent back.

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

State of H.P. .....Appellant.
Versus
Purshotam & another ....Respondents.

Cr. Appeal No. 683 of 2008.
Reserved on: 29th April, 2019.
Date of Decision: 30th May, 2019.

Indian Forest Act, 1927 – Sections 41 and 42 – Illicit transit of khair wood- Proof- Appeal against acquittal of trial court- Prosecution alleging accused carrying more khair wood (58 quitals) than permitted (40 quintals) under transport permit- Held, transit permit is merely proof that holder is entitled to transport forest produce- No inference can be drawn from it regarding actual khair wood being transported by its holder- In absence of examining witnesses, in whose presence khair wood carried by accused was weighed and found in excess of limit prescribed, accused cannot be held guilty of said offence- Appeal dismissed- Acquittal upheld. (Paras 11 & 12)

For the Appellant: Mr. Hemant Vaid, Additional A.G.
with Mr. Y.S. Thakur, Dy. Adv. General
and Mr. Vikrant Chandel, Dy. A. G.
For the Respondents: Mr. K.D. Sood, Senior Advocate with
Mr. Sanjeev Sood, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal, stands, directed by the State, against, the pronouncement made by the learned Judicial Magistrate 1st Class, Court No.1, Una, H.P., upon, Criminal Case No. 85-I-03/39-III-03, whereunder, the accused/respondents herein hence stood acquitted.

2. Briefly, stated the facts of the case are that on 11.2.2003, SI Ruldu Ram along with other police officials had laid a Nakka at Pirnigaha Road near "Satsang Ghar". At about 11 a.m. a tempo bearing No. HP-19A-0393 covered with tarpaulin came from Basoli side, which was stooped. It was occupied by its driver and one another person. The tempo was checked after removing the tarpaulin and on checking logs of Khair Heat Wood were found in the same. The person sitting in the tempo disclosed his name to be Purshotam, and, the driver thereof disclosed his name to be Ashok Kumar. Accused Purshotam produced Parcha Hamrahi of 102.2003 for transporting 40 quintals of khair wood but the khair wood appeared to be in excess to the permit limit in the tempo and as such, the Investigating Officer, took the above said tempo to Mehatpur and got weight the said tempo in Prem (P) Ltd. Dharam Kanta and on weighment, the weight of tempo along with timbers was found 138 quintals and as such the Investigating Officer, seized the tempo along with timbers and Parcha Hamrahi vide separate memo. It was found that the permit was issued for carrying in the tempo 40 quintals of khair wood, whereas, 58 quintals of khair wood was being transported in the tempo. The rukka was prepared on the spot and was sent for registration of the FIR to the police station concerned, on the basis of which FIR was registered in the police station concerned against the accused. Thereafter the police completed all the codal formalities.

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

4. The accused/respondents herein stood charged, by the learned trial Court, for, theirs committing offences, punishable under Sections 41, and, 42 of the Indian Forest Act. In proof of the prosecution case, the prosecution examined 13 witnesses. On conclusion of recording, of, the prosecution evidence, the statement(s) of the accused, under, Section 313 of the Code of Criminal Procedure, were, recorded by the learned trial Court, wherein, the accused claimed innocence, and, pleaded false implication in the case.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of acquittal in favour of the accused/ respondents herein.

6. The appellant herein/State, stands aggrieved, by the findings of acquittal, recorded, by the learned trial Court. The 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 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 being replaced by findings of conviction.

7. On the other hand, the learned counsel appearing for the respondents, has, with considerable force and vigour, contended qua the findings of acquittal, recorded, by the learned trial Court, rather standing based, on a mature and balanced appreciation, by it, of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

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

9. The accused/respondents herein faced charge, for theirs, in tempo bearing No. HP-19A-0393, hence, illicitly carrying 58 qunitals of khair wood, despite, the apposite permit being issued to them, for, theirs carrying only 40 quintals, of, khair wood, in the tempo concerned.

10. The learned Additional Advocate General, submits that, Purcha Hamrahi comprised, in Ex.PW4/B, whereunder, a permit stands issued, to the accused concerned, for carrying khair wood, upto, a weight of 40 quintals, though, is not ingrained with any aura of fictitiousness, (a) and, also further submits, that, the reason ascribed by the learned trial Court concerned, for dispelling the tenacity, of, the prosecution evidence, vis-a-vis, the relevant seizure, of, the afore khair wood, as stood, carried in the afore tempo by the accused concerned, hence, not suffering from any infirmity. However, he proceed to submits, that, the verdict of acquittal impugned before this Court rather merits interference, (b) as, the learned trial Court, has omitted to mete appropriate credence, vis-a-vis, the disclosure(s) made by co-accused Purshotam, in proceedings, drawn under Section 313 of the Cr.P.C., (c) wherewithin, rather echoings emanate qua the permissible weight/capacity, to carry, hence, in the afore tempo, rather logs of khair wood, being only upto 40 quintals, (d) and, he submits that the afore admission, made by co-accused Purshotam, in the afore proceedings, obviously nailing the charge, against, the accused qua hence in excess of Ex.PW4/B, 58 quintals of khair wood log, being carried in the afore tempo.

11. However, for the reasons to be assigned hereinafter, the afore submission canvassed before this Court by the learned Additional Advocate General, for, constraining this Court, to, interfere with the impugned verdict, is rejected. (a) The afore admission not per se working, vis-a-vis, the proof, of, charge, as it appertains, only to the permissible weight/capacity, embodied in Ex.PW4/B, to hence carry the afore khair wood, in the tempo concerned, (b) obviously it does not make any further admission, that, the quantity/weight of the khair wood, as stood, carried in the tempo concerned, rather ipso facto being in excess of the afore permissible weight, of, logs of the khair wood, to be carried, in the afore tempo, (c) rather the afore evidence was comprised in the prosecution, hence, citing the official concerned working, at Prem Pvt. Ltd. Dharamkanta, located, at Mehatpur, whereat the weight, of, logs as carried, in the afore tempo, hence, was conducted, (d) whereas, the afore official, not stepping to the witness box, to testify qua the logs, of, khair wood, as, carried in the afore tempo, hence, being in excess, of, the weight of logs, of, khair wood, as, permitted to be carried under “parcha hamrahi”, borne in Ex.PW4/B, (e) contrarily constrains an inference qua the prosecution case, qua the logs of khair wood, transported in the afore tempo, and, weight whereof being in excess of the permissible weight thereof, rather straightway failing nor it can be concluded that the learned trial Court, hence, failing to take into consideration the apposite, and, germane evidence, vis-a-vis, charge, and, as existing on record.

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

13. Consequently, there is no merit in the instant appeal, and, it is dismissed accordingly. In sequel, the impugned judgment is affirmed and maintained. All pending applications also stand disposed of. Records be sent back forthwith.

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

State of H.P. .....Appellant.
Versus
Subhash Chand ....Respondent.

Cr. Appeal No. 513 of 2008.
Reserved on: 8th May, 2019.
Date of Decision: 30th May, 2019.

Indian Penal Code, 1860 - Sections 279 & 337 – Rash and negligent driving- Proof- Appeal against acquittal of trial court- State contending wrong appreciation of evidence on part of trial court- Facts revealing (i) motor accident having taken place on National Highway (ii) victim was crossing road (iii) speed of offending vehicle was moderate, around 40 to 60 KM/h (iv) victim was struck while crossing road negligently- Held, accused cannot be said to have breached standard of due care and caution while driving vehicle on highway- Accused was also not rash- Acquittal upheld- Appeal dismissed. (Paras 9 & 10)

For the Appellant: Mr. Hemant Vaid, and, Mr. Desh Raj Thakur, Additional A.Gs. with Mr. Vikrant Chandel, Dy. A. G.
For the Respondent: Mr. Jagat Pal, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal, stands, directed by the State, against, the pronouncement made by the learned Chief Judicial Magistrate Lahaul Spiti at Kullu, H.P., upon, Criminal Case No. 140-1/2003, wherethrough, the accused/respondent herein hence stood acquitted.

2. Briefly, stated the facts of the case are that on 30.10.2002, at about 9.30 a.m., accused Subhash Chand was driving maruti van No. HP-01-2735 on Kullu to Bhunter public Highway in a rash or negligent manner so as to endanger human life. It is alleged that the speed of the vehicle being driven by the accused was very high. It is alleged that accused while driving the said vehicle on the highway in high speed, all of sudden, applied brakes just in front of the complainant's shop at Mohal. However, the vehicle stopped at a distance of 50-60 feet. One Ajay Sood, who was crossing the highway, got hit by the said vehicle. He sustained injuries on his person. Accused made abortive attempt to fled away from the scene. The complainant asked him to take injured Ajay Sood for medical treatment to the hospital. However, accused acceded to the request and took the injured person in his vehicle to the hospital. During the course of investigation, the statement of the complainant, under Section 154, Cr.P.C. was recorded on the basis of which FIR was registered at police station Kullu. Thereafter, the police completed all the investigating formalities.

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

4. The accused/respondent herein stood charged, by the learned trial Court, for, his committing offences, punishable under Sections 279 and 337 of the IPC. In proof of the prosecution case, the prosecution examined 6 witnesses. On conclusion of recording, of, the prosecution evidence, the statement of the accused, under, Section 313 of the Code of Criminal Procedure, was, recorded by the learned trial Court, wherein, the accused claimed innocence, and, pleaded false implication in the case.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of acquittal in favour of the accused/ respondents herein.

6. The appellant herein/State, stands aggrieved, by the findings of acquittal, recorded, by the learned trial Court. The 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 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 being replaced by findings of conviction.

7. On the other hand, the learned counsel appearing for the respondents, has, with considerable force and vigour, contended qua the findings of acquittal, recorded, by the learned trial Court, rather standing based, on a mature and balanced appreciation, by it, of the evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

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

9. The victim/injured one Ajay Sood, was struck, on the national highway, by the offending vehicle, driven by the accused/respondent herein. In sequel to the afore offending vehicle hence striking the victim/injured, the latter sustained injuries, on his person. The prosecution ascribed, vis-a-vis, the accused/respondent, hence, inculpable/incriminatory negligence, arising, from his driving the offending vehicle, rather at an excessive, and, brazen pace. Though, the ocular witnesses, to the occurrence, rendered testifications with inter se corroboration, vis-a-vis, the afore collision, hence, occurring, inter se, the injured/victim and, the offending vehicle, driven by the accused, rather happening hence with the afore victim standing, on, the side of the road, (i) testification whereof is meted corroboration by PW-2. However, the afore rendered corroborative testification(s), vis-a-vis, the site, of, the relevant occurrence, is/are rather shred of its/their efficacy(ies), (ii) given the victim (PW-3), upon his being subjected, to an ordeal of a scathing cross-examination, by the learned counsel for the accused, his rather thereat acquiescing, to a suggestion, put thereat to him qua, upon, his crossing the national highway, hence, rather thereat the offending vehicle, driven by the accused, hence, colliding/striking him. The effect of the afore admission, is, qua reiteratedly hence the site, of, occurrence, as enunciated, in, the consistent testifications, as, rendered, by the purported ocular witnesses, to the occurrence, and, who stepped into witness box as PW-1, and, PW-2, rather getting belied, (iii) and, when the uncontested predominant factum qua the relevant mishap, hence, occurring on the national highway, and, besides entwining therewith, the, afore admission(s) emanating from PW-3, victim/injured, (iv) thereupon, the purported excessive brazen speed, at which, the offending vehicle, was driven by the accused/respondent, hence, pales into insignificance, (v) as, the speed of 40 to 60 kilometers per hour at which the offending vehicle, was driven, at the relevant time, is, the normal speed employed by the drivers concerned, while theirs taking to ply hence vehicles, on, national highwa(s). (vi) The further concomitant effect thereof, is, that the afore speed,

cannot be construed, to be either brazen or rash nor would enable this Court, to conclude qua the prosecution hence solitarily therefrom hence proving the charge, against, the accused/respondent, (vii) unless forthright evidence exists, on record, and, it rather making vivid display(s) that the relevant site, of, occurrence rather constituted the reserved portion, of the national highway, whereon, the pedestrian(s) could hence trudge, and, whereat the accused/respondent, hence, struck the offending vehicle, against the victim, thereupon, his breaching the standards of due care and caution, (viii) and, concomitantly his committing offences, punishable under Section 279, and, under Section 337 of the IPC. However, the afore evidence is not existing, on record, and, when as aforestated, with the offending vehicle, being plied at a speed of 50 to 60 kilometers per hour, on the national highway, and, with the afore speed being the normal pliable speed, of, vehicles, on, the national highway(s), (ix) thereupon, when the victim/injured rather took to negligently, cross the national highway, besides when the offending vehicle, is not, displayed in the apposite site plan borne in Ex.PW5/D, to occupy hence, at the relevant time, the inappropriate side of the road, thereupon, its striking the person of the victim/injured, also cannot, beget any inference, that, the accused/respondent while driving, the offending vehicle, hence, committed any incriminatory offence.

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

11. Consequently, there is no merit in the instant appeal, and, it is dismissed accordingly. In sequel, the impugned judgment is affirmed and maintained. All pending applications also stand disposed of. Records be sent back forthwith.

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

State of Himachal Pradesh ....Appellant

Versus

Ajay Kumar ....Respondent

Cr. Appeal No. 318 of 2012

Date of Decision 13th May, 2019

Indian Penal Code, 1860- Sections 363 & 376- Kidnapping and rape- Proof- Appeal against acquittal of accused - State alleging misappreciation of evidence on part of trial court- Held, no evidence worth name of accused enticing or inducing victim to come along with him- Letters written by victim to accused showing that she was in extreme love with accused and pressing him hard to take her away with him- She was threatening to commit suicide in case accused did not take her with him- Accused took no active part in taking victim with him- Contradictory evidence regarding age of victim i.e. school certificating showing her age below 18 years whereas medical evidence indicating her aged between 17-19 years- Not established that victim was below 18 years of age on date of offence- Acquittal upheld. (Paras 15 to 17)

For the Appellant: Shri J.S. Guleria and Shri Kunal Thakur, Deputy Advocate Generals.

For the Respondent: Shri Bhupinder Pathania, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.(Oral)

State has preferred present appeal against acquittal of respondent by learned Additional Sessions Judge, Fast Track Court, Kangra at Dharamshala vide judgment dated 4.4.2012 passed in sessions trial No. 6 of 2012/RBT SC No. 19-D/VII/11, title State vs. Ajay Kumar, in case FIR No. 80 of 2011, dated 13.5.2011 registered at Police Station Dharamshala, District Kangra, under Sections 363, 366 and 376 of Indian Penal Code.

2. We have heard Mr. J.S. Guleria, learned Additional Advocate General as well as Mr. Bhupinder Pathania, learned counsel for the respondent, and have also gone through the record.

3. In the present case, police machinery was set in motion by PW13 Ashwani Kumar, father of PW12 the victim, by approaching the police in Police Station Dharamshala on 13.5.2011 with a written complaint Ext.PW13/A suspecting kidnapping of his 16 years old daughter (PW12) by respondent/accused during the previous night, whereupon case FIR No. 80 of 2011 was registered under Sections 363 and 366 IPC in P.S. Dharamshala. Thereafter, on 18.5.2011, respondent/accused along with PW12 victim had appeared in the Police Station Dharamshala, whereafter statement of victim was recorded under Section 161 Cr.P.C. wherein it was alleged that victim had come in contact of respondent/accused in the year 2009 when she was studying in 9th class as she had travelled in his taxi to her school and at that time, respondent/accused has proposed her for friendship which was not replied by victim and thereafter, respondent/accused had taken her in his taxi on excursion tour to Mcleodganj and during those visits he had expressed his desire to make her his life partner after marrying her and thereafter he had developed physical relations with her more than once in a garden known as Kandiyala Bag situated near their village and on 10th May, 2011, he had met her in the same garden at 3 PM and had asked her to accompany him during night intervening 12th and 13th May, 2011, without informing her parents, so as to visit Amritsar for performing marriage and thereupon, influenced by respondent/accused, she had left her home and accompanied the accused on foot upto Shahpur and thereafter they had boarded the bus to Amritsar and at Amritsar, he had again violated her forcibly on the pretext of marriage and thereafter he had executed an agreement of marriage at Amritsar.

4 It is the case of prosecution that on the basis of statement of victim, offence under Section 376 IPC was also added in the case FIR. It is further case of the prosecution that on the basis of identification by victim as well as accused, spot map (Ext.PW23/A) of houses of accused and victim, Kandiala garden, the path which was adopted by accused and victim during night after leaving their village to visit Amritsar and spot of boarding the bus and also spot map (Ext.PW23/B) of location of Amrit Guest House at Amritsar were prepared. During investigation letters Ext.PW12/A and Ext.PW12/B sent by respondent/accused to victim were taken into possession on production by victim. The accused and victim were medically examined and their MLCs Ext.PW5/B and Ext.PW11/C were also obtained. Relevant page of the register Ext.PW9/A maintained by Amrit Guest House indicating the stay of respondent/accused along with another person on 15.5.2011 was also taken into possession, which was also containing the signatures of respondent/accused, which were sent and matched with the admitted hand writing of

respondent/accused on the analysis in RFSL Dharamshala. Date of birth certificates Ext.PW7/A and Ext.PW8/B of victim, were also taken in possession from Panchayat and Primary school. After receiving the RFSL report of chemical examination on clothes of victim and accused and vaginal swab of victim, it was opined by doctor that there was evidence of sexual intercourse. On the basis of X-rays, doctor Anupma (PW4) had opined that victim was between the age of 17-19 years.

5 Defence of respondent/accused is that victim had accompanied him on her own, whereas respondent/accused was asking her to wait till attaining the age of 18 years, however, by writing a letter Ext.D1, she had compelled the respondent/accused to accompany her after leaving her house and to perform the marriage.

6 The trial Court, after going through the record, finding prima facie complicity of respondent/accused, had framed charges against respondent/accused under Sections 363, 366 and 376 IPC. After recording the statements of 23 prosecution witnesses, statement of respondent/accused was recorded under Section 313 Cr.P.C., whereafter he had opted not to lead any evidence in his defence and on conclusion of trial, the trial Court has acquitted the accused.

7 Victim and her father/complainant have been examined as PW12 and PW13. Mother of victim was given up by the prosecution being repetitive in nature.

8 PW11 Dr. Ruby Bhardwaj has examined victim on 16.5.2011 and PW6 Bali Ram Radiographer had taken the X-ray of victim and PW4 Dr. Anupma Medical Officer had assessed the age of victim on the basis of X-ray films Ext.P1 to Ext.P3 and had opined that her age was between 17-19 years. PW5 Dr. S.Chkrawarti had examined the respondent/accused.

9 PW14 Amit is a taxi driver, who has proved on record the writing of letter to the victim on behalf of respondent/accused when respondent/accused was not able to write the same on account of injuries in his hand. PW9 Prabhjot Singh, owner of Amrit Guest House Amritsar has proved the page of his register and has identified the respondent/accused as a person who had stayed in his Guest House on 15.5.2011. PW17 Dr. Visheshwar Sharma has proved the signatures of respondent/accused on the page of the said register in his hand writing. PW19 SI Mukesh Kumar has registered the case FIR on the basis of complaint submitted by PW13 Ashwani Kumar. PW15 HC Rahul Rishi has performed the role of MHC during the investigation for accepting the case property and sending the various articles/samples to RFSL Dari through PW16 C. Amarjit Singh and PW10 HHC Dharam Chand. Witnesses PW1 Tripta, PW2 Parkash Chand, PW3 Chaman Lal, PW7 Vijay Kumar, PW8 Suresh Kumar, PW18 Sanjeev Kumar and PW22 Balbir Singh are witnesses of recovery/seizure memos of letters, date of birth certificate, marriage agreement, preparation of spot map on identification of victim and accused. PW20 ASI Suram Singh has investigated the case partly by recording statements of some witnesses. PW23 ASI Om Parkash has conducted the investigation and has submitted the file to PW21 SHO Ramesh Kumar who had prepared the challan and presented it in the Court.

10 Entire case of prosecution rests upon the statement of victim, who has been examined as PW12. In her deposition in Court, she has not only denied violation of her person by respondent/accused at any point of time, but has also disowned her statement Ext.PW23/C recorded under Section 161 Cr.P.C. She was declared hostile and subjected to cross examination by learned Public Prosecutor, but therein also she has specifically denied the portions of her statement Ext.PW23/C to have been deposed by her to the police. Though she has admitted the acquaintance with the accused since 2009 during her school

days and visiting Kandiala garden on calls, but has denied any untoward happening there. It is well settled law that even portion of deposition of a hostile witness, which lend credence on the basis of corroboration from other material on record, can be relied upon in favour of either of party. Though in her deposition, victim has stated that accused had taken away her from house of her parents during night of 12th May, 2011 by saying that he would marry her at Amritsar, but in the cross examination she has denied that during that night respondent/accused had asked her to come out of her house by throwing a stone by him on the roof of her house so as to take her to Amritsar for solemnizing marriage with her. She has specifically denied the allegations of forcible violation of her person by accused. She has admitted the letters Ext.PW12/A and Ext.PW12/B were written by accused to her and also letter Ext.D1 was written by her to the accused. She has also admitted that on her return from Amritsar, she was wearing '*Chura'* and also having *Sindoor* on her head.

11 Deposition of victim and her father has vanished the allegations of sexual intercourse with victim. As per the opinion of Doctor in MLC Ext.PW11/C, there is evidence of sexual intercourse. But that much evidence is not sufficient to hold that it was respondent/accused who had violated the person of victim much less forcibly. Therefore, despite having evidence of intercourse in her medical examination Ext.PW11/C, the accused cannot be convicted for that.

12 PW13 Ashwani Kumar, father of victim, either in his complaint or in his deposition in Court, has not uttered a single word about violation of the person of his victim daughter (PW12) by accused at any point of time, which might have come in his knowledge on disclosure by his victim daughter (PW12) or otherwise. Mother of victim has not been examined being a witness to facts repetitive in nature. Therefore, there is no oral evidence of violation of person of victim daughter by respondent/accused. There is no sufficient evidence to substantiate the charge against the accused under Section 376 IPC.

13 For convicting the respondent/accused under Sections 363 and 366 IPC, it has to be proved by prosecution that victim was kidnapped by accused from lawful guardianship of her parents and for kidnapping it is necessary to establish on record that victim, being under 18 years of age, was taken away or enticed out of the keeping of her lawful guardian without consent of such guardian.

14 First of all, with regard to age of victim, prosecution itself has led self contradictory evidence. One hand reliance has been placed on certificates of date of birth (Ext.PW7/B and Ext.PW8/B) indicating her age below 18 years and on the other hand opinion of PW4 Dr. Anupma has also been relied wherein age of victim has been assessed between 17 to 19 years. Therefore, for self contradictory evidence relied upon by prosecution, benefit of doubt may be extended to the accused in given peculiar facts and circumstances of present case. Even otherwise, in case age of victim is considered below 18 years, then also ingredients for convicting the respondent/accused under Sections 363 and 366 IPC are missing on record.

15 In the deposition in Court, PW12 has categorically stated in her examination-in-chief that upto Shahpur they went on foot and therefrom onwards by bus. The crux of letters Ext.PW12/A and Ext.PW12/B, written by respondent/accused to victim, proved on record by prosecution itself, is that respondent/accused was expressing his love towards victim with request to her to wait uptil attaining the age of 18 years for performing the marriage with advice to her that any act on their part, as being proposed by her, would be an offence as law was not permitting it and it also appears from these letters that victim was threatening to end her life for not succumbing to her desire and respondent/accused was trying to pacify and assure her on his part with advice for not to end the life. In letter

Ext.D1 written by victim to the respondent/accused, she had expressed her extreme love for respondent/accused with desire to marry him and had stated that respondent/accused was worried about punishment instead of taking her care and had further stated that she would not depose against the accused/respondent and had said that in case respondent/accused was also loving her then he had to agree with her and further she had expressed that she was intending to leave the home and run away to live with him and she had further asked to do anything to take her with him by taking a decision by Saturday for taking her away by Monday, failing which she had threatened to end her life. In the last, she had stated that action of respondent/accused would decide intensity of his love for her and also that it was true love or cheating.

16 The tone and tenor of letters Ext.PW12/A, Ext.PW12/B and Ext.D1 indicates that relations between the respondent/accused and victim had come in the knowledge of their families and parents of victim had threatened and abused her and were also abusing the respondent/accused and respondent/accused was asking the victim to wait till attaining the age of 18 years for solemnizing marriage but on account of harsh treatment given by family of victim and possibility of solemnizing her marriage by her parents with someone else, she was pressing hard to take her away or to see her dead body.

17 From the evidence on record, it appears that it is not the case of alluring, instigating, taking or enticing the victim by accused to keep her out of lawful guardianship of her parents. There is nothing on record to establish that at any point of time, prior to the victim leaving her house, any active part was played by accused or even at any earlier stage he had solicited or persuaded her to do so. Rather, on the contrary, evidence is on record, to establish that it was victim who was insisting the respondent/accused to marry her without waiting further or to see her dead body and it is apparent that she had joined the respondent/accused after leaving her house and walked with him on foot a long distance from her village to Shahpur to board the bus to Amritsar. No doubt, respondent/accused, who was in love with victim, had facilitated the desire of victim but under compulsion but such evidence, in our view, in facts and circumstances of present case, is insufficient to hold that respondent/accused had kidnapped the victim.

18 From above discussion, it is apparent that there is no sufficient evidence on record to establish beyond reasonable doubt that respondent/accused has committed the offence under Sections 363, 366 and/or 376 IPC. Therefore, there is no necessity to discuss other evidence on record as the prosecution has failed to establish foundation of case by leading cogent, reliable, trustworthy and confidence inspiring evidence on record.

19 Prosecution has failed to point out any incriminatory evidence on record against the respondent, not considered by the trial Court. The trial Court has considered the entire evidence on record completely and correctly. There is no illegality, irregularity or perversity in judgment. Acquittal of respondent has neither resulted into travesty of justice nor has caused miscarriage of justice. Therefore, we find no ground for inferference in the impugned judgment. Appeal is dismissed accordingly. Bail/surety bonds furnished by respondent and his surety are discharged. Record be sent back to the concerned Court.

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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

Deep Ram ……Respondent.

Cr. Appeal No. 139 of 2019
Decided on: 19.06.2019

Narcotic Drugs & Psychotropic Substances Act, 1985 (Act) - Sections 20 & 50 – Recovery of charas during personal search- Whether provisions of Section 50 would be applicable?- Held, where police have reasonable apprehension of accused having some contraband with him, they must comply provisions of Section 50 of Act- Non-compliance with them would vitiate trial. (Paras 18 to 23)

Cases referred:
Arif Khan alias Agha Khan vs. State of Uttarakhand, AIR 2018 SC 2123
State of Himachal Pradesh vs. Desh Raj & another, 2016 (Suppl.) Himachal Law Reporter (DB) 3088
State of H.P. vs. Rakesh, Criminal Appeal No. 138 of 2015
State of Rajasthan vs. Parmanand & another, (2014) 5 SCC 345

For the appellant: Mr. Vinod Thakur and Mr. Sudhir Bhatnagar, Additional Advocates General, with Mr. Bhupinder Thakur and Ms. Svaneel Jaswal, Deputy Advocates General.

None for the respondent.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge. (Oral)

The present appeal is maintained by the appellant/State, laying challenge to judgment dated 03.10.2018, passed by learned Special Judge-I, Sirmaur at Nahan, District Sirmaur, H.P., in Sessions Trial No. 3-ST/7 of 2015, whereby the accused/respondent (hereinafter referred to as "the accused") was acquitted for the commission of the offence punishable under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as "NDPS Act").

2. The key facts necessary for adjudication of this appeal can tersely be summarized as under:

As per the prosecution story, on 17.01.2015, a police party of Police Station, Rajgarh, was on patrol duty in between Rajgarh and Neripul and a *nakka* was laid at place called Peripul. At about 08:55 a.m., a bus, having registration No. HP-71-3346, came from Neripul and it was en route Solan. The said bus was stopped for checking and the accused was found sitting on seat No. 26. Police conducted the personal search of the accused and recovered two polythene packets from his jacket. On checking, the said packets were found containing *charas*. The accused and the witnesses made to alight from the bus and the recovered contraband was weighed and it was found to be 280 grams. During the personal search of the accused police also recovered a mobile phone and two tickets of Rs. 10/- and Rs. 30/-. Thereafter, the police completed all the codal formalities and the polythene packets containing *charas* were put in a cloth parcel and the parcel was sealed with seals. The said parcel was taken into possession. Police also filled in NCB form, sample seal was drawn separately and seal after its use was handed over to witness Geeta Ram. *Rukka* was

prepared by the police and sent to Police Station, Rajgarh, through Constable Rajesh Kumar, whereupon FIR was registered. The accused was arrested. Police prepared the spot map and photographs were also clicked. The accused alongwith the case property was brought to Police Station, where relevant columns of the NCB form were filled in. The parcel containing *charas* was resealed and the case property was deposited in the *malkhana.* The case property alongwith relevant documents was sent for scientific analysis to SFSL, Junga, and as per the report the sample was found to be the extract of cannabis. Police also seized the documents of the bus and special report was sent to SDPO, Rajgarh. After completion of investigation, *challan* was presented in the Court.

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

4. The learned Trial Court, vide impugned judgment dated 03.10.2018, acquitted the accused for the commission of the offence punishable under Section 20 of the NDPS Act, hence the present appeal is preferred by the State.

5. The learned Additional Advocate General has argued that the learned Trial Court did not correctly appreciate the material, which has come on record and the judgment, as rendered by the learned Trail Court, is based on surmises and conjectures. He has further argued that it was a chance recovery, so the provisions of Section 50 of the ND&PS Act were not required to be complied with. He argued that the appeal, which has merits, be allowed and the judgment of the learned Trial Court be set aside and the accused be convicted after appreciating the facts and law to their right and true perspective.

6. In order to appreciate the contentions of the learned Additional Advocate General for the appellant/State, we have gone through the record carefully. After going through the records, it was found apt not to issue notice to the accused/respondent and the appeal is required to be disposed of at the admission stage itself.

7. The case of the prosecution is of chance recovery. Precisely, as per the prosecution story, on 17.01.2015, ASI Neelkanth (PW-11) alongwith Constable Rajesh Kumar (PW-1), HHC Harinder Singh (PW-2) and HC Hari Chand (PW-4) was on patrolling duty and at place Peripul where they had laid a *nakka.* The police intercepted bus, bearing registration No.HP71-3346, and during checking of the bus, police also conducted personal search of the accused and recovered 280 grams of *charas.* Thus, the case of the prosecution is of chance recovery.

8. PW-1, Constable Rajesh Kumar, who was member of the patrolling party, deposed that on 17.01.2015, he alongwith HC Hari Chand, ASI Neelkanth, HHC Harinder laid *nakka* at Paravi Pul and at about 08:55 a.m. they stopped bus, having registration No. HP71-3346, which was coming from Neri bridge side. He has further deposed that there were only nine passengers in the bus. The person sitting on seat No. 26 was checked and told them that he is carrying *beedi*s. As per this witness, during the checking of that person from left pocket of his jacket two polythene envelops were recovered. Police associated driver and conductor of the bus as witnesses and polythene envelops were found containing stick shaped black substance. The person disclosed his name as Deep Ram (accused herein) and on smelling the recovered substance was found to be *charas.* On weighment the contraband was found to be 280 grams. He has further deposed that personal search of the accused was also conducted, which yielded two bus tickets of Rs. 10/- and Rs. 30/- and one mobile phone. The contraband was sealed in a parcel of cloth and sealed with seal having impression 'T' at seven places. Facsimile seal was taken on a separate piece of cloth and

seal after its use was handed over to Shri Rajesh, conductor of the bus. IO filled in the NCB form and photographs were also clicked. IO prepared the *rukka,* which he handed over to MHC and MHC registered the FIR and handed over the case file to him. He brought the case file to the spot. This witness, in his cross-examination, deposed that search was conducted by ASI/IO Neelkanth. He feigned ignorance whether all the passengers of the bus were searched or not. He has further deposed that police personnel did not give their search to the accused prior to his search.

9. PW-2, HHC Harinder Singh, was also member of the patrolling party. He deposed that on 17.01.2015 he alongwith HC Hari Chand, ASI Neelkanth, laid *nakka* at Paravi Pul and at about 08:55 a.m. they stopped bus for checking, which was having registration No. HP-71-3346. He has further deposed that there were only nine passengers in the bus and during the checking of the bus the accused was found sitting on seat No. 26. I.O. conducted the personal search of the accused and recovered two polythene envelopes, which contained stick shaped black substance (*charas*). He has further deposed that thereafter personal search of the accused was conducted and two tickets of Rs. 10/- and Rs. 30/- and a mobile phone were recovered. As per this witness, the recovered contraband, on weighment, was found to be 280 grams. This witness reiterated the version as given by PW-1, Constable Rajesh Kumar, qua the sampelling and seizure formalities. PW-2, in his cross-examination, deposed that personal search of the accused was conducted by the IO prior to the arrest of the accused and after clicking photographs. He has admitted that the police party and the witnesses did not give their personal search to the accused. He deposed that IO might have given option to the accused qua his legal right to be searched before the Gazetted Officer or the Magistrate.

10. PW-3, Shri Geeta Ram, deposed that he boarded bus, having registration No. HP-71-3346, from Dhamandar at 06:45 a.m. and he was sitting on seat No. 26. He has further deposed that at about 08:55 a.m., the bus was stopped by the police and 2-3 police personnel came inside the bus. All the passengers and their luggages were checked and during the search of the accused two polythene envelops were recovered from the jacket of the accused, so the accused was made to alight from the bus by the police. As per the version of this witness, police called him alongwith Rajesh (owner of the bus) and driver of the bus. Police obtained his signatures on many places. He has further deposed that IO on smelling told that the said envelops contain *charas.* The contraband was weighed and found to be 280 grams. This witness, in his cross-examination, admitted that police party and witnesses did not give their search to the accused.

11. PW-4, HC Hari Chand, who was member of the alleged patrolling party also reiterated the versions, as deposed by PW-1 and PW-2. Thus, his deposition, being repetitive in nature is deliberately left. PW-5, HC Anil Bhardwaj, deposed that on 17.01.2015 ASI Neelkanth deposited with him a mobile phone and qua this he made entry in the *malkhana* register. He has further deposed that on the same day SI/SHO Daulat Ram deposited with him a sealed parcel, having seven seals of impression 'T' and five seals of impression 'D' alongwith sample seal and NCB form. He has further deposed that he sent the said sealed parcel alongwith sample seal and NCB form to SFSL, Junga, through Lady Constable Neelam and receipt qua deposit of the same was handed over to him. As per this witness, the case property remained intact under his custody.

12. PW-6, Constable Amit Thakur, deposed that on 19.01.2015, ASI Neelkanth handed over to him the Special Report pertaining to the case, which he delivered to the Reader of SDPO, Police Station, Rajgarh. PW-7, HC Ram Lal, the then Reader to SDPO, Rajgarh, deposed that on 19.01.2015 Constable Amit Kumar No. 332 brought special, Ex. PW-7/A, which he produced before SDPO, who endorsed the same to him. He entered the

Special Report in diary register and handed over a copy of the special report to Constable Amit Kumar.

13. PW-8, LC Neelam, deposed that on 19.01.2015, MHC Anil Kumar gave her a sealed parcel, which was sealed with seals having impression 'T' and 'D', alongwith sample seal, NCB form and other documents. He, on the same day, deposited the same in SFSL and obtained receipt thereof, which was handed over to MHC. As per this witness, the case property remained intact under her custody. PW-9, Constable Kuldeep Chauhan, deposed that on 17.01.2015 he entered the FIR (Ex. PW-9/A) in computer and issued CIPA certificate, Ex. PW-9/B.

14. PW-10, SI Daulat Ram, the then Additional SHO, Police Station Sadar, deposed that on 17.01.2015, vide daily dairy, Ex. PW-10/A, ASI Neelkanth alongwith other police personnel were on *nakabandi* duty. As per this witness, on that day he received *rukka,* mark 'X', whereupon FIR, Ex. PW-9/A was registered. He made endorsement, Ex. PW-10/B, on the *rukka* and the case file was given to Constable Rajesh Kumar. He has further deposed that on the same day ASI Neelkanth produced the case property alongwith sample seal 'T' and NCB form, Ex. PW-10/C. He resealed the parcel with five seals having impression 'D' and also filled relevant columns in NCB form. He prepared the resealing certificate, Ex. PW-10/E and deposited the case property alongwith sample seal, NCB form and other documents in *malkhana.* He has further deposed that he prepared the special report, Ex. PW-7/A, and sent the same, through Constable Amit Kumar, to SDPO, Rajgarh. After the receipt of chemical analysis report, Ex. PX, he prepared the *challan* and presented the same in the Court.

15. PW-11, ASI Neelkanth, Investigating Officer, deposed that on 17.01.2015 he alongwith HC Hari Chand, HHC Harinder Singh was on patrol duty towards Neripul and they laid a *nakka.* He has further deposed that at about 08:55 a.m., they stopped bus, having registration No. HP71-3346, which was coming from Neripul and the route of the bus was Deothi Majhgaon to Solan. He has further deposed that they stopped a bus and started checking it. The accused was sitting on seat No. 26 and on his checking two polythene packets were found in his jacket, which as per the accused contained *beedis*. The accused was asked to show the *beedis*, but the packets contained some black substance. The recovered substance was found to be *charas.* Police associated Shri Sandeep Kumar, Rajesh Kumar (driver and conductor, respectively, of the bus) and one Shri Geeta Ram as witnesses. The accused was made to alight from the bus and the recovered contraband was weighed and found to be 280 grams. He has further deposed that during the search of the accused two tickets and a mobile phone were recovered. Thereafter, the contraband was put in the same polythene and put in a cloth parcel, which was sealed with seal having impression 'T' at seven places. He prepared NCB form, Ex.PW-10/C on the spot and sample, Ex. PW-3/B, was separately taken on a piece of cloth. The contraband was taken into possession vide memo Ex. PW-3/A. This witness, in depth narrated the formalities completed by the police.

16. After going the testimonies of all the prosecution witnesses, it is clear that the present case is of a chance recovery of *charas*. Now, the prosecution evidence needs to be tested on the touchstone of its credibility and truthfulness, but before analyzing the same, in order to decide the innocence or guilt of the accused, we would like to deal with the law relating to Section 50 of the ND&PS Act. This Court in ***Criminal Appeal No. 138 of 2015***, titled ***State of H.P. vs. Rakesh,*** has been held as under:

> ***"18. ... ... In fact Section 50 of the NDPS Act has a purpose and***

communication of the said right, which is ingrained in Section 50, to the person who is about to be searched is not an empty formality. Offences under the NDPS Act carry severe punishment, so the mandatory procedure, as laid down under the Act, has to be followed meticulously. Section 50 of the Act is just a safeguard available to an accused against the possibility of false involvement. Thus, communication of this right to the accused has to be clear, unambiguous and to the individual concerned. The purpose of this Section is to make aware the accused of his right and the whole purpose behind creating this right is effaced if the accused is not able to exercise the same for want of knowledge about is existence. This right cannot be ignored, as the same is of utmost importance to the accused."

The judgment (supra) is the result of settled legal position by the Hon'ble Supreme Court, as enunciated in ***State of Rajasthan vs. Parmanand & another, (2014) 5 SCC 345.***

17. Section 50 of the NDPS Act is extracted hereunder for ready reference:

"50. Conditions under which search of persons shall be conducted.- —

(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such

person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.]"

18. Now, it is to be seen that Section 50 of the NDPS Act has application in the present case or not. As per the prosecution story, on the relevant day a police team laid a *nakka* and they stopped a bus for checking. The accused was found sitting on seat No. 26 and on his personal search two envelops were recovered, which as per the accused contained *beedis*, but on checking the same were found stuffed with 280 grams of *charas*. As per the prosecution case, Constable Rajesh Kumar (PW-1), HHC Harinder Singh (PW-2), HC Hari Chand (PW-4) and ASI Neelkanth (PW-11) were the members of the patrolling party. Thus, the testimonies of these witnesses are vital. PW-1, Constable Rajesh Kumar, deposed in his examination-in-chief that the accused was checked and during checking from the left pocket of his jacket two envelops of polythene were recovered, which, as per the accused contained *beedis.* The said packets on checking contained *charas*. Likewise, PW-2, HHC Harinder Singh, deposed that personal search of the accused was conducted by the IO and from his left pocket of jacket two polythene envelops were recovered, which as per the accused contained *beedis*. On checking the said packets were founds containing *charas* PW-4, HC Hari Chand, deposed that accused, who was sitting on seat No. 26, was searched by ASI Neelkanth and during his search, stick shaped substance was recovered from his pocket of the jacket, which, as per the accused were *beedis.* On checking the said packets contained *charas*. PW-11, ASI Neelkanth, Investigating Officer, deposed that the accused was found sitting on seat No. 26 of the bus and on his checking two polythene packets were recovered from the pocket of his jacket, which, as per the accused were containing *beedis*. He has further deposed that on checking of those polythene packets stick shaped black substance was recovered, which was *charas.*

19. The above key prosecution witnesses nowhere deposed that prior to the personal search of the accused he was given any option to be searched by the Gazetted Officer or by the Magistrate. The balanced analysis of the official prosecution witnesses shows that the police officials, prior to the checking of the accused, did not comply the mandatory provisions as ordained under Section 50 of the ND&PS Act. The inalienable right of the accused, as provided by Section 50 of the ND&PS Act, was curtailed by the police. The present is a case of chance recovery and as per the prosecution story there were only nine passengers traveling in the bus. As per the testimonies of the official prosecution witnesses, accused was found sitting on seat No. 26 and on his checking he told the police that he is carrying *beedis* in his pocket. Such circumstances are more than enough to hold that the police had reasons to believe that the accused might be having or carrying narcotic drugs or psychotropic substances or controlled substance, but even then the provisions of Section 50 of the NDPS Act were not adhered to.

20. It is imperative to highlight the law, as enunciated by the Hon'ble Supreme Court in ***Arif Khan alias Agha Khan vs. State of Uttarakhand, AIR 2018 SC 2123,*** wherein vide paras 19 to 23 it has been held as under:

"19. The short question which arises for consideration in the appeal is whether the search/recovery made by the police officials from the appellant (accused)

of the alleged contraband (charas) can be held to be in accordance with the procedure prescribed under Section 50 of the NDPS Act.

20. In other words, the question that arises for consideration in this appeal is whether the prosecution was able to prove that the procedure prescribed under Section 50 of the NDPS Act was followed by the Police Officials in letter and spirit while making the search and recovery of the contraband "Charas" from the appellant (accused).

21. What is the true scope and object of Section 50 of the NDPS Act, what are the duties, obligation and the powers conferred on the authorities under Section 50 and whether the compliance of requirements of Section 50 are mandatory or directory, remains no more res integra and are now settled by the two decisions of the Constitution Bench of this Court in State of Punjab vs. Baldev Singh (1999) 6 SCC 172: (AIR 1999 SC 2378) and Vijaysinh Chandubuha Jadeja (AIR 2011 SC 77) (supra).

22. Indeed, the latter Constitution Bench decision rendered in the case of Vijaysinh Chandubha Jadeja (AIR 2011 SC 77) has settled the aforementioned questions after taking into considerations all previous case law on the subject.

23. Their Lordships have held in Vijaysinh Chandubha Jadeja (AIR 2011 SC 77) that the requirements of Section 50 of the NDPS Act are mandatory and, therefore, the provisions of Section 50 must be strictly complied with. It is held that it is imperative on the part of the Police Officer to apprise the person intended to be searched of his right under Section 50 to be searched only before a Gazetted officer or a Magistrate. It is held that it is equally mandatory on the part of the authorized officer to make the suspect aware of the existence of his right to be searched before a Gazetted Officer or a Magistrate, if so required by him and this requires a strict compliance. It is ruled that the suspect person may or may not choose to exercise the right provided to him under Section 50 of the NDPS Act but so far as the officer is concerned, an obligation is cast upon him under Section 50 of the NDPS Act to apprise the suspect of his right to be searched before a Gazetted Officer or a Magistrate. (See also Ashok Kumar Sharma vs. State of Rajasthan, 2013 (2) SCC 67

and Narcotics Control Bureau vs. Sukh Dev Raj Sodhi, 2011 (6) SCC 392) : (AIR 2011 SC 1939).”

The judgment (supra) is fully applicable to the facts of the present case. As held above, the present is a case of chance recovery and the police had reasonable apprehension that the accused might have some contraband, but despite that the police did not comply the mandatory provisions of Section 50 of ND&PS Act. The object and purpose of Section 50 is to inform the person, who is to be searched, of his vital right to be searched by a magistrate or by a gazetted officer. Compliance of Section 50 cannot at all be given go by, as crimes under the NDPS Act provide stiffer punishments and, therefore, the procedure provided under the Act has to be followed meticulously. Indeed, Section 50 of the Act works as safeguard for the accused against false involvement. Therefore, it is incumbent upon the police to clearly communicate the accused of his valuable right to be searched by a magistrate or by the gazetted officer and in a case where this vital right of the accused is diluted, the very purpose of creating this right in the NDPS Act is defeated. The objective of this Section is to make aware the accused of his right, and the whole purpose behind creating this right is effaced if the accused is not able to exercise the same for want of knowledge about its existence. The right ingrained under Section 50 of the Act is of utmost importance to the accused and failure of the police to communicate the same to the accused, entails fatal consequences on the roots of the prosecution case.

21. In the case in hand, after examining the testimonies of the key prosecution witnesses, it is more than certain that police did not comply the provisions of Section 50 of the NDPS Act and in the wake of this, we are indeed unable to hold the accused guilty.

22. In ***State of Himachal Pradesh vs. Desh Raj & another, 2016 (Suppl.) Himachal Law Reporter (DB) 3088,*** this Court has relied upon the law laid down in ***Parmanand’s*** case (supra). Relevant para of the judgment of this Court is extracted hereunder:

“18. Their Lordships of the Hon’ble Supreme Court in State of Rajasthan v. Parmanand reported in (2014) 5 SCC 345, have held that there is a need for individual communication to each accused and individual consent by each accused under Section 50 of the Act. Their lordships have also held that Section 50 does not provide for third option. Their lordships have also held that if a bag carried by the accused is searched and his personal search is also started, Section 50 would be applicable. ……”

Again, in the present set of facts and circumstances, the judgment (supra) is fully applicable to the present case, as the right provided under Section 50 of the NDPS Act in no way can be diluted and its compliance is mandatory in nature.

23. In view of the settled legal position, as discussed hereinabove, and on the basis of testimonies of the official prosecution witnesses, which clearly show that mandatory compliance of Section 50 of the NDPS Act has not been made, it is more than safe to hold that the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt. Therefore, the findings of acquittal, as recorded by the learned Trial Court do not suffer from any infirmity. We see no ground to overturn the findings of acquittal of the learned Trial Court.

24. The appeal, which sans merits, deserves dismissal and is accordingly dismissed. Pnknknk ,ending miscellaneous application(s), if any, shall stand(s) disposed of.

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BEFORE HON'BLE MR. JUSTICE SAMDEEP SHARMA, J

State of Himachal Pradesh .....Appellant
Versus
Durga Ram & others ...Respondents

Cr. Appeal No. 94 of 2007
Decided on : 14.06.2019

Indian Penal Code, 1860 - Sections 323, 379 & 411- **Indian Forest Act, 1927**- Sections 41 and 42- Simple hurt, illicit felling of khair trees and transport/receipt of khair logs- Proof- Prosecution alleging illicit cutting of khair trees by accused from Government land and taking of converted logs to kiln of "BR" co-accused- And also their causing simple injuries to complainant "AR" by 'AS' and 'RD' etc.- Trial court convicting accused for various offences but Sessions Court acquitting them in appeal- Appeal by State- Held, complainant a stranged wife of accused No. 1 and residing separately from him- Other co-accused 'RD' is lady with whom accused No. 1 was residing- This fact was known to complainant prior to filing of complaint with police- Statements of witnesses contradictory qua nature of injuries sustained by 'AR'- Injuries not relatable to period of incident- Material contradictions and inconsistencies occurring in statements of witnesses and no conviction can be based upon such evidence- Appeal dismissed- Acquittal upheld. (Paras 6 to 9)

Case referred:
C. Magesh and others vs. State of Karnataka, (2010) 5 SCC 645

For the Appellant : Mr. Ashwani Sharma, Additional Advocate General.
For the Respondents: Mr. Amrinder Singh Rana, Advocate, for respondents No. 2, 3 & 5.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge *(oral)*

The instant Criminal Appeal filed under Section 378 of the Code of Criminal Procedure lays challenge to judgment of acquittal dated 14th December, 2006, passed by learned Sessions Judge Solan, Himachal Pradesh in Criminal Appeal No. 11-NL/10 of 2006/05, under Section 379 of the Indian Penal Code read with Sections 41 and 42 of the Indian Forest Act, reversing the judgment of conviction dated 14.09.2005, passed by learned Additional Chief Judicial Magistrate, Nalagarh, Distt. Solan, in Criminal Case No. 360/2 of 2000**, whereby learned trial Court though held all the respondents/accused guilty of having committed the offence punishable under Section 323 read with Section 34 of IPC, but while extending the benefit of provision of Probation of Offenders Act, 1958, released the respondent/accused Kumari Vibhuti on probation.**

2. Briefly stated facts, as emerge from the record are that on 13.03.2000, police after having received information that some people are illegally felling '*Khair*' tress from the forest seal, formed raiding party by associating forest guards. At about 6.00 p.m., raiding party allegedly some persons carrying '*Khair*' logs on their shoulders and thereafter,

stacking those logs in the kiln of PW-1 Bagga Ram. Allegedly, the said persons were apprehended and on interrogation, they revealed that they had earlier also sold '*Khair*' logs to Contractor Bagga Ram-accused No. 5 The raiding party allegedly found 11 logs duly peeled and five logs with bark on the spot, i.e. kiln of accused No. 5. At the instance of accused, police recovered axes and saws allegedly concealed by them under the buses in the forest. The police also got demarcated the land and found that the trees had been felled form the government land bearing Khasra No. 40.

After completion of the investigation, police presented the challan in the competent Court of law. It being satisfied that a prima-facie case exists against the accused, framed charge under Sections 41 & 42 of the Indian Forest Act and under Section of 379 IPC against accused Durga Ram, Mehar Singh, Madan Lal and Santokha, whereas accused Bagga Ram came to be charged with offence punishable under Section 411 of IPC, to which they pleaded not guilty and claimed trial.

3. The Investigating Agency, with a view to prove its case examined as many as 9 witnesses, whereas accused in their statements recorded under Section 313 of the Code of Criminal Procedure, denied the prosecution case in toto and also led evidence in their defence.

4. Learned Additional Chief Judicial Magistrate, Nalagarh, District Solan, vide judgment dated 14.09.2005 held accused Durga Ram, Mehar Chand, Santokha and Madan Lal, guilty of having committed the offences punishable under Section 379 IPC and Section 42 of the Indian Forest Act. Besides above, the Trial Court held accused Bagga Ram guilty of having committed the offence punishable under Section 41 IPC and accordingly, convicted and sentenced them

Learned trial Court vide judgment dated 13.2.2006 held all the accused guilty of having committed the offence punishable under Section 323 IPC, however fact remains that accused Vibhuti,who at that time had not completed 20 years of age was given benefit of provisions of Probation of Offenders Act, 1958. Learned trial Court convicted the accused Avtar Singh and sentenced him to undergo simple imprisonment for a term of six months and to pay fine of Rs. 1000/-, and in default of payment of fine, to further undergo simple imprisonment for a period of one month, whereas accused Rita was convicted and sentenced to undergo simple imprisonment for 15 days and to pay fine of Rs. 1000/- and in default of payment of fine to further undergo simple imprisonment for 15 days.

4. Feeling aggrieved and dissatisfied with the aforesaid judgment of conviction recorded by the learned trial Court, present respondents-accused preferred an appeal in the Court of learned Sessions Judge (Forest) Shimla, District Shimla, H.P.,who vide judgment dated 2.4.2009 set aside the judgment of conviction recorded by the learned trial Court and acquitted all the respondents-accused of the charge framed against them under Section 323 read with section 34 IPC. In the aforesaid background, appellant-State has approached this Court in the instant proceedings, praying therein for restoration of the judgment of conviction recorded by the learned trial Court after setting aside the judgment of acquittal recorded by the learned Sessions Judge(Forest) Shimla, H.P.

5. I have heard learned counsel representing the parties and perused the record carefully.

6. Having carefully perused the material evidence adduced on record by the prosecution, be it ocular or documentary vis-a-vis reasoning assigned by the learned Sessions Judge (Forest)Shimla, while reversing the judgment of conviction recorded by the learned trial Court, this Court is not persuaded to agree with the contention raised by Mr.

Kunal Thakur, learned Deputy Advocate General that learned Sessions Judge has failed to appreciate the evidence in its right perspective, as a consequence of which, erroneous findings have come to the fore. Rather, this court after having carefully examined the statements of prosecutions witnesses, is fully convinced and satisfied that there are material discrepancies and inconsistencies in the statements of prosecution witnesses and as such, no conviction could be based upon the same. It is not in dispute that complainant and respondent-accused No.1, Avtar Singh were married to each other in the year, 1992 and out of their wedlock one daughter was born. It is also not in dispute that Divorce Petition having been filed by respondent/accused No.1 was dismissed, but despite that he was not living with her wife i.e. complainant Asha Rathore(PW-4). Though, complainant in her initial statement given to the police under Section 154 Cr.P.C alleged that respondent/accused Avtar Singh despite there being decree of Restitution of Conjugal Rights had been living with co-accused namely Rita Devi at Shankar Niwa, Court Colony, Theog, but if the evidence collected on record by the prosecution is read in its entirety, it certainly compels this Court to agree with contention of learned counsel representing the respondents-accused that prosecution was not able to prove on record beyond reasonable doubt that after dismissal of Divorce Petition having been filed by the respondent-accused Avtar Singh, he was living with co-accused namely, Rita Devi. According to complainant, she was taken to the house of accused Avtar Singh by one lady Smt. Rita Kanwar(PW-6), whereas in her cross-examination, she stated that she was not known to Rita Kanwar(PW-6) before the alleged incident, whereas PW-6 in her cross-examination clearly admitted that she was known to complainant(PW-4) prior to the alleged incident. It has specifically come in her cross-examination that PW-4 was known to her as she oftenly used to visit her house at her village. It is not understood that why complainant made wrong statement to the Court with regard to her prior acquaintance with Smt. Rita Kanwar (PW-6).

7. Leaving everything aside, version put forth by the complainant during her examination-in-chief that she met Rita Kanwar(PW-6) for the first time of alleged incident, itself cast serious doubt with regard to correctness of the story put forth by the prosecution, especially in view of the contradictory statement made by Rita Kanwar(PW-6). Apart from above, both PW-4 and PW-6 deposed before the Court below that when beatings were given to the complainant, her clothes were torn and some blood fell on these clothes, but interestingly torn and blood stained clothes of the complainant never came to be taken into possession by the police.

8. SI. Raghubir Singh(PW-7) Investigating Officer, admitted in the cross-examination that neither the clothes of the complainant were shown to the police nor the injuries on her person were so serious that blood might have fallen on them. If the statement of prosecution witnesses are read juxtaposing each other, it clearly emerges that at the time of alleged incident number of people had gathered at the spot of occurrence, but interestingly, none of the independent witnesses ever came to be associated by the police for the reasons best known to it.

9. PW-5, Roshni Dogra, who happened to be owner of the house namely Shankar Niwas, Theog also not supported the case of the prosecution. She deposed that she had given room to one Virender Kumar and feigned ignorance whether accused Avtar and Reeta lived in that room and she also feigned ignorance that on 7.10.2003 there had been some quarrel between the parties. Version put forth by PW-5 Roshni Dogra, who happened to be owner of the house namely Shankar Niwas, where alleged incident took place, creates serious doubt with regard to correctness of the story put forth by the complainant.

10. True, it is that version put forth by the prosecution witnesses, if any, cannot be brushed aside solely on the ground of non-association of the independent witnesses, but

in the case at hand story put forth by the complainant does not inspire confidence, rather same appears to be concocted one and as such, non-association of independent witnesses, especially when they were available in the abundance, is fatal to the prosecution case.

11. Perusal of MLC Ex.PW1/A, which came to be proved by PW-1, Dr. Nipun Parihar, reveals that injuries, if any, on the person of complainant were caused/inflicted within 12 hours but in her cross-examination she admitted that there is no mention to this effect in the MLC Ex.PW1/A. She admitted in her cross-examination that she cannot tell the duration of injures by referring to this effect and as such, statement of PW-1 is of not much relevance as far as determination of guilt, if any, committed by the accused at the time of alleged incident.

12. By now it is well settled that in a criminal trial evidence of the eye witness requires a careful assessment and needs to be evaluated for its creditability. Hon'ble Apex Court has repeatedly held that since the fundamental aspect of criminal jurisprudence rests upon the well established principle that "no man is guilty until proved so", utmost caution is required to be exercised in dealing with the situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. Most importantly, Hon'ble Apex Court has held that there must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses. In nutshell, it can be said that evidence in criminal cases needs to be evaluated on touchstone of consistency. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in ***C. Magesh and others versus State of Karnataka*** (2010) 5 Supreme Court Cases 645, wherein it has been held as under:-

> ***"45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasis, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled Surja Singh v. State of U.P. (2008)16 SCC 686: 2008(11) SCR 286 has held:-(SCC p.704, para 14)***
>
> > ***" 14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is held to be creditworthy;..the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."***
>
> ***46. In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that " no man is guilty until proven so," hence utmost caution is required to be exercised in dealing with situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistence in evidence amongst all the witnesses.***

13. In the case at hand, there are material contradictions and inconsistencies in the statements of the prosecution witnesses and as such, no conviction could be based upon the same.

14. Consequently, in view of the detailed discussion made hereinabove as well as law referred hereinabove, this Court sees no illegality and infirmity in the impugned

judgment of acquittal passed by the learned Sessions Judge(Forest)Shimla, which otherwise appears to be based upon the proper appreciation of the evidence adduced on record and as such, same is upheld.

Accordingly, the present appeal is dismissed being devoid of any merit alongwith pending applications, if any.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J

State of Himachal Pradesh .....Appellant.

Versus

Rakesh Kumar .....Respondent.

Criminal Appeal No.499 of 2009.
Judgment reserved on :19.06.2019.
Date of decision: 26th June, 2019.

Narcotic Drugs and Psychotropic Substances Act, 1985 (Act) - Section 18 – Recovery of opium (7.100 Kgs.)- proof- Trial court acquitting accused of allegations that during search of his shop, opium weighing 7.100 Kgs. was recovered from his conscious and exclusive possession- Appeal against- On facts held, 'KS' and 'SS' panch witnesses to search and recovery not supporting prosecution case during trial- Owner of adjoining shop denying presence of accused in his shop at relevant point of time- As per documents, recovery effected from "Rakesh Kant" and not from "Rakesh Kumar"- No evidence that Rakesh Kant and Rakesh Kumar are one and same person- No evidence in whose custody samples sent for examination remained for about 15 days- NCB forms not filled at time of alleged recovery of contraband from shop- This procedure is contrary to standing order 1/89 dated 13 June, 1989- Prosecution case doubtful in nature- Appeal dismissed- Acquittal upheld.(Paras 6 to11 & 17)

Narcotic Drugs and Psychotropic Substances Act, 1985 (Act) - Section 18 – Recovery of charas- Procedure for sampling etc.- Standing Order 1/89 dated 13th June, 1989- Whether mandatory?- Held, instructions contained in Standing Order, though do not have force of law, yet they are intended to guide officers and to see that fair procedure is adopted by Investigating Officers. (Para 13)

Cases referred:

Khet Singh vs. Union of India, (2002) 4 SCC 380
State of Punjab vs. Makhan Chand, (2004) 3 SCC 453
Union of India vs. Balmukund and others, (2009) 12 SCC 161

For the appellant : Mr. Vinod Thakur and Mr. Sudhir Bhatnagar,
Additional Advocate Generals with
Mr. Bhupinder Thakur and Ms. Svaneel Jaswal,
Deputy Advocate Generals.

For the Respondent : Mr. N.S.Chandel, Senior Advocate with
Ms. Prem Lata Negi, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Aggrieved by the acquittal of the respondent for an offence punishable under Section 18 of the Narcotic Drugs and Psychotropic Substances Act (for short 'ND&PS Act'), the State has filed the instant appeal.

2. Briefly stated the case of the prosecution is that on 16.03.1998, a police party headed by the Deputy Superintendent of Police, Shri Prem Thakur, was present at Village Bhadroa and at about 3.00 p.m., it received a secret information that 'Sharma Traders' shop at Damtal deals in contraband. Such information was reduced into writing and then passed on to the Superintendent of Police, Kangra. The police party thereafter proceeded to Damtal and also associated two witnesses namely Karnail Singh and Sandip Singh. The shutters of the shop had been pulled down and when opened it was found that there were two persons inside the shop, who disclosed their names as Subhash and Rakesh. Both the persons were apprised of the information received by the police party and also gave reasons for search and issued notice to this effect to both these persons and they opted to be searched by the police party. Their personal search was conducted and premises in question was also searched, which led to the recovery of a polythene bag containing opium, which on weighment was found to be 7kg 100 grams. Two samples of 25 grams each were taken and sealed separately with seal 'M', whereas, remaining opium was also put in six polythene bags which were also sealed and put in one parcel of cloth which too was sealed. The specimen of the seal impression was taken separately vide Ex. PR and seal after use was handed over to Karnail Singh. The rukka was then sent to the Police Station for registration of the case pursuant to which an FIR in question came to be registered. On completion of the investigation, the respondent along with Subhash Chand was made to face trial. Since Subhash Chand did not appear, therefore, he was declared as proclaimed offender vide order dated 29.11.2000.

3. After recording evidence and evaluating the same, the learned Special Judge acquitted the respondent mainly on the ground that the prosecution has not been able to establish the guilt of the respondent and since the complainant and the person investigating the case was the same person, the same has resulted in miscarriage of justice.

4. It is vehemently contended by the learned Additional Advocate General that the learned Special Judge erred in acquitting the respondent without taking into consideration that the officials witnesses examined by the prosecution were reliable. It is further contended that the learned Court below remained completely oblivious to the quantity of the contraband that had been recovered, which by sheer volume, size and weight could not have been planted.

5. On the other hand, Shri N.S.Chandel, learned Senior Advocate assisted by Ms. Prem Lata, Advocate, for the respondent would contend that since the prosecution has miserably failed to prove its case beyond reasonable doubt, therefore, no fault can be found with the judgment of acquittal passed by the learned Special Judge.

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

6. It is the case of the prosecution that the contraband was recovered from the exclusive and conscious possession of the respondent in the presence of two independent witnesses namely Karnail Singh and Sandip Singh. It is not in dispute that the independent

witnesses PW-1 Karnail Singh and PW-2 Sandip Singh did not support the case of the prosecution and rather claimed that nothing was recovered from the respondent in their presence.

7. Even PW-4 Satnam Singh whose shop is adjacent to the shop in question also did not support the case of the prosecution and rather stated that he had not seen the respondent in the shop at the time when the alleged contraband was recovered.

8. PW-5 Raj Kumar, who is an independent witness and President of 'Damtal Veopar Mandal' also did not support the case of the prosecution and was declared hostile.

9. As regards the official witnesses, even though they tried to prove the case of the prosecution, however, when their statements are read with other material that has come on record, then the case of the prosecution becomes doubtful because indisputably the premises belonged to respondent Rakesh Kumar and admittedly did not have any lock. The recovery has been effected from one Rakesh Kant and not Rakesh Kumar and there is nothing on record to show that Rakesh Kant and Rakesh Kumar are the one and the same person.

10. That apart, there is nothing on record to even remotely indicate where and whose custody the samples that were separately drawn and sent to FSL, Kandaghat had been kept with effect from 16.03.1998 to 22.03.1998 and thereafter from 22.03.1998 to 30.03.1998 and could therefore conveniently be tampered with.

11. What is more surprising is that the NCB forms had not been filled up at the time when the search of the premises was carried out and the contraband as is alleged to have been recovered, which in itself casts a serious doubt on the prosecution case, more particularly, when there is no reason forthcoming as to why the NCB forms were not filled up.

12. A detailed procedure for drawal, storage, testing and disposal of samples from seized drugs have been issued vide Standing Orders No. 1/88 and the same was thereafter followed by Standing Orders No. 1/89, dated 13th June, 1989. The relevant portion whereof reads as under:-

> *2.1 All drugs shall be properly classified, carefully, weighed and samples on the spot of seizure.*
>
> *2.2 All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (Panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot.*
>
> *2.3 The quantity to be drawn in each sample for chemical test shall not be less than 5 grams in respect of all narcotic drugs and psychotropic substances save in the cases of opium, ganja and charas (hashish) where a quantity of 24 grams in each case is required for chemical test. The same quantities shall be taken for duplicate sample also. The seized drugs in the packages/containers shall be well mixed to make it homogeneous and representative before the sample (in Duplicate) is drawn.*
>
> *2.4 In the case of seizure of a single package/container, one sample in duplicate shall be drawn. Normally, it is advisable to draw one sample (in*

duplicate) from each package/container in case of seizure of more than one package/container.

2.5 However, when the packages/containers seized together are of identical size and weight, bearing identical markings and the contents of each package given identical results on colour test by the drug identification kit, conclusively indicated that the packages are identical in all respects the packages/containers except in the case of ganja and hashish (charas), where it may be bunched in lots of 40. Such packages/containers, one sample (in duplicate) may be drawn.

2.6 Whereafter making such lots, in the case of hashish and ganja, less than 20 packages/containers remain, and in the case of other drugs, less than 5 packages/containers remain, no bunching would be necessary and no samples need be drawn.

2.7 If such remainder is 5 or more in the case of other drugs and substances and 20 or more in the case of ganja and hashish, one more sample (in duplicate) may be drawn for such remainder/container.

2.8 While drawing one sample (in duplicate) from a particular lot, it must be ensured that sample are in equal quantity is taken from each quantity is taken from each package/container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.

2.9 The sample in duplicate should be kept in heat sealed plastic bags as it is convenient and safe. The plastic bag container should be kept in a paper envelope which may be sealed properly. Such sealed envelope may be marked as original and duplicate. Both the envelopes should also bear the S. No. of the package(s)/container(s) from which the sample has been drawn. The duplicate envelope containing the sample will also have a reference of the test memo. The seals should be eligible. This envelope along with test memos should be kept in another envelope which should also be sealed and marked 'secret-drug' sample/test memo', to be sent to the chemical laboratory concerned.

3.0 The seizing officers of the Central Government Departments, viz., Customs, Directorate of Revenue Intelligence, etc. should dispatch samples of the seized drugs to one of the Laboratories of the Central Revenues Control Laboratory nearest to their offices depending upon the availability of test facilities. The other Central Agencies like BSF, CBI and other Central Director, Central Forensic Laboratory, New Delhi. All State Enforcement Agencies may send samples of seized drugs to the Director/ Deputy Director, Assistant Director of their respective State Forensic Science Laboratory.

3.1 After sampling, detailed inventory of such packages/containers shall be prepared for being enclosed to the panchnama. Original wrappers shall also be preserved for evidentiary purposes.

Section-III Receipt of Drugs in Godown and Procedure

3.2 All the drugs invariably be stored in safes and vaults provided with double-locking system. Agencies of the Central and State Governments, may specifically designate their godowns for storage purposes. The godowns should be selected keeping in view their security angle, juxtaposition to courts, etc.

3.3 Such godowns, as a matter of rule, shall be placed under the over-all supervision and charge of a Gazetted Officer of the respective enforcement agency, who shall exercise utmost care, circumspection and personal supervision as far as possible. Each seizing officer shall deposit the drugs fully packed and sealed in the godown within 48 hours of such seizure, with a forwarding memo indicating NDPE Crime No. as per Crime and Prosecution (C & P register) under the new law, name of the accused, reference of test memo, description of the drugs, total no. of packages/containers, etc.

3.4 The seizing officer, after obtaining an acknowledgement for such deposit in the format (Annexure-I), shall had acknowledgement over such to the Investigating Officer of the case alongwith the case dossiers for further proceedings.

3.5 The Officer-in-Charge of the godown, before accepting the deposit of drugs, shall ensure that the same are properly packed and sealed. He shall also arrange the packages/containers (case-wise and lot-wise) for quick retrieval, etc.

3.6 The godown-in-charge is required to maintain a register wherein entries of receipt should be made as per format at Annexure-II.

3.7 It shall be incumbent upon the Inspecting Officers of the various Departments mentioned at Annexure-II to make frequent visits to the godowns for ensuring adequate security and safety and for taking measures for timely disposal of drug. The Inspecting Officers should record their remarks/observations against Col. 15 of the Format at Annexure-II.

3.8 the Heads of the respective enforcement agencies (both Central and State Governments) may prescribe such periodical reports and returns, as they may deem fit, to monitor the safe receipt, deposit, storage, accounting and disposal of seized drugs.

3.9 Since the early disposal of drugs assumes utmost consideration and importance, the enforcement agencies may obtain orders for pre-trial disposal of drugs and other articles (including conveyance, if any) by having recourse to the provisions of sub-section (2) of section 52A of the Act.

13. What is the effect of non-filing of the NCB forms or for that matter as had been directed by the Standing Orders has been considered by the Hon'ble Supreme Court in ***Khet Singh*** *versus* ***Union of India***, ***(2002) 4 SCC 380***, wherein it was held that the instructions issued by the Narcotics Control Bureau, New Delhi, are to be followed by the officer-in-charge of the investigation of the crimes coming within the purview of the NDPS Act, even though these instructions do not have the force of law. They are intended to guide the officers and to see that a fair procedure is adopted by the officer-in-charge of the investigation. It is apposite to refer to the relevant observations as contained in paragraphs 5 and 10 of the report which read as under:-

"5. *It is true that the search and seizure of contraband article is a serious aspect in the matter of investigation related to offences under the NDPS Act. The NDPS Act and the rules framed thereunder have laid down a detailed procedure and guidelines as to the manner in which search and seizure are to be effected. If there is any violation of these guidelines, Courts would take a serious view and the benefit would be extended to the accused. The offences under NDPS Act are grave in nature and minimum punishment prescribed under the Statute is incarceration for a long period. As the possession of any*

narcotic drugs or psychotropic substance by itself is made punishable under the act, the seizure of the article from the appellant is of vital importance.

10.The instructions issued by the Narcotics Control Bureau, New Delhi are to be followed by the officer in-charge of the investigation of the crimes coming within the purview of the NDPS Act, even though these instructions do not have the force of law. They are intended to guide the officers and to see that a fair procedure is adopted by the officer in-charge of the investigation. It is true that when a contraband article is seized during investigation or search, a seizure mahazar should be prepared at the spot in accordance with law. There may, however, be circumstances in which it would not have been possible for the officer to prepare the mahazar at the spot, as it may be a chance recovery and the officer may not have the facility to prepare a seizure mahazar at the spot itself. If the seizure is effected at the place where there are no witnesses and there is no facility for weighing the contraband article or other requisite facilities are lacking, the officer can prepare the seizure mahazar at a later stage as and when the facilities are available, provided there are justifiable and reasonable grounds to do so. In that event, where the seizure mahazar is prepared at a later stage, the officer should indicate his reasons as to why he had not prepared the mahazar at the spot of recovery. If there is any inordinate delay in preparing the seizure mahazar, that may give an opportunity to tamper with the contraband article allegedly seized from the accused. There may also be allegations that the article seized was by itself substituted and some other items were planted to falsely implicate the accused. To avoid these suspicious circumstances and to have a fair procedure in respect of search and seizure, it is always desirable to prepare the seizure mahazar at the spot itself from where the contraband articles were taken into custody."

14. It is thereafter that the Hon'ble Supreme Court after examining the issue of violation of such procedural guidelines ruled as under:

"16. *Law on the point is very clear that even if there is any sort of procedural illegality in conducting the search and seizure, the evidence collected thereby will not become inadmissible and the Court would consider all the circumstances and find out whether any serious prejudice had been caused to the accused. If the search and seizure was in complete defiance of the law and procedure and there was any possibility of the evidence collected likely to have been tampered with or interpolated during the course of such search or seizure, then, it could be said that the evidence is not liable to be admissible in evidence."*

15. Subsequently, the issue came up before the Hon'ble Supreme Court in ***State of Punjab*** *versus* ***Makhan Chand***, ***(2004) 3 SCC 453***, wherein it was observed as under:-

"*9. Learned counsel for the respondent-accused relied on certain standing orders and standing instructions issued by the Central Government under Section 52A(1) which require a particular procedure to be followed for drawing of samples and contended that since this procedure had not been followed the entire trial was vitiated.*

10. This contention too has no substance for two reasons. Firstly, Section 52A, as the marginal note indicates, deals with "disposal of seized narcotic drugs

and psychotropic substances". Under Sub-section (1), the Central Government, by a notification in the Official Gazette, is empowered to specify certain narcotic drugs or psychotropic substance's having regard to the hazardous nature, vulnerability to theft, substitution, constraints of proper storage space and such other relevant considerations, so that even if they are material objects seized in a criminal case, they could be disposed of after following the procedure prescribed in Sub-sections (2) & (3). If the procedure prescribed in Sub-sections (2) & (3) of Section 52A is complied with and upon an application, the Magistrate issues the certificate contemplated by Sub-section (2), then Sub-section (4) provides that, notwithstanding anything to the contrary contained in the Indian Evidence Act, 1872 or the Code of Criminal Procedure, 1973, such inventory, photographs of narcotic drugs or substances and any list of samples drawn under Sub-section (2) of Section 52A as certified by the Magistrate, would be treated as primary evidence in respect of the offence. Therefore, Section 52A(1) does not empower the Central Government to lay down the procedure for search of an accused, but only deals with the disposal of seized narcotic drugs and psychotropic substances.

11. Secondly, when the very same Standing Orders came up for considerations in Khet Singh v. Union of India,(2002) 4 SCC 380 this Court took the vie that they are merely intended to guide the officers to see that a fair procedure is adopted by the Officer-in-Charge of the investigation. It was also held that they were not inexorable rules as there could be circumstances in which it may not be possible for the seizing officer to prepare the mahazar at the spot, if it is a chance recovery, where the officer may not have the facility to prepare the seizure mahazar at the spot itself. Hence, we do not find any substance in this contention."

16. However, it would be noticed that subsequent to the aforesaid judgment which had been rendered by the two Hon'ble Judges, a Bench of three Hon'ble Judges of the Hon'ble Supreme Court of India in ***Union of India*** *versus* ***Balmukund and others, (2009) 12 SCC 161***, held that the Standing Instruction 1/88 (as was involved in that case) is a requirement of law, as would be evident from paragraphs 7 and 36 of the judgment which read as under:-

"7. The manner in which a sample of narcotic is required to be taken has been laid down by the Standing Instruction 1/88, the relevant portion whereof reads as under:

"e) While drawing one sample in duplicate from a particular lot, it must be ensured that representative drug in equal quantity is taken from each package/ container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot."

36. There is another aspect of the matter which cannot also be lost sight of. Standing Instruction 1/88, which had been issued under the Act, lays down the procedure for taking samples. The High Court has noticed that PW-7 had taken samples of 25 grams each from all the five bags and then mixed them and sent to the laboratory. There is nothing to show that adequate quantity from each bag had been taken. It was a requirement in law."

17. As observed above, in the present case, the evidence of the prosecution is totally lacking to the effect that the NCB forms at the first instance were filled up, rather, it

is admitted that the NCB forms were not even filled up and thereafter even when the same were filled up, there is nothing on record to suggest where the samples of 25 grams each that were drawn apart for the purpose of analysis had been kept. This assumes importance, especially, when the prosecution had brought 'Malkhana' register, but did not bother to exhibit the same calling for an adverse inference under Section 114(g) of the Evidence Act.

18. The object of filling up of the forms suggests of its preparation at the time of seizure of a contraband article and separation of its representative sample and the affixing of the seal impressions is that the specimen seal impressions used at the time are affixed on the forms, so that it can be deposited with the case property in the 'Malkhana' and another copy thereof can be forwarded to FSL along with sample parcel, so that the seal impressions affixed on the sample parcel are duly compared with seal impressions on the NCB forms. The idea behind taking such precautions is to complete a material link in the prosecution evidence by eliminating the possibility of the sample being tampered with.

19. The sentence provided under the Act is very severe and, therefore, naturally the Courts insist for the standard of proof beyond shadow of all reasonable doubt against the accused. Suspicion, however strong, cannot take the place of positive proof.

20. In view of the aforesaid discussion, we are of the considered view that the prosecution has not been able to prove conclusively the guilt of the respondent and has, therefore, rightly been acquitted by the learned Special Judge. The appeal sans merit and is dismissed as such. Bail bonds, if any, furnished by the respondent are discharged.

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

State of Himachal Pradesh .....Appellant.
Versus
Surjan Singh .....Respondent.

Cr. Appeal No. 217 of 2009
Reserved on: 27.05.2019
Decided on: 14.06.2019

Indian Penal Code, 1860 – Sections 323, 325 and 504 - Hurt and criminal intimidation- Proof- Trial court acquitting accused of causing simple injuries to "BD" and grievous injuries to "KD"- Appeal by State- On facts, held, "BD" injured denying of having received injuries at hands of accused, rather stating that complainant gave her beating- "KD", another injured denying any such incident having taken place in her presence- Statement of complainant "CL" clearly contradicted by injured "BD" and "KD"- Eye witness turning hostile and denying her presence at time of incident- Prosecution case is of doubtful nature- Appeal dismissed- Acquittal upheld. (Paras 11 to 17)

Cases referred:

Chandrappa vs. State of Karnataka, (2007) 4 SCC 415
T. Subramanian vs. State of Tamil Nadu, (2006) 1 SCC 401

For the appellant: Mr. Shiv Pal Mahans and Mr. P.K. Bhatti, Additional Advocates General, with Mr. Raju Ram Rahi, Deputy Advocate General.

For the respondent: Mr. G.S. Palsra, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal is maintained by the appellant/State laying challenge to judgment dated 05.02.2009, passed by learned Additional Chief Judicial Magistrate, Court No. 1, Mandi, H.P., in Criminal Case No. 163-II of 2005, whereby the respondent/accused (hereinafter referred to as "the accused") was acquitted for the offences punishable under Sections 323, 325 and 504 of Indian Penal Code, 1860 (hereinafter referred to as "IPC").

2. The facts giving rise to the present case, as per the prosecution story, can succinctly be encapsulated as under:

On 20.11.2004, at about 10:00 p.m., at place known as Ropru the accused gave beatings to Bhajani Devi and when Chaman Lal and Krishana Devi intervened, he also thrashed them with kick and fist blows. The accused voluntarily caused simple injuries to Bhajani Devi and Chaman Lal and caused simple as well as grievous injuries to Krishana Devi. As per the prosecution case, the accused criminally intimidated Bhajani Devi, Chaman Lal and Krishana Devi. Injured Chaman Lal (complainant) reported the matter to the police, whereupon a case was registered against the accused and investigation ensued. Police prepared the site plan and procured medico legal certificates of injured. Police also recorded the statements of the witnesses. After completion of investigation, police presented *challan* in the learned Trial Court.

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

4. The learned Trial Court, vide impugned judgment dated 05.02.2009, acquitted the accused for the commission of the offences punishable under Sections 323, 325 and 504 IPC, hence the present appeal preferred by the appellant/State.

5. The learned Additional Advocate General has argued that the learned Trial Court has wrongly appreciated the facts and law and the judgment is based on surmises and conjectures, thus the same is liable to be set aside. He has further argued that the learned Trial Court did not appreciate the evidence in its right and true perspective and the accused was wrongly acquitted. He has argued that the statement of PW-4, complainant Shri Chaman Lal, has not been properly appreciated by the learned Trial Court. He has further argued that the MLC clearly corroborates the injuries and the testimonies of the prosecution witnesses. Thus, the only inference is that the accused had committed the offence and he is liable to be convicted. Conversely, the learned counsel for the accused had argued that testimonies of PW-4 and PW-5 are totally contradictory to each other and PW-9 had given a different version. So, there is nothing against the accused, which could even remotely establish that he had committed the offences, as alleged by the prosecution. It has been argued that the learned Trial Court has correctly appreciated the material, which has come on record, and the judgment, as rendered by the learned Trail Court, is after appreciating the facts and law to their right and true perspective. The judgment of acquittal needs no interference and the appeal be dismissed.

6. In rebuttal, the learned Additional Advocate General has argued that after re-appreciating the evidence, the accused be convicted by setting aside the judgment of the learned Trial Court, as the prosecution has proved the guilt of the accused.

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

8. As per the prosecution case on 20.11.2004, at about 10:00 p.m., at place Ropru, accused gave beatings to complainant, Bhajani Devi and Krishana Devi with kick and fist blows and he voluntarily caused simple injuries to Bhajani Devi and Chaman Lal and also caused simple as well as grievous injuries to Krishana Devi. In the case in hand medical evidence is to be seen in juxtaposition with the testimonies of key prosecution witnesses

9. PW-1, Dr. P.K. Soni, medically examined the injured persons. He issued medico legal certificates of the injured persons. As per this witness, Smt. Bhajani Devi and Shri Chaman Lal (complainant) sustained simple injuries. This witness, in his cross-examination, has deposed that such injuries could be possible by way of fall and striking.

10. In the case in hand the statements of injured persons, including the complainant are very important. Admittedly, the accused is close relatives of the injured persons. The complainant is uncle of the accused and Smt. Bhajani Devi is mother of the accused. Smt. Krishana Devi is wife of the complainant. These three witnesses and one Smt. Koyala Devi (PW-9) are the eye witnesses of the occurrence and the edifice of the prosecution story stands on the testimonies of these witnesses.

11. PW-7, Smt. Bhajni Devi, has not supported the prosecution case and she narrated altogether different story. As per this witness, Shri Chaman Lal, complainant (PW-4), gave beatings to her and to Smt. Krishana Devi (PW-5). This witness was declared hostile and subject to exhaustive cross-examination, however, nothing relevant could be elicited from her. Despite lengthy cross-examination, this witness nowhere deposed that the accused caused injuries to her with fist blows and he also caused injuries to the complainant and Smt. Krishana Devi. Thus, the testimony of PW-7, Smt. Bhajani Devi, who is key prosecution witness, is of no help to the prosecution, rather her deposition makes the prosecution story doubtful.

12. Another important witness is PW-5, Smt. Krishna Devi, in her cross-examination, specifically admitted that no incident took place in her presence. She has further deposed that only accused was on the spot and blood was oozing from the mouth of her husband (complainant). Now, if her statement is analyzed as a whole, there is variance in her testimony. She deposed in her examination-in-chief that the accused thrashed her husband (complainant), but she, in her cross-examination, deposed that the accused gave beatings to the complainant and Smt. Bhajani Devi (PW-7). Noticeably, PW-7, denied that accused gave any beatings to anyone. She has further deposed that she was not present on the spot when the accused was talking to his mother (Smt. Bhajani Devi). Thus, the testimony of this key prosecution witness is also marred with major contradictions and discrepancies, which render the same unbelievable.

13. PW-4, Shri Chaman Lal (complainant) tried to support the prosecution case. As per the complainant, on the day of occurrence at about 10:00 p.m., when Smt. Bhajani Devi (PW-7) was in his house, the accused came and asked PW-7 why she is here. Thereafter, the accused started beating PW-7 and when the complainant tried to rescue her, the accused gave beatings to him with leg and fist blows. As per the complainant, when Smt. Krishna Devi (wife of the complainant) tried to rescue him, the accused thrashed him

and thereafter he went away from the spot. As per this witness, he sustained injuries on his left eye, left arm and shoulder and his wife also sustained injuries due to the beatings of the accused. In a nut-shell, it can be said that the complainant tried to support the prosecution story, however, his deposition stands alone and rest of the evidence is so slippery that even the version of complainant is not sufficient to convict the accused.

14. Smt. Koyala Devi (PW-9) is also one of the important witnesses. However, this witness did not support the prosecution case. She feigned ignorance about the whole incident and deposed that no beatings were given in her presence. This witness was also declared hostile and subjected to exhaustive cross-examination, but the prosecution could not extract anything from her which could remotely establish the involvement of the accused in the alleged offence.

15. In addition to above key witness, the prosecution also examined official prosecution witnesses, who conducted the investigation in the case. So, it would not be apt to discuss the testimonies of official prosecution witnesses, as the prosecution case fails on first count, i.e., after examination of alleged eye witnesses of the occurrence.

16. Though PW-1, Dr. P.K. Soni, who medically examined the injured, deposed that Smt. Bhajani Devi and Shri Chaman Lal (complainant) sustained simple injuries. As per this witness, injured Smt. Krishana Devi (PW-5) sustained grievous injuries. Admittedly, the injured persons sustained injuries, but those injuries cannot be attributable to the accused, as the testimonies of injured, i.e., Smt. Bhajani Devi and Smt. Krishana Devi fail to inspire confidence. Their statements create a doubt about the veracity of the prosecution case. The medical evidence lacks lateral evidentiary support from the key prosecution witnesses, so the same is of no help to the prosecution.

17. After exhaustively and carefully examining the testimonies of key prosecution witnesses, this Court finds that there are glaring contradictions and discrepancies in the testimonies of key prosecution witnesses. The eye witnesses of the occurrence have portrayed variable picture qua the occurrence, so it would be apt to conclude that the conclusion of acquittal of the accused, as arrived at by the learned Trial Court is not wrong.

18. 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.

19. In ***Chandrappa vs. State of Karnataka, (2007) 4 SCC 415,*** the Hon'ble Supreme Court has culled out the following principles qua powers of the appellate Courts while dealing with an appeal against an order of acquittal:

> ***"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:***
>
> ***1. An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.***
>
> ***2. The Code of Criminal Procedure, 1873 puts no limitation, restriction or condition on***

exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

3. Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

4. An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

5. If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial Court."

20. In view of the settled legal position, as aforesaid, and on the basis of material, which has come on record, it is more than safe to hold that the prosecution has failed to prove the guilt of the accused beyond reasonable doubts and the findings of acquittal, as recorded by the learned Trial Court, needs no interference, as the same are the result of appreciating the facts and law correctly and to their true perspective. Accordingly, the appeal, which sans merits, deserves dismissal and is dismissed.

21. In view of the above, the appeal, so also pending application(s), if any, stand(s) disposed of.

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

Sumit Thakur ...Petitioner.

Versus
Central University of H.P. ` ....Respondent.

CWP No. 1678 of 2018.
Reserved on : 17th May, 2019.
Decided on : 30th May, 2019.

Constitution of India, 1950 – Articles 14 & 16 – Selection against post of Senior Technical Assistant- R&P rules requiring 3 years experience as Technical Assistant in Central/State University or similar other institution/ Government department besides mandatory educational qualification- Expression 'similar other institution'- Meaning of- Whether experience gained by candidate in a private institute is to be counted towards 3 years requisite experience as provided in R&P Rules?- Held, expression 'similar other instituion' as used in qualification criteria must be construed liberally to mean any institution alike Central or State University or other Department of Central/State Government having all teaching faculties and laboratories for requisite purpose- If such facility possesses requisite faculties and laboratories then experience acquired by candidate in such institution cannot be discounted- Experience of candidate has to be computed accordingly- Such experience may be proved by experience certificate of respective institution. (Paras 2 to 4)

For the Petitioner: Mr. Abhishek Sood, Advocate.
For the Respondent: Mr. Shashi Shirshoo, Central Government Counsel.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The rejection of the petitioner's candidature, for, selection,and, appointment to the post of Senior Technical Assistant, made, through, Annexure P-7, hence, stands challenged through the instant writ petition.

2. The qualifications assigned to the advertised post, of Senior Technical Assistant, exist(s) at serial No.15, of, page 21 of the paper book, qualification(s) whereof, stands extracted hereinafter:-

> "Essential Qualifications:-
>
> i. M.Sc. Degree in any discipline from a recognized University.
>
> ii. 3 years' experience as Technical Assistant in Central/State University or similar other institution/Government Department."

A reading thereof, underscores, the fact that apart from the writ petitioner necessarily possessing, a, M.Sc. Degree, from, any recognized university, his being also enjoined, to possess 3 years' experience, as Technical Assistant, in Central/State University or similar other institution/government Department. Consequently, both the afore conditions were required to be conjointly satiated, by the petitioner. The afore primary requisite academic qualification(s) prescribed, in the afore extracted apposite criteria, evidently stands satiated, by the petitioner, given the existence on record, of, Annexure P-1, and, of, Annexure P-2. Even otherwise, any lack of holding, by the petitioner, of the afore requisite academic qualification, is not echoed in Annexure P-7, to hence, constrain the respondent, to reject, the candidature, of the petitioner. However, the rejection of the candidature, of the petitioner, as disclosed therein, rather emanates, from the petitioner, not possessing, three

years' requiste experience, as Technical Assistant, in Central/State University or similar other institution/Government Department. Consequently, the endeavour of the counsel, for the petitioner, that, he had fulfilled the afore secondary criteria, besides, in, satiation thereof, also possessed the requisite experience, is, harboured, (i) upon, his averring in the writ petition, that, he holds 7 years' experience in the afore capacity, in government sector or in other institutions. (ii) Besides, in support of the afore submission, he has placed on record , Annexure P-10, Annexure P-11, Annexure P-12, Annexure P-13, and, Annexure P-15, all Annexures whereof, embody therein, the, experience certificates issued, by those institution(s), whereat, he worked, in, different/varying capacities. A perusal of Annexure P-10, unveils qua the petitioner, working, in the capacity of Research Associate-1, in Ind-Swift Laboratories Ltd, w.e.f. 16.6.2005 to 31.03.2008, whereas, a perusal of Annexure P-11, unfolds, qua the petitioner, working in the capacity, of, Senior Research Associate, w.e.f. 11.8.2008 to 5.2.2010, in Parabolic Drugs Ltd., besides Annexure P-12, reveals qua the petitioner, working in the capacity of Sr. Reserarch Scientist-1, Analytical Development, in, Fresenuius Kabi Oncology Limited. A perusal of Annexure P-13, unveils, qua the petitioner, working, in the capacity, of, a Senior Scientist at Basmati Export Development Foundation Modipuram, Meerut (UP) w.e.f. 16th June 2011 till 28th December, 2012, (iii) whereas, Anexure P-15, unveils, qua the petitioner working as Development Officer, at, Tea Board Palampur. Though, all the afore annexure, do not reflect, qua the petitioner working in the trite capacity, of, a Technical Assistant, in any, of the afore institution(s). However, in general, the technical staff is expected, to assist, the Scientist, in the design, and, development of apposite systems, (iv) and, with, the afore annexures unveiling qua the petitioner, hence, working in the capacity, of, Research Associate or Senior Research Associate of Sr. Research Scientist etc., hence, his experience in the afore capacity, cannot be considered, to be less, than, the experience, of, the ordained Technical Assistant, (v) and, hence his experience, as, unveiled in the afore annexures was required to be meted deference, by the validly constituted expert committee, hence, enjoying the requisite expertise, to, make the requisite analyses.

3. Be that as it may, with this Court, upon, making the afore expansive interpretation, vis-a-vis, the connotation, hence, enjoyed by the phrase “technical assistant” rather, is, also concomitantly constrained, to make, a liberal besides an unabridged objective construction(s), upon, the apposite phrase “similar other institution”, (I) and, its hence holding, the, signification, qua rather the requisite institution/company, to hence fall within the domain(s) thereof, hence, being enjoined, to satiate qua alike, any Central or State University, it hence at par(s) therewith, also, possessing all teaching faculties, and laboratories, for, the requisite purpose. However, the afore parameters, are not in extenso dwelt, upon, in Annexure P-7, rather it embodies a perfunctory short-shrift manner, of, slighting the, petitioner's candidature.

4. Consequently, the instant petition is allowed, and, annexure P-7 is quashed and set aside. The respondent is directed to reconstitute the recruitment committee, in accordance with its ordinance, and, ensure qua it being manned by resource persons, holding the requisite analysing expertise, vis-a-vis, the qualification, and, experience, of the petitioner, as borne in Annexure P-10 to P-11, and, upon, the respondent receiving its report, it is directed, to, thereafter proceed in accordance with law. All pending applications also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J

Tej Pal .....Appellant/Defendant No.1.

Versus

Kewal Ram and others ....Respondents.

RSA No. 45 of 2018.
Reserved on : 22nd April, 2019.
Decided on : 30th May, 2019.

Code of Civil Procedure, 1908 (Code) – Order XXVI- Rules 9 & 10- Report(s) of local commissioner(s)- Relevancy and appreciation- Trial court decreeing suit for permanent prohibitory injunction by relying upon report of local commissioner appointed by it- And by ignoring previous demarcation report of local commissioner- Appellate court dismissing appeal of defendant No. 1- RSA- On facts, previous demarcation report stood rejected by judicial order as its being not in accordance with instructions- Second report admitted by all parties except defendant No. 1- Nothing in cross-examination of local commissioner indicating that second report is not in consonance with instructions- Held, first report cannot be read in evidence as it stood rejected by a judicial order- RSA dismissed- Decrees of lower courts upheld. (Paras 9 to 11)

For the Appellants: Mr. Dalip K. Sharma, Advocate.
For Respondent No.1: Ms. Devyani Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed by the appellant herein/defendant No.1, against the concurrently recorded verdicts, initially, by the learned trial Court, and, subsequently by the learned First Appellate Court, respectively, upon, Civil Suit No. 20/1 of 2009, and, upon Civil Appeal No. 19-NL/13 of 2017, wherethrough(s), the plaintiff's suit, for rendition of a decree for permanent prohibitory injunction, vis-a-vis, the suit khasra number(s) hence stood decreed.

2. Briefly stated the facts of the case are that the plaintiff had filed a suit for permanent prohibitory injunction, restraining the defendants from interfering in any manner whatsoever over the land measuring 5 bighas, 7 biswas, comprised in Khata/Khatauni no. 200/201, bearing Khasra No.298/235, situated in the area of Village Chuhuwal, Pargana Nalagarh, Tehsil Nalagarh, District Solan, H.P. It is averred that the land measuring 5 bighas 7 biswas is exclusively owned and possessed by the plaintiff, and, the defendant shave no right, title or interest over the same. On 10.01.2009, the defendants started interference over the suit land by threatening that they will raise construction over the suit land and for that purpose, they had also collected construction material near the suit land. The defendants were requested several times to admit the claim of the plaintiff, but they refused to do so.

3. The defendants contested the suit and filed written statement, wherein, the have taken preliminary objections, qua, maintainability, cause of action, and suppression of material facts. On merits, they denied that they ever interfered over the suit land in nay manner. In fact defendant No.1 Tej Pal had purchased the land from one Gurcharan Singh and also purchased small area from defendant No.3, Prakash, for leading a passage to his

land and said land of Parkash is abutting to the suit land. When defendant No.1 started making path through said purchased land, the plaintiff filed this false and frivolous suit. Defendant No.1 had constructed a wall only after getting his land demarcated. The land was allotted to the plaintiff by the government from the government land, dimensions of which are towards the rivulet and in fact, the plaintiff wants to encroach upon the land of the defendants in order to make his holding 5 bighas 7 biswas, which is not in existence on the spot at present.

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 permanent prohibitory injunction, as prayed for? OPP
2. Whether the suit is not maintainable, as alleged? OPD
3. Whether the plaintiff has no cause of action and locus standi to file the present suit, 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 No.1 herein. In an appeal, preferred therefrom, by, the defendant No.1/appellant herein, before the learned First Appellate Court, the latter Court dismissed, the, appeal, and, affirmed the findings recorded by the learned trial Court.

6. Now defendant No.1/appellant(s) herein, has instituted the instant Regular Second Appeal, before, this Court, wherethrough, he hence assails the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court.

7. The gravamen of the reasoning, concurrently assigned, by both the learned courts below, hence for decreeing, the plaintiff's suit, for, rendition of a decree for permanent prohibitory injunction, vis-a-vis, the suit khasra number(s), is centered, (a) upon, the report of demarcating officer, one D.R. Bhatia, who, during the course of his deposition, tendered it, before the learned trial Court, and, wherewith stood appended the apposite tatima, delineating therein, the area of suit land, encroached upon, by the defendant/appellant herein. Also CW-1, appended with the demarcation report, a, copy of istemal musabi. Uncontrovertedly, the plaintiff, is, the exclusive owner in possession of the suit khasra number(s). The encroachment, vis-a-vis, the suit land,, as, delineated by CW-1, upon, his holding demarcation, of, the adjoining estates of the contesting litigants, is, comprised in an area of 10 biswas.

8. The learned counsel, appearing for the aggrieved defendant, has, though strived to cast, a scathing onslaught, upon, the report of the local commissioner, and, his afore strivings are (a) anvilled, upon, a previous report of the Local Commissioner, embodied in Ex.OW1/A, wherein, rather unfolding(s) are borne, qua no encroachment being detected, to be hence made, by the aggrieved defendant/appellant, upon, hence the suit khasra number(s), (b) and, also upon, the reliance, if any, placed, upon, the report prepared by CW-1 Mr. D.R. Bhatia, being aggravatingly unbefitting, as, the local commissioner concerned, rather failing, to, even after receiving the consent, of, the contesting litigants, vis-a-vis, the fixed points, wherefrom, demarcation of the contiguous estates of the contesting litigants, was, to commence, (c) rather commencing the demarcation, upon, his prior thereto not ascertaining the relevant fixed points, from the musabi, and, his also thereafter failing to hence relay, the, ascertained therefrom, hence, fixed points, onto, the relevant contiguous estates, of the contesting litigants, (d) the measurements being omitted to be carried by the

local commissioner, after, verification of the jareb. However, the afore reared contentions, for, hence belittling the report of the local commissioner are extremely frail, as, it is visibly imminent, upon, a thorough, and, incisive reading, of his, testification rendered, on oath before the learned trial Court, (e) qua his echoing therein qua prior to his proceeding to conduct the demarcation, of, the contiguous estates of the contesting litigants, his recording the statements of each of them, vis-a-vis, the fixed points, wherefrom, he had commenced, the, apt demarcation, (f) and, his further echoing therein qua subsequent to the completion, of the apt demarcation, all the contesting litigants, except defendant No.1, meteing the completest satisfaction, vis-a-vis, the demarcation conducted, by him, of the contiguous estates of the contesting litigants, (g) the fixed points being determined by the demarcating officer, from, the istemal musabi, as, stood carried by him, to the relevant site, and, thereafter it being relayed, onto, the relevant khasra numbers. (h) In aftermath, the afore emanations, as, visibly generate, from, the testification rendered, on oath, by the demarcating officer concerned, and, when he had denied the suggestions put to him, during, the course of his being cross-examined, qua his prior, to, holding the demarcation of the suit khasra number, and, of, the adjoining thereto land owned and possessed, by the aggrieved defendant, his obtaining the signatures, of, the defendant, on a piece of blank paper, (i) thereupon, and, with the trite factum qua subsequent to the completion, of demarcation, the contesting litigants, except defendant No.1 portraying their completest satisfaction, vis-a-vis, demarcation conducted by him, (j) reiteratedly, and, obviously enjoins this court to mete credence, to the report of the local commissioner, wherewith stood also appended the apt tatima, wherein encroachments, to the extent, of, 10 biswas, stand, delineated to be made, by the aggrieved defendant, upon, the land owned and possessed, by the plaintiff/respondent.

9. Be that as it may, as afore stated, subsequent to the completion of the demarcation, of, the suit khasra number, and, of the adjoining thereto estates/lands, owned and possessed by the contesting defendants, all, except defendant No.1, rendered their satisfaction thereto, (i) thereupon, it is imperative to consider, the, objection meted by defendant No.1, to the report of the local commissioner, objections whereof, are anvilled, upon, a previously conducted demarcation, borne in Ex.OW1/A, (ii) wherein, the demarcating officer concerned, had enunciated qua no encroachment being made, upon, the suit khasra number, by defendant No.1. However, any reliance, thereupon, is grossly untenable, as, the afore report was set aside by a judicial verdict, given it being carried, in flagrant violations, of, the relevant instructions, as, issued by the Financial Commissioner.

10. The above discussion, unfolds, that the conclusions as arrived by both the learned Courts below, being based, upon a proper and mature appreciation of evidence on record. While rendering the findings, both the learned Courts below have not excluded germane and apposite material from consideration. Consequently, no substantial question of law much less a substantial question of law arises for determination in this appeal.

11. In view of the above discussion, there is no merit in the instant appeal, and, it is dismissed accordingly. In sequel, the judgments and decrees impugned before this Court are affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Tek Chand alias Indu ...Petitioner.

Versus
State of Himachal Pradesh ...Respondent.

Cr.MP(M) No. 822 of 2019
Order reserved on : 18.6.2019
Date of Decision : June 21, 2019

Code of Criminal Procedure, 1973 - Section 439 – Regular bail in murder, robbery case- Grant of- Circumstances- On facts, held, case against accused founded on 'last seen' theory based on statement of witness who saw accused visiting victim's house two days prior to alleged incident- Statement of that witness recorded after gap of 13 days and no reason given for its delayed recording - Disclosure statement of accused not leading to discovery of any fact- He is in custody for more than one year and eight months- Accused having no criminal history and permanently residing on address given- Conditional bail granted. (Paras 12 to 14)

Cases referred:
Dataram Singh vs. State of Uttar Pradesh and another, (2018) 3 SCC 22
Gurbaksh Singh Sibbia vs. State of Punjab, (1980) 2 SCC 565
Gurcharan Singh vs. State (Delhi Administration), (1978) 1 SCC 118
Prasanta Kumar Sarkar vs. Ashis Chatterjee and another, (2010) 14 SCC496
Sanjay Chandra vs. Central Bureau of Investigation, (2012) 1 SCC 40
Siddharam Satlingappa Mhetre vs. State of Maharashtra and others, (2011) 1 SCC 694
Zahur Haider Zaidi vs. Central Bureau of Investigation, Criminal Appeal No. 605 of 2019 (arising out of SLP (Crl.) No. 2123 of 2018), decided on 5th April, 2019

For the petitioner : Mr. Ritesh Bhardwaj and Ms. Shashi Kiran, Advocates, for the petitioner.
For the respondent : Ms. Ritta Goswami, Additional Advocate General, Ms. Divya Sood, Deputy Advocate General and Mr. Manoj Bagga, Assistant Advocate General for the respondent/State.

The following judgment of the Court was delivered:

Anoop Chitkara, Judge.

The present petition is under Section 439 of the Code of Criminal Procedure, seeking regular bail in F.I.R. No. 231/17, 28.9.2017, registered at Police Station Balh, Distt. Mandi, H.P., under Sections 302, 392, 201, read with Section 34 of the Indian Penal Code. In this case police report stands filed under Section 173 Cr.P.C.

2. ASI Lal Chand, I/O, Police Station Balh, Distt. Mandi, H.P., was present on the last date, when the matter was heard. He had filed status report and had also brought the police file. I have seen the status report as well as the police file to the extent it was necessary for the purpose of deciding the present petition and the same stands returned to the police official. Status report was taken on record.

3. I have heard learned counsel for the petitioner as also the learned Additional Advocate General for the respondent/State. Status report also perused. Police file was also made available to the Court which was thoroughly seen and returned.

4. The gist of the prosecution case necessary for the purpose of deciding this bail application is as follows:

(a) On receipt of information of a dead body of a lady lying near her house, police swung into action. Inspector Sanjeev Sood, SHO, Police Station Balh, started the investigation and reached the spot.

(b) After preliminary investigation, Sh. Prem Singh gave his statement to Inspector Sanjeev Sood, SHO, Police Station Balh, which he recorded as statement under Section 154 Cr.P.C. on 28.9.2017 at 2.00 p.m., at Sakroha, which was the spot of the incident.

(c) In the said statement Prem Singh stated that deceased Fulmu Devi was his elder sister and was residing separately at Sakroha. Her husband had died long time before. No issue was born to the couple. She used to reside alone in the house.

(d) He further stated that on 28.9.2017, in the morning at about 9.30 a.m., his nephew Jalam Ram informed him that his sister had died. On this he reached Sakroha.

(e) On reaching the house of his sister, he noticed that lot of people had assembled there. The dead body of his sister was lying at the southern portion outside the house, with both the arms of her sister tied with shawl, and blood oozing out from the mouth.

(f) He further stated that his sister used to wear rings, made of gold, in her ears but those were not noticed by him in her ears.

(g) He further stated that when he checked the residential room of his sister then he noticed that the lock holder of the trunk was broken and the lock was hanging from it. The luggage of the room was also shattered.

(h) He further stated that his sister had hired one Krishna Devi as a care-taker.

5. On these allegations, the present FIR was registered.

6. During investigation, police recorded the statement of Krishna Devi under Section 161 Cr.P.C. She stated as follows:

(a) The husband of Fulmu Devi deceased had died 20 years before and the couple was issue less.

(b) Fulmu Devi deceased used to reside alone in her house and she was slightly lame because one of her legs had been operated.

(c) She further stated that Fulmu devi had around one bigha land (750 Sq. Mts.) around her house. Apart from that there is also a single storied cemented house.

(d) She further stated that she used to take care of Fulmu Devi deceased for the last two and a half years. She would return back to her home after cooking the evening meals.

(d) On 27.9.2017, as usual, she went to her house, cooked food for her, and thereafter returned at 7.30 p.m.

(e) On the next day, i.e. 28.9.2017, in the morning at about 8.30 a.m., she came to know through her daughter-in-law Babli that Fulmu Devi is dead.

(f) She further stated that some unknown persons have caused her death, after committing robbery at her house.

7. The Investigating Officer got the post mortem examination of the deceased conducted through Government Hospital Mandi at Ner Chowk. In the post mortem report there is no mention of time between the injury and the death and the probable time between death and post mortem is 12 – 24 hours. The post mortem took place on 28.9.2017 at 5.00 p.m., that is the same day. As such Fulmu Devi is likely to have died any time from the evening of 27.9.2017 till the morning of 28.9.2017.

8. After investigation, police arrested one Durga Dass on 4.10.2017. Police recovered one mobile phone from Durga Dass, which belonged to the deceased. It had been used by Durga Dass on 29th and 30th September, 2017, by inserting a SIM card in it. Further his statement under Section 27 of the Indian Evidence Act was recorded which led to the recovery of utensils sold to one Gagan Kumar.

9. As far as the present bail petitioner Tek Chand is concerned, he was also arrested on 4.10.2017. While in police custody, he also gave a disclosure statement under Section 27 of the Indian Evidence Act, regarding the place where he had thrown the weapon of offence. However, police could not discover any weapon.

10. Another set of evidence collected by the prosecution is that Fulmu Devi deceased used to sell illicit liquor. One Nar Bahadur had seen both the accused visit her house on 26th and 27th September, 2017. So case of the prosecution is based also on the theory of 'last seen'.

11. Statement of said Nar Bahadur under Section 161 Cr.P.C. was also recorded by the Investigating Officer on 11th October, 2017,

12. Without commenting on the merits of the 'last seen' evidence, even as per the case of the prosecution, Krishan Devi had left her house at 7.30 p.m. and till that time she was alive. She was also with the deceased. The evidence against Durga Dass is multiple, which includes usage of mobile phone, discovery of stolen articles. As far as evidence against the present bail petitioner is concerned, it is only the evidence of 'last seen'. There is no other evidence against the petitioner.

13. Learned Additional Advocate General did not point out that there was any other evidence against the present petitioner except pointing of the place where he had allegedly thrown the weapon of offence which was not recovered.

14. In view of the nature of the allegation against the present bail petitioner Tek Chand alias Indu, I am of the considered opinion that he is entitled to bail on the following grounds:

(a). That the only evidence against the bail petitioner is the statement of Nar Bahadur recorded under Section 161 Cr.P.C., in which he has stated that for two days prior to her death, he has seen both the accused visiting house of the deceased. At the stage of bail, it is sufficient to mention that this statement of Nar Bahadur was recorded on 11.10.2017, whereas the alleged crime took place on 28.9.2017. It means that statement was recorded after a gap of 13

days. He was the person living in the vicinity and no reason has been assigned as to why he did not state this fact initially. This observation is being made only for the purpose of deciding this bail application and shall not at all be considered by the learned trial Court, during the course of hearing. He shall arrive at his own findings on this evidence, if so required.

(b) The next evidence which prosecution tried to introduce was the disclosure statement, wherein he pointed the place from where he along with the principal accused had thrown the weapon of offence. It is mentioned in the police report under Section 173 Cr.P.C. that such disclosure statement did not lead to discovery of any fact.

(c) That the accused is in custody from 4.10.2017 and as such he is in judicial custody for the last more than one year and eight months.

15. Hon'ble the Supreme Court in Criminal Appeal No. 605 of 2019 (arising out of SLP (Crl.) No. 2123 of 2018), titled as *Zahur Haider Zaidi vs. Central Bureau of Investigation,* decided on 5th April, 2019 stated as follows:

> "Our attention has been drawn to the allegations against the accused-appellant and that he is in custody for the last 19 months. Though the accused-appellant is facing charge under section 302, we are told that the trial has not made substantial progress beyond the framing of the charge. Completion of trial will take some time."

16. Principles with regard to grant of bail are well settled, which have been reiterated by the Hon'ble Supreme Court in numerous pronouncements. The Hon'ble Supreme Court in case titled as *Gurcharan Singh versus State (Delhi Administration)*, reported in (1978) 1 Supreme Court Cases 118, has laid the following criteria for grant of bail:

> *"22. In other non-bailable cases the Court will exercise its judicial discretion in favour of granting bail subject to sub-section (3) of Section 437 CrPC if it deems necessary to act under it. Unless exceptional circumstances are brought to the notice of the court which may defeat proper investigation and a fair trial, the Court will not decline to grant bail to a person who is not accused of an offence punishable with death or imprisonment for life. It is also clear that when an accused is brought before the court of a Magistrate with the allegation against him of an offence punishable with death or imprisonment for life, he has ordinarily no option in the matter but to refuse bail subject, however, to the first proviso to Section 437 (1) CrPC and in a case where the Magistrate entertains a reasonable belief on the materials that the accused has not been guilty of such an offence. This will, however, be an extraordinary occasion since there will be some materials at the stage of initial arrest, for the accusation or for strong suspicion of commission by the person of such an offence.*
>
> *23. .....*
>
> *24. Section 439 (1) CrPC of the new Code, on the other hand, confers special powers on the High Court or the Court of Session in respect of bail. Unlike under Section 437 (1) there is no ban imposed under*

> *Section 439 (1) CrPC against granting of bail by the High Court or the Court of session to persons accused of an offence punishable with death or imprisonment for life. It is, however, legitimate to suppose that the High Court or the Court of Session will be approached by an accused only after he has failed before the Magistrate and after the investigation has progressed throwing light on the evidence and circumstances implicating the accused. Even so the High Court or the Court of session will have to exercise its judicial discretion in considering the question of granting of bail under Section 439 (1) CrPC of the new Code. The overriding considerations in granting bail to which we adverted to earlier and which are common both in the case of Section 437 (1) and Section 439 (1) CrPC of the new Code are the nature and gravity of the circumstances in which the offence is committed; the position and the status of the accused with reference to the victim and the witnesses; the likelihood, of the accused fleeing from justice; of repeating the offence, of jeopardising his own life being faced with a grim prospect of possible conviction in the case; of tampering with witnesses; the history of the case as well as of its investigation and other relevant grounds which, in view of so many variable factors, cannot be exhaustively set out."*

17. The Hon'ble Supreme Court in case titled as *Prasanta Kumar Sarkar versus Ashis Chatterjee and another,* reported in (2010) 14 Supreme Court Cases 496, has laid down the following principles to be kept in mind, while deciding petition for bail:

> *"(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;*
>
> *(ii) nature and gravity of the accusation;*
>
> *(iii) severity of the punishment in the event of conviction;*
>
> *(iv) danger of the accused absconding or fleeing, if released on bail;*
>
> *(v) character, behaviour, means, position and standing of the accused;*
>
> *(vi) likelihood of the offence being repeated;*
>
> *(vii) reasonable apprehension of the witnesses being influenced; and*
>
> *(viii) danger, of course, of justice being thwarted by grant of bail."*

14. Thereafter, the Hon'ble Supreme Court in a detailed judgment in *Siddharam Satlingappa Mhetre versus State of Maharashtra and others*, reported in (2011) 1 Supreme Court Cases 694, relying upon pronouncement of the Constitution Bench in *Gurbaksh Singh Sibbia versus State of Punjab*, reported in (1980) 2 Supreme Court Cases 565, laid down the following parameters for grant of bail:-

> *"(i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;*
>
> *(ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;*
>
> *(iii) The possibility of the applicant to flee from justice;*
>
> *(iv) The possibility of the accused's likelihood to repeat similar or the other offences;*

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail."

18. Following observations made by the Hon'ble Supreme Court in *Sanjay Chandra versus Central Bureau of Investigation,* reported in (2012) 1 Supreme Court Cases 40, may also be relevant to be reproduced herein:

"21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some un-convicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, `necessity' is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.

23. Apart from the question of prevention being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any Court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an un-convicted person for the purpose of giving him a taste of imprisonment as a lesson.

24. The grant or refusal to grant bail lies within the discretion of the Court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the Court, whether before or after conviction, to assure that he will submit to the jurisdiction of the Court and be in attendance thereon whenever his presence is required."

16. In a recent pronouncement in case titled as *Dataram Singh versus State of Uttar Pradesh and another*, reported in (2018) 3 Supreme Court Cases 22**,** the Hon'ble Supreme Court, after considering its previous pronouncements, has held as under:

"2. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.

3. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to

incarceration has been taken by Parliament by inserting Section 436-A in the Code of Criminal Procedure, 1973.

4. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in Inhuman Conditions in 1382 Prison, In re (2017) 10 SCC 658 : (2018) 1 SCC (Cri) 90.

5. The historical background of the provision for bail has been elaborately and lucidly explained in a recent decision delivered in Nikesh Tarachand Shah v. Union of India, (2018) 11 SCC 1 : (2017) 13 Scale 609, going back to the days of the Magna Carta. In that decision, reference was made to Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465, in which it is observed that it was held way back in Nagendra Nath Chakravarti, In re 1923 SCC OnLine Cal 318 : AIR 1924 Cal 476, that bail is not to be withheld as a punishment. Reference was also made to Emperor v. H.L. Hutchinso, 1931 SCC OnLine All 14 : AIR 1931 All 356, wherein it was observed that grant of bail is the rule and refusal is the exception. The provision for bail is therefore age-old and the liberal interpretation to the provision for bail is almost a century old, going back to colonial days.

6. However, we should not be understood to mean that bail should be granted in every case. The grant or refusal of bail is entirely within the discretion of the judge hearing the matter and though that discretion is unfettered, it must be exercised judiciously and in a humane manner and compassionately. Also, conditions for the grant of bail ought not to be so strict as to be incapable of compliance, thereby making the grant of bail illusory."

19. Keeping in view the nature of the allegations and the fact that judicial custody is not going to serve any purpose whatsoever, I am of the considered view that, *prima facie* a case for bail is made out.

20. Also, in the status report, there is no mention of any previous criminal history of the bail petitioner. The petitioner is a permanent resident of the address mentioned in the memo of parties. Therefore, the presence of the petitioner can always be secured to face trial.

21. In the result the present petition is allowed. The petitioner shall be released on bail in the present case, in connection with the FIR mentioned above, on his furnishing personal bond in the sum of `5000/- with one surety in the like amount to the satisfaction of the trial Court /Sessions Court.

22. It is clarified that the present bail order is only with respect to the above mentioned FIR. It shall not be construed to be a blanket order of bail in all other cases, if any, against the petitioner.

23. This Court is granting the bail subject to the conditions mentioned herein. The petitioner undertakes to comply with all the directions given in this order and the furnishing of bail bonds by the petitioner is acceptance of all such conditions:

a) The petitioner is directed to join the investigation as and when called by the Investigating Officer. It shall be open for the Investigating Officer to call the petitioner as and when he feels such a necessity. The petitioner undertakes to appear before the Investigating Officer as and when directed to do so. However, whenever the investigation takes place within the boundaries of the Police Station or Police Post, then the Petitioner shall not be called before 9 A.M and shall be let off before 5 p.m.

b) The Petitioner shall neither influence nor try to control the investigating officer, or any witnesses in any manner whatsoever.

c) The petitioner undertakes not to contact the complainant, to threaten or browbeat him or to use any pressure tactics.

d) The Petitioner undertakes not to make any inducement threat or promise, directly or indirectly, to the investigating officer or any person acquainted with the facts of the case to dissuade him from disclosing such facts to the Court or any Police Officer or tamper with the evidence.

e) The Petitioner shall not hamper the investigation.

f) The petitioner undertakes to attend the trial.

24. However, it is clarified that in case, if the petitioner to fails to attend the trial Court even on a single occasion, his bail shall automatically stand cancelled without taking further orders from this Court. This stringent condition is being imposed because the other co-accused is still in jail and if the trial is delayed his liberty would be curtailed.

25. Any observation made herein above shall not be taken as an expression of opinion on the merits of the case and the trial Court shall decide the matter uninfluenced by any observation made herein above.

Petition stands allowed in the aforesaid terms.

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

The New India Assurance Co. Ltd. .....Appellant.

Versus

Kaushlya Devi and others ....Respondents.

FAO No. 566 of 2018.
Reserved on : 17th May, 2018.
Decided on : 30th May, 2019.

Motor Vehicles Act, 1989– Section 166– Motor accident– Claim application- Defences- Contributory negligence- Proof- Insurer of offending vehicle filing appeal against award of

Tribunal and submitting that husband of claimant, who was driving scooty and on which claimant was riding on pillion, was also rash and negligent in his driving- And his negligence also contributed in occurrence of accident- Praying that insurer of scooty shall also be made liable to indemnify claimant equally- Held, no efforts were made by appellant to implead insurer and driver of scooty as parties to application before Tribunal- No suggestion put to witnesses regarding contributory negligence during cross-examination- Injured clearly stating that driver of offending vehicle was driving it in a brazen speed- It not being a case of contributory negligence, insurer of scooty cannot be made liable to indemnify award- Appeal dismissed- Award maintained. (Paras 2 to 4)

For the Appellant:	Mr. Praneet Gupta, Advocate.
For Respondent No. 1:	Mr. Abhay Kaushal, Advocate, vice Mr. T.S. Chauhan, Advocate.
For Respondent No. 2:	Mr. Karan Sharma, Advocate.
For Respondent No.3:	Mr. B.S. Chauhan, Senior Advocate with Mr. Munish Dhatwalia, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The Insurer of the offending vehicle, has, instituted the instant appeal before this Court, wherethrough, it, casts, a, challenge, upon, the award pronounced by the learned Motor Accident Claims Tribunal , Una, H.P, upon, MACP No. 54 OF 2015, as stood, cast therebefore, under, the provisions of Section 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as the Act), (i) AND, whereunder, compensation amount comprised, in, a sum of Rs.9, 92,568/- alongwith interest accrued thereon, at the rate of 9% per annum, and, commencing from, the date of petition till realization thereof, stood, assessed, vis-a-vis, the disabled claimant The apposite indemnificatory liability thereof, was, fastened upon the insurer of the offending vehicle, appellant herein.

2. The learned counsel appearing, for, the appellant/insurer, has, contested the validity of findings recorded, upon, issue No.1, and, also thereonwards has contested the validity of fastening of the apposite indemnificatory liability, vis-a-vis, compensation as determined under the impugned award, was proportionately fastenable upon the appellant herein, and, upon the insurer of the scooty (Activa) No.HP-20C-7759, whereon the disabled claimant was astride, upon, its pillion, and, was at the relevant time driven by her husband, and, when FIR lodged, vis-a-vis, the occurrence, borne in Ex.PW2/A, makes trite echoings, vis-a-vis, both respondent No.2 herein, and, the husband of the disabled claimant being co-tortfeasor. The afore submission addressed by the learned counsel appearing for the insurer before this Court is unmeritworthy, as, assumingly, upon, affirmative findings being recorded, upon, his afore submission, enjoined the arraying of the husband of the disabled claimant, who at the relevant time was driving scooty (Activa) No.HP-20C-7759, and, also enjoined arraying in the memo of parties of the claim petition, in the array of respondents, the insurer of the afore scooty. Despite the pleadings in consonance therewith reared respectively, by the insurer of the offending vehicle, and, the respondents in their replies furnished to the claim petition, no endeavour was made each of them, by casting an application under the provisions of Order 1, Rule 10 of the CPC, to seek addition therethrough, in the array of co-respondents, of the husband of the disabled claimant, and, the insurer of the scooty (Activa) No.HP-20C-7759. Further plead that qua with Ex.PW4/A carrying communication qua both respondent No.2 herein, and, the husband of the disabled

claimant, while driving their respective vehicle being co-tortfeasor, would not get any inference that the husband of the disabled claimant contributed to the relevant accident, as, a reading of the deposition of PW-4, appears to be the only solitary eye witness to the occurrence, who while stepping into the witness box as PW-4, has tendered in her examination-in-chief, her affidavit borne in Ex.PW4/A. During the afore course has rather therein ascribed tort of negligence, vis-a-vis, respondent No.2 herein, comprised in his driving the offending vehicle at a brazen speed, and, in a rash and negligent manner. The afore testification borne in Ex.PW4/A was concerted to be ripped of its efficacy by the counsel for the insurer while holding her to cross-examination, and, the suggestion for negating the rule of respondent No.;2, in causing collision, is, couched in the phraseology qua the husband of the disabled claim ant not awaiting the signaling of the green light at the relevant site, and, his thereafter crossing the chowk. However, the afore suggestion stood repelled by her. The effect of the afore suggestion being repelled by PW-4, when combined further with lack of any articulations in Ex.PW4/A that in the afore manner, the husband of the disabled claimant while driving the scooty (Activa) No.HP-20C-7759, being negligent, and, with further factum that the entire report filed before the criminal court of competent jurisdiction, and, constituted under Section 173 of the Cr.P.C., not being, adduced into evidence for therefrom gaugings being made, vis-a-vis, respondent No.2 or the husband of the disabled claimant while driving scooty, occupying the appropriate or inappropriate side of the road, nor, the apposite site plan existing on record, whereas, existence of the afore documentary evidence, is, imperative for concluding whether respondent No.2 or the husband of the disabled claimant was driving the respective vehicle in appropriate or inappropriate site of the road, thereupon, the effect of the afore suggestion being negatived by PW-4, and, further when thereafter the counsel for the insurer concerted to impute tort of negligence, vis-a-vis, husband of the disabled claimant by meteing a suggestion to her that bag of fertilizers was carried on the scooter, and, hence, her husband lost the control over the scooty, and, when the afore suggestion also stood repulsed rather leads to an inference being erected that the insurer has meted to PW-5 imaginative suggestions for exculpating the incriminatory rule of respondent No.2 herein, in causing the relevant collision, and, also strived to impute role of co-tortfeasor, vis-a-vis, the husband of the disabled claimants, dehors the afore best evidence for earmarking the role of co-tortfeasor, vis-a-vis, the husband of the disabled claimant driving the scooty (Activa) No.HP-20C-7759 along with respondent No.2, hence, happening of the collision. Consequently, the findings returned by the learned tribunal upon the apposite issue No.1 not interferable, and, are sustained.

3. The learned counsel appearing for the insurer has also contended that the learned tribunal has inaptly mis-appraised Ex.PW3/A, the apposite disability certificate, inasmuch as, despite no echoings occurring in the apposite column qua 53% disability being permanent, and, it proceeding to conclude that the disabling injuries as pronounced therein being permanent in nature. Even, the afore submission is not acceptable as the learned counsel for the insurer has not heeded to the coulumn No.2, occurring in Ex.PW3/A wherein the disabling injuries as entailed upon the person of the disabled claimant are ticked to be not likely to improve, and, hence, are permanent in nature. Emphasisingly also when since the year 2014, and, upto the date of deposition of PW-3 being recorded, not attempt being made by the insurer, vis-a-vis, the disabling injuries entailed upon the person of the disabled claimant, being re-examined, and, re-assessed by the doctor concerned, and, his opining that the injuries are under recuperation, and, are likely to be improved, and, hence, the afore expression at serial No.2 of Ex.PW3/A losing its relevance and import.

4. The learned tribunal has aptly computed the contribution of the disabled claimant, who is a house wife, being borne in a sum of Rs.5000/- per mensem, towards her estate, and, with the afore permanent disability deterring her to perform the hitherto chores

as housemaker, thereupon, it concluded the annual income of the deceased in a sum of Rs.60,000/-, and, also given the permanent disability entailed upon the claimant, hence, hence completely precluding the disabled claimant to perform the chores of housemaker, and, thereon applied the apt multiplier of 14, and, thereafter computed the compensation payable to disabled claimant being borne in a sum of Rs.4,45,200/-. Apart from the above, the learned tribunal has also awarded a sum of Rs.1,77,638/- towards the medical expenses, besides a sum of Rs.50,000/- towards payment charges, and, Rs. 30,000/- towards special diet, a sum of Rs.1,50,000/- towards pain and suffering, and, Rs.1,00,000/- towards "loss of amenities and enjoyment of life", and, Rs.40,000/- towards taxi charges. The afore assessment of compensation, vis-a-vis, the disabled claimants also does not suffering from any illegality.

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

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

The State of H.P. & Others … Appellants.
Versus
Devinder Singh … Respondent.

LPA No. 82 of 2016
Date of decision: 8.5.2019.

Constitution of India, 1950 – Article 14- Payment of excess salary to employee- Recovery by employer- Permissibility and circumstances- Held, employee concerned does not belong to Class-I, Class-II or Class-III category- There was no misrepresentation or fraud on his part in getting himself regularized and receiving salary on basis of said regularization- Mistake, if any in pay fixation was committed by department itself- Recovery of excess salary sought to be effected from him is impermissible in law. (Para 9)

Cases referred:
Gauri Dutt and Others vs. State of H.P., Latest HLJ 2008 (HP) 36
State of Punjab and Others vs. Rafiq Masih, (2015) 4 SCC 334

For the Appellants: Mr. Vikas Rathore, Addl. A.G. with
Mr. J.S. Guleria, Dy. A.G.
For the respondent: Mr. Abhyendra Gupta, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge. *(Oral)*

Appellants/State/writ-respondents, by means of present appeal, have assailed the judgment dated 23.1.2015, passed by learned Single Judge, in Civil Writ

Petition No.8269 of 2013 titled Devinder Singh Vs. State of H.P. and others, whereby pay fixation order dated 8.5.2013, determining entitlement of the respondent/writ-petitioner to receive wages/ pay, has been modified dis-entitling the appellants/State to make recovery proposed from the respondent/writ-petitioner.

2. The respondent/ writ-petitioner was engaged as a beldar on daily wage basis w.e.f. May, 1991 and was promoted as Work Inspector in November, 1996 and he served as Work Inspector till 31.12.2000 as w.e.f. 1.1.2001, he was regularized as beldar on completion of 10 years after his appointment as beldar**.** The respondent/writ-petitioner has filed an Original Application before the H.P. State Administrative Tribunal, claiming his regularization on higher post i.e. Work Inspector, as he was promoted as Work Inspector in November, 1996 and at the time of regularization of beldar in 2000-2001 he was working as daily wage Work Inspector. In the year 2008, after abolition of the Administrative Tribunal, his petition was transferred to this High Court and was registered as CWP(T) No.16471 of 2008 and was decided on 13.7.2012, directing the appellants to regularize his service as Work Inspector w.e.f. 11.10.2007, in terms of directions issued by this Court in ***Gauri Dutt and Others Vs. State of H.P.***, reported in ***Latest HLJ 2008 (HP) 366,*** on completion of 10 years after his appointment/promotion on higher post i.e. Work Inspector.

3. In compliance of aforesaid judgment, appellants had issued an order on 12.2.2013 (Annexure P-1) to the petitioner, whereby services of respondent/writ-petitioner were regularized as Work Inspector w.e.f. 11.10.2007. After issuance of order dated 12.2.2013 (Annexure P-1), appellants had ordered pay fixation of respondent/writ-petitioner vide order dated 22.3.2013 and thereafter, vide order dated 8.5.2013 (Annexure P-2), had ordered recovery as under:-

> " The arrear of pay shall be prepared as per pay fixation order dated 22.3.2013 by effecting the recovery as mentioned below:-
>
> 1. 1.1.2001 to 10.10.2007: He has drawn the pay of WC Beldar, whereas he is entitled to get the daily wage wages of Work Inspector.
>
> 2. 11.10.2007 to date of his joining as Work Inspector, he has got the pay of WC Beldar, but entitled for pay of regular Work Inspector".

4. The recovery proposed in order dated 8.5.2013 (supra) was assailed by respondent/writ-petitioner in CWP No.8269 of 2013 and judgment passed therein by learned Single Judge is under challenge herein this appeal, wherein the respondent/writ-petitioner has been held entitled for salary of work charge beldar w.e.f. 1.1.2001 till 31.12.2006 with all consequential monetary benefits and salary of Work Inspector w.e.f. 1.1.2007 with all consequential monetary benefits with clarification that amount already paid to the petitioner in capacity of regular beldar will be adjusted.

5. Learned Additional Advocate General has contended that regularization of respondent/writ-petitioner as a beldar w.e.f. 1.1.2001 was found to be contrary to the judgment passed in Gauri Dutt's case (supra) and, therefore, he has to be considered as daily wage Work Inspector throughout after November, 1996 till his regularization as Work Inspector w.e.f. 11.10.2007 and therefore, for the said period, he would be entitled for emoluments payable to daily wage Work Inspector, whereas he has received salary/wages payable to regular work charge beldar w.e.f. 1.1.2001 to 10.10.2007 and therefore, action of appellant/State directing recovery of excess amount paid to respondent/writ-petitioner on this count is justified and respondent/writ-petitioner would be entitled for salary as regular Work Inspector only w.e.f. 11.10.2007.

6. Learned counsel for the respondent/writ- petitioner has contended that there was no fault on the part of respondent/writ-petitioner and entire mess has been created by mistake committed by the appellants, for which respondent/writ-petitioner cannot be blamed and made to suffer as the said mistake of the appellants could be rectified only after approaching the Court by the respondent/writ- petitioner. He has also put reliance on the pronouncement of the Apex Court in case ***State of Punjab and Others Vs. Rafiq Masih***, reported in ***(2015) 4 SCC 334***, wherein it is held that recovery proposed by the appellants/State is impermissible in Law.

7. In Rafiq Masih's case (supra), the Apex Court has held as under:-

> 6. "In view of the conclusions extracted hereinabove, it will be our endeavour, to lay down the parameters of fact situations, wherein employees, who are beneficiaries of wrongful monetary gains at the hands of the employer, may not be compelled to refund the same. In our considered view, the instant benefit cannot extend to an employee merely on account of the fact, that he was not an accessory to the mistake committed by the employer; or merely because the employee did not furnish any factually incorrect information, on the basis whereof the employer committed the mistake of paying the employee more than what was rightfully due to him; or for that matter,merely because the excessive payment was made to the employee, in absence of any fraud or misrepresentation at the behest of the employee.
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> 7. Having examined a number of judgments rendered by this Court, we are of the view, that orders passed by the employer seeking recovery of monetary benefits wrongly extended to the employees, can only be interfered with, in cases where such recovery would result in a hardship of a nature, which would fat outweigh, the equitable balance of the employer's right to recover. In other words, interference would be called for, only in such cases where, it would be iniquitous to recover the payment made. In order to ascertain the parameters of the above consideration, and the test to be applied, reference needs to be made to situations when this Court exempted employees from such recovery, even in exercise of its jurisdiction under Article 142 of the Constitution of India. Repeated exercise of such power, " for doing complete justice in any cause" would establish that the recovery being effected was iniquitous, and therefore, arbitrary. And accordingly, the interference at the hands of this Court.
>
> 8. As between two parties, if a determination is rendered in favour of the party, which is the weaker of the two, without any serious detriment to the other (which is truly a welfare State), the issue resolved would be in consonance with the concept of justice, which is assured to the citizens of India, even in the Preamble of the Constitution of India. The right to recover being perused by the employer, will have to be compared, with the effect of the recovery on the employee concerned. If the effect of the recovery from the employee concerned would be, more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer to recover the amount, then it would be iniquitous and arbitrary, to effect the recovery. In such a situation, the employee's right would outbalance, and therefore eclipse, the right of the employer to recover".
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> ....

"12. Reference may first of all be made to the decision of Syed Abdul Qudir Vs. State of Bihar, wherein this Court recorded the following observation in para 58: (SCC p. 491)

> "58. The relief against recovery is granted by courts not because of any right in the employees, but in equity, exercising judicial discretion to relieve the employees from the hardship that will be caused if recovery is ordered. But, if in a given case, it is proved that the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where the error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, courts may, on the facts and circumstances of any particular case, order for recovery of the amount paid in excess, Sahib Ram Vs. State of Haryana, Shyam babu Verma Vs. Union of India, Union of India Vs. M. Bhaskar, V. Gangaram Vs. Director, B.J. Akkara Vs. Govt. of India, Purshottam Lal Das Vs. State of Bihar, Punjab National Bank Vs. Manjeet Singh and Bihar SEB Vs. Bijay Bhadur".

....

15. "Examining a similar proposition, this Court in B.J. Akkara Vs. Govt. of India observed as under:

28. Such relief, restraining back recovery of excess payment, is granted by courts not because of any right in the employees, but in equity, in exercise of judicial discretion to relieve the employees from the hardship that will be cause if recovery is implemented. A government servant, particularly one in the lower rungs of service would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess payment for a long period, he would spend it, genuinely believing that he is entitled to it. As any subsequent action to recover the excess payment will cause undue hardship to him, relief is granted in that behalf. But where the employee had knowledge that the payment in that behalf. But where the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, courts will not grant relief against recovery. The matter being in the realm of judicial discretion, courts may on the facts and circumstances of any particular case refuse to grant such relief against recovery".

....

16. "This Court in Syed Abdul Qadir Vs. State of Bihar held as follows:

" 59. Undoubtedly, the excess amount that has been paid to the appellant teachers was not because of any misrepresentation or fraud on their part and the appellants also had no knowledge that the amount that was being paid to them was more than what they were entitled to. It would not be out of place to mention here that the Finance Department had, in its counter-affidavit, admitted that it was a bona fide mistake on their part. The excess payment made was the result of wrong interpretation of the rule that was applicable to them, for which the appellants cannot be held responsible. Rather, the whole confusion was because of inaction, negligence and carelessness of the officials concerned of the Government of Bihar. The learned counsel appearing on behalf of the appellant teachers submitted that majority of the

beneficiaries have either retired or are on the verge of it. Keeping in view the peculiar facts and circumstances of the case at hand and to avoid any hardship to the appellant teachers, we are of the view that no recovery of the amount that has been paid in excess to the appellant teachers should be made".

8. Finally, in para 18 of aforesaid Rafiq Masih's case, the Apex Court has concluded as under:-

> 18. "It is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to hereinabove, we may, as a ready reference, summaries the following few situations, wherein recoveries by the employers, would be impermissible in law:
>
> (i) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).
>
> (ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.
>
> (iii) Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.
>
> (iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.
>
> (v) In any other case, where the court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover".

9. In present case, it is undisputed that respondent/ writ-petitioner does not belong to Class II or Class I, but to Class III and there was no mis-representation or fraud on his part for getting him regularized as a beldar and to receive salary on basis of said regularization/ work charge status since 1.1.2001 till his regularization as a Work Inspector. Rather it was a mistake committed by the appellants in applying the ratio of Law laid down by the Apex Court and this High Court, which have attained finality. Therefore, as per ratio of Law laid down by the Apex Court in Rafiq Masih's case, recovery sought to be effected from respondent/writ-petitioner is impermissible in Law.

10. There is another angle in the present case. Undoubtedly, respondent/writ-petitioner has served as a regular/work charge beldar w.e.f. 1.1.2001 till 12.2.2013 and has received salary for performing duties against the post of regular/ work charge beldar. For this period, he has not received any excess salary than the entitlement of a regular beldar. Further, vide judgment dated 13.7.2012, the appellants were directed to regularize the service of respondent/writ-petitioner w.e.f. 1.1.2007 on completion of 10 years of his service after his promotion as daily wage Work Inspector by applying the ratio of Law laid down in Gauri Dutt's case and therefore, the respondent/writ- petitioner would be entitled for salary as a Regular Work Inspector w.e.f. 1.1.2007, whereas vide order dated 8.5.2013 (Annexure P-2), he has been held entitled for salary of Regular Work Inspector w.e.f. 11.10.2007, which is in violation of the judgment passed by this Court in CWP (T) No.16471 of 2008, as there was an unambiguous direction to appellants to regularize the service of the

respondent/writ- petitioner w.e.f. 1.1.2007. Therefore, the appellants were not having any authority to regularize the service of respondent/writ-petitioner as Work Inspector and to restrict his salary as such w.e.f. 11.10.2007 instead of 1.1.2007.

11. So far as receiving the salary of work charge beldar w.e.f. 1.1.2001 to 10.10.2007 is concerned, as discussed supra, the respondent/writ-petitioner has received salary while he was serving as a work charge beldar, but he was agitating for his claim for regularization as Work Inspector by filing the petition in the Administrative Tribunal/High Court and during that period he had performed the duty as a work charge beldar and not as a daily wages Work Inspector. Therefore, for that period, fixing his pay/wages at the rate of daily wage Inspector, is not permissible. He is entitled to receive the salary/wages against the post, for which he has performed his duties, but for fault on the part of appellants.

12. In aforesaid facts and circumstances, we find that learned Single Judge has not committed any mistake by holding that respondent/writ-petitioner will be entitled for the salary of work charge/ regular beldar w.e.f. 1.1.2001 till 31.12.2006 with all consequential monetary benefits and for salary of Work Inspector w.e.f. 1.1.2007 with all consequential monetary benefits. So far as the adjustment of payment of salary as a regular beldar is concerned, the same, in view of the ratio of Law laid down by the Apex Court in Rafiq Masih's case, is to be construed that in case the respondent/writ-petitioner is entitled for over and above the said salary, the said amount shall be paid to the respondent/writ-petitioner and in case it is found that he has received excessive salary for the said period, recovery of the said amount shall not be permissible under the Law.

13. With the aforesaid observations, we find no merit in the appeal and accordingly the same is dismissed.

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

Vishwa Nath ...Petitioner.

Versus

Rakesh Kumar & Ors. ...Respondents.

CMPMO No.487 of 2017.
Reserved on : 7.5.2019.
Decided on: 20.6.2019.

Code of Civil Procedure, 1908 (Code) – Order VIII- Rule 6A – Counter claim- Filing of- Held, right to file counter claim is an additional right of defendant- It can be laid when cause of action has accrued to defendant before filing of suit or after filing of suit but before he has delivered his defence- Defendant cannot be permitted to file counter claim with respect to cause of action which has accrued after delivering written statement. (Paras 7 to 9)

Case referred:
Vijay Prakash Jarath vs. Tej Prakash Jarath, 2016 (11) SCC 800

For the petitioner : Mr. Hamender Chandel, Advocate.
For the respondent : Mr. Prashant Sharma, Advocate

for respondent No.1.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present petition, under Article 227 of the Constitution of India, is maintained by the petitioner for quashing and setting aside the impugned order, dated 21.8.2017, passed by the learned Civil Judge (Junior Division), Court No.2, Ghumarwin, District Bilaspur, in CMA No.437/6 of 2017, in Civil Suit No.248/1 of 2015, whereby an application filed by the petitioner seeking permission to file the counter claim was dismissed.

2. The key facts, giving rise to the present petition are that respondent No.1-plaintiff maintained a suit for permanent prohibitory injunction restraining the defendants from digging the land, raising any type of construction and from alienating the suit land in any manner. As per the plaintiff, late Smt. Prabhi, was recorded owner-in-possession over the land measuring 2-16 bighas, comprised in Khasra No.291/1, 294, kita 2, situated in village Bakain, Pargana Baseh, Tehsil Jhandutta, District Bilaspur, H.P. Smt. Prabhi, reported missing since so many years and the predecessor-in-interest of the defendant late Shri Ram Prakash by practicing the fraud with the revenue authorities have got the revenue entries in the column of possession in his name, however, Smt. Prabhi Devi, was exclusive owner-in-possession over the suit land and she has neither inducted late Shri Ram Prakash, predecessor-in-interest of the defendants as tenant nor any possession was over delivered to late Shri Ram Prakash by her in any manner and as such, revenue entries in the name of late Shri Ram Prakash predecessor-in-interest of the defendants and now in the name of defendants No.1 and 2 in the column of possession, vide mutation No.529, dated 24.4.2013, are illegal, wrong and null and void. The defendants and their predecessor-in-interest Shri Ram Prakash have got no right, title and interest in any manner in the suit land and other successor of Smt. Prabhi Devi is also having equal right and interest according to their respective shares in the suit land.

3. The petitioner-defendant No.1 maintained an application for seeking permission to file the counter claim in the civil suit, whereby the said application was dismissed, vide order dated 21.8.2017.

4. Feeling aggrieved, the impugned order, dated 21.8.2017, passed by the learned Trial Court, the petitioner maintained the present petition.

5. Learned counsel appearing on behalf of the plaintiff has argued that the learned Court below should have allowed the applicant to file the counter claim as per the law laid down in ***Vijay Prakash Jarath vs. Tej Prakash Jarath, 2016 (11) Supreme Court Cases, 800***. On the other hand, learned counsel appearing for the defendant has also relied upon the aforesaid judgment (supra) and argued that as the cause of action to the counter claim has accrued after filing of the written statement, so, the present petition cannot be allowed.

6. To appreciate the arguments of learned counsel appearing on behalf of the parties, I have gone through the entire record in detail.

7. From the aforesaid discussion, as per the pleadings of the plaintiff, cause of action accrued to him on 1.5.2017, which has occurred to the defendant and can be taken on 1.5.2017. The written statement in the present case is filed on 10.3.2016. Now, coming

to the provision of Order 8 Rule 6 (A) of the Code of Civil Procedure, the law as cited by the learned counsel appearing for the plaintiff in ***Vijay Prakash Jarath vs. Tej Prakash Jarath, 2016 (11) Supreme Court Cases, 800,*** wherein it has been held as under :

> **"It is in these circumstances, that we advert to Order VIII Rule 6A of the Code of Civil Procedure, which is being reproduced below:**
>
> **"6A. Counter-claim by defendant - (1) A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not:**
>
> **Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.**
>
> **(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.**
>
> **(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.**
>
> **(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints."**
>
> **A perusal of Sub-clause (1) of Section 6A of Order VIII, leaves no room for any doubt, that the cause of action in respect of which a counter claim can be filed, should accrue before the defendant has delivered his defence, namely, before the defendant has filed a written statement. The instant determination of ours is supported by the conclusions drawn in Bollepanda P. Poonacha & Anr vs. K.M.Madapa , wherein this Court observed as under:**
>
> **"11. The provision of Order 8 Rule 6-A must be considered having regard to the aforementioned provisions. A right to file counterclaim is an additional right. It may be filed in respect of any right or claim, the cause of action therefor, however, must accrue either before or after the filing of the suit but before the defendant has raised his defence. The respondent in his application for amendment of written statement categorically raised the plea that the appellants had tresspassed on the lands in question in the summer of 1998. Cause of action for filing the counterclaim inter alia was said to have arisen at that time. It was so explicitly stated in the said application. The said application, in our opinion, was, thus, clearly not maintainable. The decision of Ryaz Ahmed is based on the decision of this Court in Baldev Singh Vs. Manohar Singh, 2006 6 SCC 498."**

It is not a matter of dispute in the present case, that cause of action for which the counter-claim was filed in the present case, arose before the respondent-plaintiff filed the suit (out of which these petitions/appeals have arisen). It is therefore apparent that the appellants before this Court were well within their right to file the counter-claim."

8. In view of the aforesaid discussion, as the cause of action accrued to the defendant after filing of the written statement, so, in these circumstances, the impugned order dated 21.8.2017, passed by the learned Court below is just and reasoned and needs no interference.

9. In view of what has been stated hereinabove, the present petition sans merits, deserves dismissal and is accordingly dismissed. No order as to costs. Parties through their learned counsel are directed to appear before the learned Court below on ***15th July, 2019.*** Pending application(s), if any, also stand(s) disposed of.

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

IFCO Tokio General Insurance Company .....Appellant.
Versus
Budhi Singh and others ...Respondents.

FAO No. 261 of 2017
Decided on : 20.4.2018

Motor Vehicles Act, 1989 (Act) – Sections 3 and 149- Motor accident- Claim applications- Defences- Driving licence- Validity of- Held, driver authorized to drive HMV does not ipso facto get bestowed with authorization to drive a motor cycle- In such cases, insurer cannot be held liable to indemnify award- Appeal of insurer against award of Claims Tribunal directing it to pay compensation is partly allowed- Award modified- Insurer directed to pay compensation first and recover it from insured. (Para 2)

Cases referred:
Kulwant Singh and others vs. Oriental Insurance Company Limited, 2015) 2 SCC186
S Iyyapan vs. United India Insurance Company Limited and another, (2013) 7 SCC 62

For the Appellant: Mr. Chandan Goel, Advocate.
For Respondents: Mr. Naveen K. Bhardwaj, Advocate, for respondents No. 1 to 3.
Mr. Naveen Awasthy, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge (oral).

The Insurance Company, whereon, the apposite indemnificatory liability, was, fastened by the learned Tribunal, has through the extant appeal, hence cast

a challenge thereon. The learned counsel for the Insurance company has, prima-facie, at this stage, adequately demonstrated that respondent No. 4, was, at the relevant time, driving a motor cycle, whereas, he was authorized to solitarily drive a Light Motor Vehicle, (a) and, with apparently the category of the vehicle, he was driving at the relevant time, hence falling in a contra distinct category, therefrom, in as much as a motor cycle, (b) thereupon the pronouncement recorded by the Hon'ble Apex Court, in (2008) 12 Supreme Court Cases 385, the relevant paragraph whereof is extracted hereinafter:

> " In the light of the above settled proposition of law, the appellant Insurance Company cannot be held liable to pay the amount of compensation to the claimants for the cause of death of Shukurullah in road accident which had occurred due to rash and negligent driving of scooter by Ram Surat who admittedly had not valid and effective license to drive the vehicle on the day of accident. The scooterist was possessing a driving license of driving HMV and he was driving a totally different class of vehicle, which act of his is in violation of Section 10(2) of the MV Act."

(c) wherein, it is clearly expostulated, that, a driver authorized to drive a light motor vehicle, hence not ipso-facto thereupon being also bestowed, with an authorization, to also drive a motor cycle, rather being squarely attracted hereat, (a) the aforesaid submission addressed by the learned counsel, for the Insurance Company, for his hence challenging fastening, of the apposite indemnificatory liability, vis-à-vis it, concomitantly, prima-facie, attains, tremendous legal force. Moreso, when the respondent No. 4 in his cross-examination acquiesced, to the trite factum, of his not at the relevant time, holding the apposite authorization, to drive the offending motor cycle.

2. However, in view of the law laid down by the Hon'ble Supreme Court in **(2015) 2 Supreme Court Cases 186, Kulwant Singh and others versus Oriental Insurance Company Limited,** and **(2013) 7 Supreme Court Cases 62, S Iyyapan versus United India Insurance Company Limited and another, the apposite** indeminificatory liability, is, however fastened upon the owner of the offending vehicle(s). Even if the offending vehicle, was, at the relevant time, hence driven by a person, not holding apposite valid driving license, to drive it, yet the Insurer being enjoined to initially defray the compensation amount vis-à-vis the claimants whereafter it being empowered to recover it from the owner of the offending vehicle. Consequently, the compensation amount, assessed vis-à-vis the claimant, in consonance therewith, shall initially be liquidated by the Insurer of the offending vehicle, and, thereafter the insurer shall have the right to recover it, from, the owner.

3. In view of the aforesaid submissions/observations, the appeal is partly allowed. All pending application(s) are disposed of.

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BEFORE HON'BLE MR. JUSTICE HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

Sukhdev Singh ... Petitioner.

Versus

State of Himachal Pradesh and others ...Respondents.

Cr.MMO No.245 of 2014
Reserved on : 11.6.2019

Date of decision: 17th June,2019

Code of Criminal Procedure, 1973 – Section 482- Inherent powers- Exercise of- Quashing of FIR- Civil dispute/ Civil remedy- Consequences- Held, mere availability of civil remedy to complainant per se cannot be a ground to quash criminal proceedings- The test is whether allegations made in complaint disclose commission of offence or not? - Petitioner-accused by agreeing to sell plot connected by road, which in fact was not so connected, prima facie misrepresented to complainant- Allegations disclose commission of offence of cheating- FIR cannot be quashed- Petition dismissed. (Paras 17, 22 & 23)

***Cases Referred**:*

Madhavrao Scindia vs. Sambhajirao Chandrojirao Angre, 1988 (1) SCC 692

Ravindra Kumar Madhanlal Goenka vs. Rugmini Ram Raghav Spinners P Ltd, (2009) 11 SCC 536

State of Bihar vs. P. P. Sharma, AIR 1991 SC 1268

Vijayander Kumar vs. State of Rajasthan, 2014 (5) 3 SCC 389

For the Petitioner	:	Mr. T.S.Chauhan, Advocate.
For the Respondents	:	Ms. Rita Goswami, Additional Advocate General, Ms. Divya Sood,Deputy Advocate General and Mr.Manoj Bagga, Assistant Advocate General for State. Ms. Divyani Sharma, Adv. for the respondent no.3.

The following judgment of the Court was delivered:

Anoop Chitkara, Judge

The present petition is under Section 482 of the Code of Criminal Procedure for quashing of FIR No.239 of 2013 dated 31-07-2013, registered in Police Station-Sadar, District-Una, Himachal Pradesh, for the commission of offences punishable under Sections 420, 467, 468 & 471 of the Indian Penal Code as well as further proceedings arising out of the FIR which are pending in the Court of Judicial Magistrate Ist Class, Una, Distt. Una, HP in case No. 117-1-14 titled State Vs. Veena Devi & another pending since 12-11-2014.

2. The FIR in question was registered on the basis of complaint filed by Dinesh Kumar, S/O Sh. Chaman Lal, who is respondent no.3 in the present petition. The gist of the allegations contained in FIR is as follows:-

(a) That the accused no.1 Veena Devi, is the petitioner no. 2 in the present case, A-2 Sukhdev Singh, is the petitioner no.1 in the present case.

(b) The further allegations are that with malafide intentions, connivance, conspiracy, collusion and in league with each other, they have misrepresented the complainant, while entering into an agreement of sale of land comprised in Khasra No. 2262/1740/23.

(c) The main allegations are that at the time of sale agreement dated 07-05-2013, it was promised that the plot would be connected with a road, whereas on the spot, no road is in existence, adjacent to the land described above and which is subject matter of the agreement.

(d) It was further mentioned in the complaint that the road did not mean only path or passage but road means motorable access to the plot of the land. It was prayed that prosecution be launched against the accused persons.

(e) Feeling aggrieved by this FIR, accused No. 1 and 2, Sukh Dev and Veena Devi have preferred this petition. The complainant has been arrayed as respondent no.3 in the present petition. The FIR which is sought to be quashed has been annexed as annexure P1. Petitioner has annexed record pertaining to khasra No. 2262/1740/23 as annexures P2, P3, P4. Petitioner has also annexed the agreement dated 7th May, 2013 as annexure P5 and its translation is also filed with the petition as part of annexure P-5.

(f) The agreement reveals that it is executed between Veena Devi claiming herself to be the owner in possession of the alleged land, measuring 0-02-30 hectares, being 230/492 share out of land, measuring 0-04-92 hectares comprised in Khewat No. 268, Khatauni No. 316 bearing Khasra No. 2262/1740/23 as per Jamabandi for the year 2008-2009, situated in up Mahal Jalgarahan, Mahal Tabba, Tehsil & Distt. Una, HP, wherein she has agreed to sell this much land to the complainant/ respondent no.3 Dinesh Kumar for a sum of Rs. 1,15,800/- per marla. In the foot of agreement it has been clarified through a note which reads as follows:

"Note- the plot will be sold alongwith the road at South and West."

3. The petitioner is further placing reliance on a legal notice dated 26-07-2013 issued from an Advocate to the respondent no.3. which is annexure P-6 .

4. Another legal notice dated 26-07-2013 annexure P7 was issued to the present petitioner on behalf of the respondent no.3 and a copy also placed on record annexure P7. Vide annexure P-8 Tatima of the land has been placed on record.

5. Vide annexure P-9, location plan prepared by a draftsman, which is dated 7th December, 2013, has been placed on record. On the portion of this location plan, the plot in question has been shaded. At the bottom portion, one meter wide gate has been mentioned and other portion of this area which is in the shape of road, there is a brick wall.

6. The petitioner has also relied upon an application made against respondent no.3, to SP, Una, H.P. In this application it was stated by Sukh Dev Singh petitioner no.1, to close investigation and file cancellation report because the matter is Civil in nature and the Civil Courts have the jurisdiction to adjudicate the matter.

7. All these documents are supported by affidavits of the petitioners. Respondents no.1 & 2 filed reply to petition, wherein it is stated that it is absolutely wrong that petitioners were ready to execute the sale deed as per the agreement. In fact the petitioners had committed fraud with respondent no.3, by cheating him by entering into an agreement, in which it was specifically written that the plot will be given to respondent no.3 adjacent to road on the South & West, where in fact no road exists.

8. It has been stated on affidavit by Superintendent of Police Una which reads as follows:

"It has been reiterated that the exists of path does not mean that there exists any road. Over all the respondents no. 1 and 2 i.e. State has sought dismissal of the present petition in paragraph 8 (g) it is specifically stated that there was no road on any side of the plot and under the provisions of

> Town and Planning Act all the future upcoming residential houses can be constructed only on the plots connected with the roads. Thus no house can be constructed over the plots as the site plan will not be passed by the competent authority."

9. The complainant, respondent no.3, has also filed a reply in which he has sought for dismissal of the present petition on the following grounds that the allegations are incorrect and inherent jurisdiction under Section 482 Cr.P.C. should not be invoked.

10. The petitioner has filed rejoinder to replies reiterating his stands in the petition.

11. I have heard learned counsel for the parties and gone through the entire case files.

12. It appears that basic main grievance of the petitioner is that the allegations are Civil in nature and not penal in nature. It can further be inferred from the petition as well as arguments of the counsel of the petitioner that once the Civil case is pending on the same facts then there is no occasion for further proceedings to continue. The next contention is that on the perusal of these annexures, prima facie no case is made out.

13. To the contrary, as Ms. Reeta Goswami, Additional Advocate General and Miss Divya Sood, Deputy Advocate General, opposed quashing of this petition and Ms Divyani Sharma, Advocate for the respondent no.3 has vigorously opposed quashing of the petition and also drawn attention to the location plan annexure P9.

14. After applying my mind to the entire matter, I am of the opinion that the contention that once Civil case is pending then criminal case cannot continued has no substance, in the instant case, which has disputed facts. Civil case is for adjudication of rights whereas criminal cases for violation of penal laws. They do not over lap unless the case is purely in Civil in nature and there is no penal infringement made out.

15. This Court is aware of the law laid down by three Judges bench of Supreme Court in ***Madhavrao Jiwaji Rao Scindia*** *v.* ***Sambhajirao Chandrojirao Angre, 1988 (1) SCC 692***.The Court observed thus***:-***

> "7. The legal position is well-settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilised for any oblique purpose and where in the opinion of the court chances of an ultimate conviction is bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage.
>
> 8. Mr. Jethmalani has submitted, as we have already noted, that a case of breach of trust is both a civil wrong and a criminal offence. There would be certain situations where it would predominantly be a civil wrong and may or may not amount to a criminal offence. We are of the view that this case is one of that type where, if at all, the facts may constitute a civil wrong and

> the ingredients of the criminal offences are wanting. Several decisions were cited before us in support of the respective stands taken by counsel for the parties. It is unnecessary to refer to them. In course of hearing of the appeals, Dr.Singhvi made it clear that Madhavi does not claim any interest in the tenancy. In the setting of the matter we are inclined to hold that the criminal case should not be continued."

16. While dealing with the over laping of Criminal and civil litigation, the facts are inter alia different and this judgment is clearly not applicable in the disputed facts of present case.

17. In the present petition, the petitioner wants quashing of FIR, by placing reliance on location plan. Mr. Tara Singh Chauhan, counsel for petitioner says that road is clear and five meters road goes up to the plot in question which has been shaded in this location plan annexure P9. To the contrary Miss Devyani Sharma, Adv. has brought to the notice of this Court that on one side of the road, there is a brick wall and only one meter wide gate, which means no vehicle can cross, because the gate is only one meter. She further says that other side of the road is blocked being no connectivity to any other road. The counsel for the petitioner has not even made a verbal statement that they have either removed this gate or they would like to remove it and even in the petition no such promise has been made.

18. During the course of arguments Ld. Counsel for the petitioner wants to draw the attention of the Court to one plan which is part of his brief. When questioned that this document is not part of the record of the Court file, then a submission was made by the counsel to look into this plan from the file of the counsel. It is unthinkable that this kind of approach is permissible in law. I am of the considered opinion that even by invoking powers under Section 482 Cr.P.C. it is not permissible to the High Court to place reliance on those documents, which are in the file of the counsel of the petitioner and not on the record of the Court. Therefore, this court has refused to look into such documents. It is trite that each and every documents filed alongwith the petition under Section 482 Cr.P.C., cannot be looked into.

19. In the land mark case titled ***State of Bihar Vs. P. P. Sharma, AIR 1991 Supreme Court 1268***, the Hon'ble Supreme Court observed as follows:-

> "16. It is thus obvious that `the annexures' were neither part of the police-reports nor were relied upon by the investigating officer. These documents were produced by the respondents before the High Court along with the writ petitions. By treating `the annexures' and affidavits as evidence and by converting itself into a trial court the High Court pronounced the respondents to be innocent and quashed the proceedings. The last we can say is that this was not at all a case where High Court should have interfered in the exercise of its inherent jurisdiction. This Court has repeatedly held that the appreciation of evidence is the function of the criminal courts. The High Court, under the circumstances, could not have assumed jurisdiction and put an end to the process of investigation and trial provided under the law. Since the High Court strongly relied upon "the annexures" in support of its findings, we may briefly examine these documents."

20. In **Ravindra Kumar Madhanlal Goenka and another Vs. Rugmini Ram Raghav Spinners Private Limited, (2009) 11 SCC 536**, Hon'ble Supreme court hold as under:

> **"18.** While entertaining a petition under Section 482 CrPC, the materials furnished by the defence cannot be looked into and the defence materials can be entertained only at the time of trial. It is a well-settled position of law that when there are prima facie materials available, a petition for quashing the criminal proceedings cannot be entertained. The investigating agency should have had the freedom to go into the whole gamut of the allegations and to reach a conclusion of its own. Pre-emption of such investigation would be justified only in very extreme cases.
>
> 19. While considering the facts of the present case, we are of the considered opinion that the present case is not one of those extreme cases where criminal prosecution can be quashed by the Court at the very threshold. A defense case is pleaded but such defence is required to be considered at a later stage and not at this stage. The appellants would have ample opportunity to raise all the issues urged in this appeal at an appropriate later stage, where such pleas would be and could be properly analyzed and scrutinized.
>
> 20. In view of the aforesaid position, we decline to interfere with the criminal proceeding at this stage. The appeal is consequently dismissed."

21. In ***Vijayander Kumar Vs. State of Rajasthan, 2014 V 3 SCC 389,*** *Hon'ble Supreme Court* observed thus:

> "10. Contra the submission advanced on behalf of the appellants, the learned counsel for Respondent 2 has submitted that there is no merit in the contention advanced on behalf of the appellants that the FIR discloses only a civil case or that there is no allegation or averment making out a criminal offence. For that purpose he relied upon the judgment of the High Court rendered in the facts of this very case in *Vijayander Kumar* v. *State of Rajasthan*, already noted earlier.
>
> 11. No doubt, the views of the High Court in respect of averments and allegations in the FIR were in the context of a prayer to quash the FIR itself but in the facts of this case those findings and observations are still relevant and they do not support the contentions on behalf of the appellants. At the present stage when the informant and witnesses have supported the allegations made in the FIR, it would not be proper for this Court to evaluate the merit of the allegations on the basis of documents annexed with the memo of appeal. Such materials can be produced by the appellants in their defence in accordance with law for due consideration at appropriate stage.
>
> **12.** The learned counsel for the respondents is correct in contending that a given set of facts may make out a civil wrong as also a criminal offence and only because a civil remedy may also be available to the informant/complainant that itself cannot be a ground to quash a criminal proceeding. The real test is whether the allegations in the complaint disclose a criminal offence or not. This proposition is supported by several judgments of this Court as noted in para 16 of the judgment in *Ravindra Kumar MadhanlalGoenka* v. *Rugmini Ram Raghav Spinners (P) Ltd."*

22. I am of the considered opinion that even if reference is made to annexure P-9, still unless the obstacles in the form of gate, is removed it would prima facie amount to misrepresentation to the purchaser, by making him agree to pay a price which he was willing to pay for a drive in plot. Judicial notice can be taken of the fact that in the present time, worth of the drive-in properties is much more valuable than those that are unconnected by road. Due to motorable connectivity the cost of construction comes down and it is extremely convenient for the occupants to use premises.

23. I am of the opinion that, prima facie, even if everything is admitted as if it stands proved, even then no case of quashing of FIR is made out at this stage.

24. However, it shall be open for the accused to make his contention at the time of framing of charges if the police report, if any, is filed under Section 173 Cr.P.C. and cognizance is taken with the concerned Court.

25. In case the petitioner provides motorable access to the plot of respondent no. 3, after doing that and proving such access, by photographic or video evidence, it shall be open for the petitioner to file fresh petition on the same and similar grounds. This order shall not come in way in filing such petition.

26. Needless to say that the observations made in the petition are only for the purpose of the present petition. This order shall not be read either at the time of summoning or framing of charges or at any further stage.

27. In the result the petition is dismissed.

28. Pending application(s), if any, also stand disposed of.

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

Shri Devinder Bhardwaj and another .....Appellants/Defendants.

Versus

Sh. Ravinder Lal ....Respondent/Plaintiff.

RFA No. 197 of 2008.
Reserved on: 2nd April, 2019.
Decided on: 30th April, 2019.

Transfer of Property Act, 1882- Section 38- Bonfaide purchaser- Who is? Trial court setting aside sale deed executed by defendant No. 1 (D1) as GPA of plaintiff in favour of defendant No. 2 (D2)- And declining plea of D2 of his being bonafide purchaser for consideration- Appeal against- Held, material on record suggesting D2 having visited tehsil office for verifying subsisting validity of GPA executed in favour of D1 by plaintiff- Inferentially, he had come to know that GPA aforesaid stood rescinded by plaintiff, yet he (D2) opted to get sale deed registered on basis of rescinded GPA- D2 is not a bonafide purchaser of suit land- Appeal dismissed- Decree of lower court upheld. (Para 12)

For the Appellants: Mr. Bhupender Gupta, Senior Advocate with Ms. Rinki Kashmiri, Advocate.

For the Respondent: Mr. R.L. Sood, Senior Advocate with Mr. Arjun Lal, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal is directed against the verdict recorded by the learned Additional District Judge, Solan, H.P., upon, Civil Suit No.2-S/1 of 2006, wherethrough, the plaintiff's suit for rendition of a decree for declaration, and, for setting aside the sale deed executed by defendant No.1, vis-a-vis, defendant No.2, and, serialized as deed No.438 of 4.5.2005, with, the Sub Registrar, Solan, was, hence decreed.

2. Briefly stated the facts of the case are that the plaintiff filed a suit qua declaration that the sale deed executed by defendant No.1 in favour of defendant No.2 bearing No.438 of 4.5.2005 registered with Sub Registrar, Solan, to be void abinitio and restraining the defendant from interfering over the suit land in any manner. It has been averred that the plaintiff is owner in possession of the land comprised in Khata No.213, Khatauni No.308, Khasra No.1414/137, measuring 300 sq. meters, situated at Mauza Salogra Solan, Tehsil and District Solan, H.P. Defendant No.1 was appointed as power of attorney to manage and to lookafter the suit land on 30.11.1995 vide registered deed No.273. It has been averred that since defendant No.1 failed to perform the job which was assigned to him as general power of attorney, it was got cancelled vide registered deed No.47 of 1.3.1997 registered with Sub Registrar, Solan, with whom general power of attorney was earlier registered. Defendant No.1 was intimated qua the cancellation of the power of attorney and photo copy of cancellation deed was handed over to him and receipt was also taken. It has been alleged that in the first week of September, 2005, the plaintiff came to know that some people had visited the suit land claiming the land to be owned by them, thereby on enquiry came to know that defendant No.1 had executed a sale deed in favour of defendant NO.1 qua the suit land. The general power of attorney under which he was authorised to deal with having been cancelled. He had no authority to execute the sale deed bearing No.438 registered with Sub Registrar, Solan, thereby it has been prayed that neither defendant No.1 was having any right, title or interest over the suit land nor he could have created any right, title or interest in favour of defendant No.1. Defendant No.1 has played fraud and has executed the sale deed without any power. The market value of the suit land was Rs.1,20,000/- per biswa as the average value of the land comes out Rs.6,49,866/-. However, defendant No.1 had sold it for the amount of Rs.3,50,000/-. Defendant No.1 was tried to be contacted but to no result. Mutation was also attested in favour of defendant No.1 bearing mutation No.712 of 30.052005 on the basis of which defendant No.1 is now claiming himself to be owner in possession of the suit land, whereas defendant has acquired no right, title or interest by a sale deed which has been executed unauthorised person.

3. The defendants contested the suit and filed joint written statement, wherein, preliminary objections have been taken qua estoppel, cause of action, maintainability, jurisdiction, court fee etc. on merits, it has been pleaded that the plaintiff had entered into an agreement for sale of the suit land in favour of Shri Swaran Singh Cheema son of Sh. Sant Singh for a consideration of Rs.1,55,000/- on 28.9.1995. The amount of Rs.30,000/- was paid by Swaran Singh Cheema to the plaintiff and remaining amount was to be paid on or before 30.11.1995 when the sale deed was got to be registered. Defendant No.1 was one of the witness to that deed. When on 30.11.1995 the remaining amount was to be paid, Swaran Singh Cheema showed his inability to purchase the same land, and was reluctant to pay the remaining amount and ultimately a sale in favour of defendant no.1 was made who paid the amount of Rs.1,55,000/- to the plaintiff on the same day i.e. 30.11.1995 and possession of the suit land was delivered to defendant No.1 by the plaintiff. The same day

general power of attorney was also executed by the plaintiff in favour of defendant No.1 for executing the necessary sale deed in favour of any person and it was undertaken that the general power of attorney would not be revoked as for all intents and purposes defendant No.1 was owner of the land in suit as the full consideration amount having been paid and possession also having been delivered. It was agreed that defendant No.1 can get the sale deed executed as of his choice. The amount of Rs.30,000/- which has been paid by Swaran Singh Cheema was paid to him and Saran Singh Cheema was satisfied with the sale of the land n favour of defendant No.1. The receipt qua the payment of the amount was also executed thereby the plaintiff had lost his right, title and interest over the suit lad. The general power of attorney thereafter was with defendant No.1 which was never got cancelled. The allegation of cancellation of the general power of attorney and thereafter providing of intimation to defendant No1 has been disputed. It has been averred that full consideration amount having been received by the plaintiff and the amount of the earlier purchaser Swaran Singh Cheema having been refunded, defendant No.1 has become owner. It has also been averred that defendant No.1 had sold the suit land vide registered sale deed to defendant No.1 and handed over its possession, he being authorised under general power of attorney to effect sale. The other averments made by the plaintiff have been stated to be wrong and it has been submitted that no fraud so far was palyed by the defendant No.1 with the plaintiff and the defendant No.2 is bonafide purchaser for valuable consideration. It has also been averred that selling of the land at less than the market price has also been denied whereby it has been prayed that in view of the value of the land the court has got jurisdiction and and at the same time the land having been sold by power of attorney and defendant No.2 having paid valuable consideration in good faith, the suit deserves dismissal.

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

1. Whether the sale deed No. 438 dated 4.5.2005 is void abinitio as alleged? If so its effect? OPP.
2. Whether the suit is not maintainable in the present form? OPD.
3. Whether the plaintiff is estopped due to his own acts, conduct and acquiescence to file the present suit? OPD.
4. Whether the plaintiff is out of possession of the suit land and as such he has no locus standi to file the present suit? OPD.
5. Whether the plaintiff has no enforceable cause of action to file the present suit? OPD.
6. Whether the suit is not properly valued for the purpose of court fee and jurisdiction? OPD.
7. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the plaintiff's suit.

6. Now the defendants/appellant(s) herein, have instituted the instant Regular First Appeal, before, this Court, wherein they assail the findings, recorded in its impugned judgment and decree, by the learned trial Court.

7. Uncontrovertedly, the plaintiff, was, the recorded owner in possession, of, the suit property. Through validly proven agreement to sale, borne respectively in Ext. P-1, and, in Ex. P-2, he, had contracted, to execute a registered deed of conveyance, vis-a-vis, the suit property, with, one Swaran Singh. However, the afore Swaran Singh, has not, instituted any suit, rather for enforcing the contract of sale, borne in Ex.P-1, and, in Ex. P-2. Contrarily,

the entire fulcrum of the dispute engaging the parties at contest, is, hinged upon, the entitlement or otherwise of the plaintiff, to, rescind Ex.PW3/A, wherethrough, he constituted defendant No.1, as his general power of attorney, hence for the purpose(s) enumerated therein, inclusive of his being bestowed, with an authorization, to, execute a registered deed(s) of conveyance, with respect to the suit property. The conferment, of, an authorization, upon, defendant No.1, through Ex.PW3/A, stood rescinded by the plaintiff, through, an apposite therewith cancellation deed, borne in Ex.P-3.

8. Initially, and, at the outset, it is to be determined, whether the arguments addressed before, this Court by the learned counsel, appearing for the appellants/defendants (i) qua with Ex. D-1 rather containing, a, receipt qua the plaintiff, receiving a sum of Rs.1,55,000/- for the sale of suit land, from, defendant No.1, and, its further containing, recitals qua the plaintiff, hence, constituting defendant No.1, as his general power of attorney, through, Ex.PW3/A, and, also it echoing qua the latter exhibit being irrevocable, rather with plaintiff, subsequent thereto, through Ex.P-3 hence rescinding the general power of attorney, borne in PW3/A, qua whether hence rendering, the afore Ex.P-3, to, hold any vigour. The afore conundrum, is, of grave importance, as, therethrough the learned counsel for the aggrieved defendants, has contended, that Ex.D-1 hence operating, as, a protective statutory shield, vis-a-vis, him, and, the afore statutory protective cover, erupting from, the mandate, of, Section 53-A of the Transfer, of, Property Act, (ii) and, thereupon the vesting of title, in defendant No.2, through, a registered deed of conveyance, vis-a-vis, the latter, by defendant No.1, rather not being inflicted, hence, with any aura, of, any invalidity. Contrarily, the plaintiff being estopped, to, on anvil of Ex.P-3, hence cast, any challenge, vis-a-vis, the validity of execution, of sale deed, as stood executed inter se defendant No.1, and, defendant No.2. However, for the reasons hereinafter assigned, the afore submission falters, (iii) as it is embedded, upon, unmindfulness of the learned counsel, for the defendants/appellants, that the contract of sale, borne in Ex.P-1, and, in Ex. P-2, rather standing executed inter se the plaintiff, and, one Swaran Singh , and, when Ex.PW3/A, wherethrough, the plaintiff hence constituted defendant No.1, as his general power of attorney, even for executing a registered deed of conveyance, vis-a-vis, the suit property, rather being executed, on 30.11.1995, hence, subsequent thereto, (iv) thereupon, the effect(s) of the apposite contract(s) of sale, respectively embodied in Ex.P-1, and, in Ex. P-2, when is construed, vis-a-vis, Ex.PW3/A, standing executed subsequent thereto, is, qua an inference being erectable, vis-a-vis, the general power of attorney, borne in Ex.PW3/A, being executed only for enabling or hence thereupon rather power being bestowed, upon, defendant No.1, to, execute a registered deed of conveyance, with, one Swaran Singh. Corollary whereof, when is construed, with, the factum, of Swaran Singh not striving to enforce, the contract of sale embodied in Ex.P-1, and, in ExP-2, is, (a) qua, the reliance, if any, placed, upon Ex. D-1, with, an, articulation therein, vis-a-vis, the entire sale consideration, vis-a-vis, the suit property, being received by the plaintiff, from defendant No.1, (b) and, with a further communication borne therein, vis-a-vis, the requisite general power of attorney, being irrevocable, (c) rather being entirely inconsequential, and, rather standing negated, (d) given Ex. D-1 reciting therein, qua its, drawing occurring on 30th November, 1995, hence, in contemporaneity, vis-a-vis, the execution of Ex.PW3/A, (e) and, when as aforestated, the execution of Ex.PW3/A, is construable, qua its rather facilitating the completion of contracts of sale, respectively borne in Ex.P-1, and, in Ex. P-2, and, when the alienee therein, one Swaran Singh has failed, to, enforce, the afore contracts of sale, (f) thereupon, it is to be concluded qua tendering, if any, of the amount of sale consideration, as, borne, in, Ex.D-1 , rather being tenderings by defendant No.1, vis-a-vis, the plaintiff rather for or on behalf of the afore Swaran Singh, who, however, for reiteration, as aforestated, has not, strived to enforce the contract(s) of sale, respectively embodied, in, Ex.P-1, and, in Ex. P-2.

9. Be that as it may, it appears that the defendant No.1, despite, being fully aware, and, mindful qua, in, contemporaneity, vis-a-vis, the drawings of Ex.PW3/A, and, of, Ex.D-1, and, also with his further being aware, and, awakened, qua the purpose, of, conferment, of, an authorization, upon him, by the plaintiff, through, his executing Ex.PW3/A, rather being, for, completion of the contracts of sale, borne in Ex.P-1, and, in Ex.P-2, (a) thereupon, merely, for, a recital occurring therein, qua his personally liquidating, the, amount of sale consideration therein, has, concerted to hence thereupon, make an untenable capitalization. However, the afore concert, cannot either to be accepted or countenanced, as, thereupon, the combined effects, of, execution of Ex.P-1, and, of Ex. P-2, by the plaintiff, vis-a-vis, a person, other than defendant No.1, and, the enabling facilitative conferment, hence, of a power of attorney, through Ex.PW3/A, upon, defendant No.1, for completing the contracts of sale, respectively, embodied in Ex.P-1, and, in Ex. P-2, would be rendered wholly nugatory. Obviously, the afore mishap is to be avoided, thereupon, the argument as addressed by the learned counsel, for the appellants, is, to be rejected.

10. Even otherwise, the sale deed qua the suit property, was executed by defendant No.1, vis-a-vis, defendant No.2, on 4.5.2005, and, in case, since, the drawing, of Ex.D-1 on 30.11.1995 upto 2005, rather defendant No.1, under, the garb of Ex.D-1, held rights, if any, to propagate, the provisions encapsulated, in Section 53-A of the Transfer of Property Act, he, was enjoined to subject, the suit property, to user. However, no evidence has been adduced on record, (a) that, since 1995, upto 2005, rather defendant No.1 hence subjected the suit property to any user, nor any documentary evidence, has been adduced on record, in personification, of, the factum qua the apposite column, of possession in the jamabandi, as, appertaining to the suit property, and, vis-a-vis, the afore facet, hence, rather holding reflections, bearing concurrence, with, the recitals borne in Ex.D-1, (b) and, nor when any evidence, to rebut the apposite reflections, occurring in the column of possession, borne in the jamabandi appertaining to the suit land, and, vis-a-vis, the afore period, is adduced, (c) thereupon, all the reflections borne in the jamabandi, with graphic echoings therein qua the plaintiff, being the owner in possession of the suit property, acquire(s) conclusivity, (d) and, the further sequel thereof, is, qua the passing of possession, by the plaintiff, to defendant No.1 through Ex. D-1, and, after his receiving, the entire sale consideration, rather not facilitating defendant No.1 to contend, that he has acquired therethrough the statutory leverage engrafted in Section 53-A of the Transfer of Property Act, for, hence, resisting the plaintiff's suit. Contrarily, the afore inference(s), drawn by this Court, and, on a combined reading of Ex.P-1, P-2, D-1, and, of, Ex.PW3/A, hence, qua execution of Ex.PW3/A, being facilitative, for, completion of contract(s) of sale, respectively, borne in Ex.P-1, and, in Ex. P-2, rather acquiring, the, fullest therewith tenacity.

11. Furthermore, what erodes the efficacy of the afore submission addressed by the learned counsel, for the defendant, is, the factum, of, the sale deed, as, executed by defendant No.1, vis-a-vis, defendant No.2, in the year 2005, rather containing a recital qua defendant No.1, while, acting as GPA of the plaintiff, his, hence, executing, the, registered deed of conveyance, vis-a-vis, the suit land qua defendant No.2. Consequently, the afore recital, does estop, defendant No.1, to, contend that with, Ex.D-1 hence carrying therein the afore recitals, rather forbidding the plaintiff, to, annul Ex.PW3/A, by his subsequent thereto hence executing Ex.P-3.

12. Nowat, this Court is enjoined to delve, into/ upon, the contention reared by the vendee, of the sale deed, executed in the year 2005, qua his being, a, bonafide purchaser, for value or for consideration, of, the suit property. However, his attempt, on the afore anvil, to validate the sale deed, executed inter se defendant No.1 and defendant No.2, is rather scuttled, by defendant No.2 making an admission in his cross-examination qua his

visiting, the, Tehsil Office for hence verifying, the, subsisting validity of the general power, of, attorney, borne in Ex.PW3/A, (a) and, upon his visiting the afore office, his making certain inquiries, from, the official available thereat, and, his being apprised qua Ex.PW3/A rather still surviving, and, holding validity. The effect thereof when is combined with his thereafter also making an admission, qua his verifying the validity, and, subsistence of Ex.PW3/A, rather foisting an inference qua his despite, holding knowledge qua rescinding, of Ex.PW3/A, by the plaintiff, by the latter executing Ex.P-3,, his, yet proceeding to execute a registered deed of conveyance, vis-a-vis, the suit property, (b) thereupon, he is amenable to construed to be not an ostensible owner, nor he is amenable to be construed, to execute, the afore sale deed, with defendant No.1, without any notice, qua the authorization conferred, upon, defendant No.1, by the plaintiff, rather coming to be rescinded, and, annulled. Consequently, his attempt to validate, the, afore submission, is futile, and, hence, is rejected.

13. The effect of the afore discussion, is that the judgment, and, decree rendered by the learned Court below is maintained and affirmed. In sequel, there is no merit in the instant appeal, and, it is dismissed accordingly. Decree sheet be prepared accordingly. All pending applications also stand disposed of. Records be sent back forthwith.

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

Pamwi Tissue Ltd., Barotiwala and another .....Petitioners.

Versus

Universal Sales Corporation and others .....Respondents.

Civil Revision No. 198 of 2017.
Reserved on : 17th April, 2019.
Date of Decision: 30th April, 2019.

Code of Civil Procedure, 1908 - Section 39(3)- Order XXI Rules 6 & 8- Transfer of decree- Pecuniary jurisdiction of transferee Executing Court- Question of – Held, transferee Executing Court must have pecuniary jurisdiction to try suit in which decree was passed- If it has none, it cannot acquire jurisdiction to execute decree transferred to it- Acquiescence of judgment debtor for transfer of decree to transferee Court does not prohibit him from raising objection as to its pecuniary jurisdiction. (Paras 3 & 4)

Code of Civil Procedure, 1908 – Sections 21 & 39(3)- Order XXI Rules 6 & 8- Execution of transferred decree- Objection on ground of pecuniary jurisdiction- Acquiescence of judgment debtor in transfer of decree- Effect- Held, acquiescence of judgment debtor does not confer jurisdiction upon Executing Court if it lacks pecuniary jurisdiction- But objection to execution before transferee Court can be filed only if transferor Court expressly mentions same about it in its order. (Paras 3 & 4)

Cases referred:

Jai Narain Ram Lundia vs. Kedar Nath Khetan and others, AIR 1956 SC 359
Khatu Bai and another vs. Khatija Bai and others, AIR 1973 AP 35

For the Petitioners: Mr. Vinay Kuthiala, Sr. Advocate with Mr. Rahul Mahajan, Advocate.

For Respondents No. 1 and 2: Mr. G.D. Verma, Sr. Advocate with Mr. Vinay Thakur, Advocate.
Respondents No.3 to 5 already ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant petition, is, directed against the orders recorded by the learned Senior Civil Judge, Nalagarh, District Solan, H.P., upon, execution petition No.4/10 of 2013, on 28.7.2017, wherethrough, he after dismissing the objections raised therebefore by the petitioners herein, (a) rather proceeded to order for attachment of the immovable properties of the JDs/petitioners herein, (b) and, also drew a schedule for putting to sale through public auction, the attached immovable assets of the JDs/petitioners herein.

2. The assumption of jurisdiction, upon, the afore application, was, in pursuance to a conclusive, and, binding judgment, standingrendered by the learned Additional District Judge, Chandigarh. The afore conclusive verdict recorded by the learned Additional District Judge, Chandigarh, whereby, the plaintiffs/decrees holders, were, held entitled for a sum of Rs.77,35,073/- alongwith interest @ 6% per annum, immediately before filing of the execution petition till date of realization, was put for execution, before the learned Additional District Judge, Chadigarh. Furtheronwards, the afore execution application was received by the learned Senior Civil Judge, Nalagarh, upon, its transfer to him, by the afore learned executing Court concerned. The learned counsel appearing for the aggrieved petitioners/judgment debtors concerned submits, (a) that since the objection appertaining to the assumption of jurisdiction thereon, by the learned Senior Civil Judge, Nalagarh, was contested, by the JDs/petitioners herein, on anvil, of the decree strived to be put into execution, rather containing a decretal amount, apparently falling outside the pecuniary limits of jurisdiction, of, the transferee Court, (b) and, when, a, decision thereon, hence, adversarial to the petitioners/JDs, was, recorded in the impugned order, thereupon, the res-controversia engaging the parties at contest, before this Court, is, squarely grooved, in, the trite factum, whether the afore objections, hence, hold any validity.

3. For determining the afore factum probandum, it is imperative to bear in mind, the, mandate borne in Section 39 of the CPC, provisions whereof stand extracted hereinafter:-

> **"39. Transfer of decree**.
>
> (1) The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court 1[of competent jurisdiction],-
>
> (a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or
>
> (b) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or
>
> (c) if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the Court which passed it, or
>
> (d) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

(2) The Court which passed the decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction.

1[(3) For the purposes of this section, a Court shall be deemed to be a Court of competent jurisdiction if, at the time of making the application for the transfer of decree to it, such Court would have jurisdiction to try the suit in which such decree was passed.]

2[(4) Nothing in this section shall be deemed to authorise the Court which passed a decree to execute such decree against any person or property outside the local limits of its jurisdiction.]"

The relevant sub-section(3) whereof, is, of utmost importance. A perusal thereof, makes a marked display qua assumption, of, jurisdiction by the transferee Court, vis-a-vis, the decree sent therebefore, for its coercive enforcement, would hold validity, (a) upon, the imperative statutory canon borne therein, qua, at the time of making the application for the transfer, of the decree, vis-a-vis, the transferee court, the latter Court also thereat or in contemporaneity therewith, rather holding, the, pecuniary jurisdiction to render, a judgment, and, decree, vis-a-vis, the decretal sums, as stood, transferred thereto, for, its/their coercive realization. The learned counsel appearing for the aggrieved petitioners, has contended (b) that the parlance borne by the coinage, "a court shall be deemed to be a court of competent jurisdiction, if, at the time of making the application for the transfer to it, such court would have jurisdiction to try the suit in which such decree was passed," as, existing in sub-section (3) of Section 39 of the CPC, (c) holding no connotation than the transferee executing Court, in contemporaneity, vis-a-vis, its assuming jurisdiction, upon the execution petition rather also holding the pecuniary limits, of jurisdiction, hence, commensurate, to, the decretal amount(s). The afore submission has vigour, as, the afore coinage, does carry, the imperative import (d) qua the transferee Court/executing court, necessarily being enjoined, to hold the pecuniary jurisdiction, especially in contemporaneity, vis-a-vis, its striving to put, to, coercive realization, the, decretal amounts, hence to also render a judgment, and, decree, in commensuration therewith, and, importantly, and, reiteratedly qua its pecuniary jurisdiction, rather bearing commensuration, vis-a-vis, the decretal sums, as strived, to be, put to coercive realization. Any other connotation, if is ascribed thereto, would lead to a disastrous consequence, qua the transferee executing court, rather proceeding to assume jurisdiction, upon, the transfered execution application, even when the decretal sums, as, concerted, to be realized therethrough, rather holding a value hence, evidently beyond the limits, of, its pecuniary jurisdiction, (e) and, when the decretal sums were never amenable, for, any affirmative rendition, vis-a-vis, the plaintiff/decree holders, in the latters' suit, as cast therebefore, thereupon, the transferred execution application, would also be unamenable, for, any assumption, of, any valid jurisdiction thereon. In coming to the afore conclusion, this Court finds strength from a verdict, rendered by the Andra Pradesh High Court, in a case titled as ***Khatu Bai and another v. Khatija Bai and others***, reported in ***AIR 1973 Andhra Pradesh, 35,*** the relevant pragraph No.9 whereof stands extracted hereinafter:-

"9. So far as the first point is concerned Shri Subbaraydu relies upon the decisions of Calcutta, Bombay and Patna High Courts and submits that there is a sharp difference in the views expressed in Judgments of the said High Courts and the judgments of the Madras High Court Court, which were referred to and approved by the Allahabad High Court. So far as this High Court is concerned,, the rulings of Madras High Court rendered prior to 5th July, 1954 have binding effect on this High Court. On this point, the long catena of cases decided by the Madras High Court had clearly taken a view that for the purpose of determining

the jurisdiction of the executing court, it is only the amount involved in execution that has to be considered and not the value of the subject matter of the suit. In Narasayya v. Venkatakrishnayya (1884) ILR 7 Mad 397, it was held by Ayyar. J. as follows:-

> "although by the Madras Civil Courts Act, 1873 the ordinary jurisdiction of Munsif's is limited in suits and applications of a civil nature to those in which the subject matter does not exceed in value Rs.2,500/-. Section 223 of the old Code of Civil Procedure gives jurisdiction to a Munsif's Court to execute a decree in a suit beyond its jurisdiction which has been transferred to it for execution by a District Court."

4. Be that as it may, the learned counsel appearing for the decree holders/respondents herein, (i) has also contended with much vigour before this Court, that, any objection, vis-a-vis, the lack of assumption, of, any jurisdiction by the transferee executing Court, was required to be raised, at the initial stage, (ii) and, when the JDS/petitioners herein had acceded to the transfer, of execution application, vis-a-vis, the court of learned Senior Civil Judge, Nalagarh, thereupon, the statutory embargo, created in sub-section (3) of Section 21 of the CPC, provisions whereof stand extracted hereinafter:-

> **"21. Objections to jurisdiction**
>
> **1**[(1)] No objection as to the place of suing shall be allowed by any appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues or settled at or before such settlement, and unless there has been a consequent failure of justice.
>
> **2**[(2) No objection as to the competence of a Court with reference to the pecuniary limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity, and in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.
>
> (3) No objection as to the competence of the executing Court with reference to the local limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the executing Court at the earliest possible opportunity, and unless there has been a consequent failure of justice.]"

rather stands attracted, (iii) and, thereupon, the, order impugned before this Court, hence, assumes an aura, of, validation. However, the afore contention raised before this Court, by the learned counsel for the respondents/decree holders, is, anvilled, upon, a gross misreading of the provisions of Section 21 CPC, given sub-section (1) thereof, making, a, graphic display qua no objection, as to the place suing, being acceptable by any Appellate or Revisional Court, unless, such objection was taken in the Court, of first instance at the earliest, however, with an exception qua for avoiding the failure of justice. The words, " as to the place of suing" occurring therein, (ii) carry no other signification than the one, qua theirs appertaining to the territorial limits, of jurisdiction of the court, wherebefore the plaint, is, presented, and, with sub-section (2) of Section 21 of the CPC, containing a clear mandate qua objection, vis-a-vis, assumption of jurisdiction, by the Court of first instance, and, it appertaining, to, the pecuniary limits of jurisdiction also being barred to be raised, before the Appellate or Revisional Court, rather the afore objection, vis-a-vis, the afore facet, being raisable only at the first instance, and, however with an exception, qua for avoiding

failure of justice, (iii) thereupon, the occurrence of the coinage " No objection as to the place of suing shall be allowed by any Appellate Court or Revisional Court unless such objections was taken in the Court of first instance at the earliest", in sub-section (1) of Section 21 of the CPC, (iv) does carry, an obvious connotation, qua it, operating, vis-a-vis, the territorial limits of jurisdiction, of the learned trial Judge, and, all the succeeding thereto provisions borne in the other sub-sections also working only at the initial stage, of presentation of plaint, and, thereafter being not workable at the stage, of, filing of an execution petition . Furthermore, when sub-section (3) of Section 21 of the CPC also rears a bar against objections, vis-a-vis, assumption of jurisdiction, by the executing Court, and, with the afore objection appertaining to the local limits of jurisdiction, being unrearable before the Appellate or Revisions Court. However, with an exception obviously for avoiding failure of justice, (v) thereupon, upon, a combined reading, of, apt sub-sections (1), (2), and (3), and, given, upon sub-section (2), on its being read, alone with sub-section (1), rather creating bar qua rearing of objections, appertaining to the territorial jurisdiction, and, sub-section (2) in contradistinction thereof, rather creating bar against, the, rearing, of, apposite objection, vis-a-vis, the pecuniary limits, of, jurisdiction, of, the court concerned, to hence try the suit, (vi) thereupon, rather sub-section (3) is to be concomitantly concluded, to be appertaining, to, and, it creating a bar against the rearing of objection, vis-a-vis, the local limits, of, jurisdiction of the executing Court and, hence, the play of sub-section (3) of Section 21 of the CPC, is, uninvocable for hence leveraging, the, submission, made by the learned counsel appearing, for the respondents/decree holders, that it, also envelopes therewithin, the necessity of raising, of, objection, vis-a-vis, the pecuniary jurisdiction, of, the transferee executing court, (vii) and, is also unworkable for succoring, the afore submission of the learned counsel for the plaintiffs/decree holders, that, with the plaintiffs/decree holders acquiescing, vis-a-vis, the transfer of the execution application, vis-a-vis, the transferee court, thereupon, the aggrieved defendants/judgment debtors, being barred to raise objections, vis-a-vis, the pecuniary limits of jurisdiction, of, the transferee executing court, to, hence render the impugned order. Preeminently also acquiescence, if any, does not cloth, the, transferee executing Court, with, any jurisdiction, importantly when it lacked, the, requisite jurisdiction, and, conspicuously also when the mandate, of the afore provisions, is working only at, the outset, and, is unworkable at, an, advanced stage, of drawing, of, execution proceedings. In coming to the afore conclusion, this court finds support from a decision of the Hon'ble Apex Court rendered in a case titled as ***Jai Narain Ram Lundia versus Kedar Nath Khetan and others***, reported in ***AIR 1956 SC 35***9, relevant paragraph No. 25 whereof stands extracted hereinafter:-

> "25. Then it was argued that this objection to execution should have been taken by the plaintiff in the Calcutta High Court when the defendant asked for transfer of the decree to Motihari and that as that was not done it is too late now. But here also the answer is same. The only question before the Calcutta High Court on the application made to it was whether the decree should be transferred or not. Whether the plaintiff might or could have taken the objection in the High Court is beside the point because it is evident that he need not have done so on the only issue which the application for transfer raised, namely, whether the decree should be transferred or not; at best it could only be said that the plaintiff had a choice of two forums. But normally this sort of question which involves an enquiry into fact would not be tried by an appellate court. It would be more appropriate for an original court to which the decree is transferred for execution to enquire into it. In any case, if the appellant's contention is pushed to its logical conclusion it would mean that whenever a decree is transferred all objection to execution must cease unless the order of the court directing the transfer expressly enumerates the issues that the

transferring court is at liberty to determine. In our opinion Section 42 of the Civil Procedure Code is a complete answer to this contention."

5. Consequently, the instant petition is allowed, and, the impugned order is set aside. However, it is open to the decree holders/respondents herein to move afresh, to, the Court of first instance, for modifying or for reviewing, the order for transferring the apposite execution petition, vis-a-vis, the transferee executing court or to challenge the order made by the learned Additional District Judge, Chandigarh, before the High Court concerned. All pending applications also stand disposed of. Records be sent back forthwith.

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