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Code of Civil Procedure, 1908- Appeal- Whether one of the tenants in joint possession of the tenanted premises could surrender the tenancy right or possession individually – **Held**- No.

The question whether a decree passed by the learned Court below is not executable, has to be decided by the Executing Court and not by the Court deciding the appeal. In the facts and circumstances of the case held that not only the suit premises were identifiable – even in the written statement defendant (defendant No.1) who was owner had averred that suit premises were handed over to him for the purpose of re-construction by the defendant claiming sole tenancy, nor any evidence led that the character of the suit premises had been changed after the reconstruction- held- it cannot be said that the decree was not executable. (Para-15 to 17)

Title: Surinder Kumar Chaudhary (deceased) through his legal representatives Smt. Saroj Kumari Chaudhary and others Vs. Devinder Kumar Chaudhry and another Page-8

Code of Civil Procedure, 1908- Civil Suit for Permanent Prohibitory Injunction and in the alternative for vacant possession- Order 26 Rule 9 C.P.C.- Whether it was incumbent upon the Court to have appointed a Court Commission suo motu or allowed the application under Order 26 Rule 9 C.P.C. to do complete justice- **Held**- Since it was not a boundary dispute simplictor but the defendant was alleged to have encroached on the suit land, onus was on the plaintiff to prove the same , such evidence could not have been permitted to be created in the garb of an application under Order 26 Rule 9 CPC- appeal dismissed, findings of the Courts below affirmed.

Title: Charan Dass (since deceased) through his legal heirs Smt. Savratu Devi & Ors Vs. Het Ram (since deceased) through his legal heirs Smt. Soma Devi & Ors. Page-1

Code of Civil Procedure, 1908- Limitation Act, 1963- Article 58- Regular Second Appeal- Plaintiff filed a suit for declaration that he is exclusive owner of the suit land and in the alternative for being declared in exclusive possession thereof- plaintiff claiming to be the sole heir of his father, Shri Kirpa Ram- mutation of inheritance however reflected in the name of the plaintiff and Maya and Bheema- defendants contested the suit and averred that Kirpa Ram died in 1962- plaintiff alone was not the sole heir- in fact, Roshani Devi, defendant No.3 had married Kirpa Ram and two daughters, namely, Maya and Bheema were born out of the wedlock- mutation was thus rightly sanctioned jointly in favour of the legal heirs of the deceased Kirpa Ram- both the learned Courts below held against the plaintiff- **In Regular Second Appeal held** - that cause of action of the plaintiff did not arise in the year 1998 when the defendants allegedly started interfering in the suit land- the revenue entries from the year 1962 to 1998 were known to the plaintiff and at the best as per Article 58 of the Limitation Act- he could have challenged the mutation within three years of his attaining majority in the year 1970- suit thus held barred by limitation too.

Title: Lachhman Vs. Keshav & another Page-91

Code of Civil Procedure, 1908- Order 1 Rule 10- H.P. Urban Rent Control Act, 1987- Section 14- Petitioner, daughter of the original tenant, sought to be impleaded as co-respondent in rent petition along with her brother –learned Trial Court dismissed the application- **Held**, that evidence on record shows that she has not been residing with the original tenant since 1962 - she has not shared any profits with her brother of the business being run in the demised premises- she waived her right qua the demised premised- **Further held**, that her pleadings does not suggest that her brother is not properly watching her interest in the litigation relying upon ***Ashok Chintaman Juker and others v. Kishore Pandurang Mantri and another, AIR 2001 SC 2251*** held that when tenancy is one, all the members of the family of the original tenant residing with him at the time of his death, succeed the tenancy together- in such circumstances, one of the family members impleaded as respondent represents other members also – petition is not bad

for non-joining of other members- petitioner has failed to establish that she is either proper or necessary party- No merit in the petition – petition dismissed.

Title: Sunita Goyal Vs. Chamba Mal Bhagra & another Page-542

Code of Civil Procedure, 1908- Order 2 Rule 2- Civil Suit filed seeking declaration as exclusive owner of the suit land, with the consequential relief of permanent prohibitory injunction- Plaintiff seeking intestate succession being the sole heir of the deceased Karmu- defendant claiming ownership and possession on the basis of Will dated 27.5.1985- Suit land being a part of the land of the deceased Karmu qua which decree had been obtained by the plaintiff in a previous suit - As per the plaintiff, the Halqa Patwari without any authority of law had sanctioned mutation in favour of defendant on 25.8.1985 on the basis of the aforesaid forged Will, which was also under challenge in the earlier suit- the Learned Trial Court and the 1st Appellate Court had dismissed the suit of the plaintiff – In the Second Appeal the judgments of both the learned Courts below set aside- Suit of the plaintiff decreed to the effect that the plaintiff was owner in possession of the suit land the revenue entry showing defendant as owner in possession were wrong and illegal- **Held**- that the act of omission of the plaintiff to reflect the Khasra number in the earlier suit has to be an intentional omission, a mere omission is no bar in a subsequent suit on the same cause- the omission to sue has to be an intentional omission and in the knowledge of plaintiff- rigor of Order 2 Rule 2 CPC would be applicable only in case of intentional omission and when the fact is in the knowledge of the plaintiff.

Title: Durga Devi Vs. Nihal Dass & another Page-84

Code of Civil Procedure, 1908- Order 22 Rule 3- An application for being impleaded as LRs. Of the deceased filed by the wife, purportedly on the basis of a Will, to the exclusion of all, however, in paragraph-3 of the application filed under Order 22 Rule 3- she had averred that beside her, one Jasvir Singh, Ajmer Singh, Jaspal Singh, Gurmit Kaur and Smt. Satto, being sons and daughters of her deceased husband from the earlier marriage were also there- The Learned Trial Court had issued notices of the aforesaid application to the contesting defendants, in the civil suit. However, no notices were issued to the aforesaid L.Rs reflected in para-3 of the applicant - **Held**- it was incumbent upon the learned Trial Court to make an effective determination, vis-à-vis the solitary capacity of Puni Devi (the wife) on demise of her husband, seeking impleadment by way of the application under Order 22 Rule 3- it was also enjoined upon the learned Trial Court below to ensure elicitations from the persons enumerated in para-3- Further held that it was the duty of the Court to protect the rights of other L.Rs. and it was, thus, imperative for the learned Trial Court to issue notices to them with the respect to the claim made by the wife, seeking exclusive testamentary disposition qua her. It was also held that non-issuance of notice was also an infraction of the principle(s) of audi alteram partem- Consequently, the orders of the trial Courts below reversed and set aside.

Title: Hardev Singh Vs. Puni Devi and others Page-239

Code of Civil Procedure, 1908- Order 23 Rule 1(3)- Maintainability of a subsequent writ petition- Question whether the petitioner after having withdrawn the civil suit with liberty to file a fresh suit on the same cause can be permitted to file a writ petition- **Held**- yes- principle of withdrawal and abandonment as per the provisions of Order XXIII is distinct and different from the principle of resjudicata- liberty having been granted by the Court, it would be for the Court or Authority in the subsequent proceedings to decide upon the maintainability of the subsequent proceedings- further held even otherwise proceedings in the suit are essentially different from the proceedings initiated while invoking the extra ordinary writ jurisdiction- thus writ petition held to be maintainable.

Title: Suman Aggarwal Vs. Municipal Council and another Page-29

Code of Civil Procedure, 1908- Order 34 Rule 7- Suit for possession by way of redemption of mortgage of the suit property- The learned Trial Court dismissed the suit – The First Appellate Court allowed the appeal and pronounced decree for possession subject to payment of Rs.200/- as redemption money, payable within six months from the date of judgment - **Held**, that Order 34 Rule 7 CPC itself clearly provides for the extension of time period granted by the Court for payment of mortgage money by the concerned Court- Hence, no application of Section 148 CPC in such cases- the explanation of the plaintiff for non-depositing of the requisite amount that his counsel did not inform him about the same stand demolished from the record- non-deposit of redemption money is result of malafide and, as such, does not constitute sufficient reason within the meaning of said provisions for extending time- there is no merit in the instant revision- Revision dismissed. Title: Amar Singh Vs. Roop Singh Page-345

Code of Civil Procedure, 1908- Order 41 Rule 22- Section 5 of Limitation Act- Case of the plaintiff's for declaration and possession of the suit land decreed- directed to pay ad valorem court fee vis-à-vis subject matter of suit- Defendant preferred appeal along with an application under Section 5 of Limitation Act- Plaintiff preferred cross-objections – Application filed by defendant under Section 5 of the Limitation Act was dismissed for no-prosecution- **Held**, as per mandate of Order 41 Rule 22(4) of CPC cross-objections are maintainable and shall be decided by the Court, even if original appeal is withdrawn or dismissed in default, however original appeal must be registered for the application of this provision of law- Dismissal of application under Section 5 of Limitation Act implies that the appeal preferred by the defendant was never registered- Accordingly, cross-objections must also fail- Further, held that plaintiff could not have filed application under Section 148 of CPC for extending time to comply with the conditions of the decree as well as cross-objections challenging those conditions- no merit in the appeal- Appeal dismissed.
Title: Subhash Chand Vs. Ishwar Dass Page-373

Code of Civil Procedure, 1908- Order 6 Rule 17- Petitioner sought to incorporate amendment to the effect that notification dated 6.9.2006 qua Excise Policy issued by the Government of India may be declared nonest, void and non applicable to the applicant- During the proceedings before the Hon'ble High Court in Regular Second Appeal the reasons given for non-filing of the application for amendment at the earlier stage was that the counsel was appraised of the need of the incorporation of this fact, but he did not do the needful- It was held that from the record it is clear that the present application has been filed with the intention of dragging the proceedings indefinitely for misusing the ex-parte ad interim injunction allowed in favour of the applicant- The applicant has failed to satisfy the requirements of law qua due diligence in pursuing the instant application and same lacks bonafide, hence, dismissed- It is further held that it is bounden duty of the Court to ensure that Court proceedings are not abused resulting into unjust enrichment to unscrupulous litigants and a party should not be allowed to take benefit of its own wrong turning the litigation in to a fruitful industry- Courts can check such frivolous litigations by imposing appropriate costs- Appeal dismissed with cost of Rs.50,000/- Possession of the demised premise was directed to be taken over from the petitioner within 48 hours.
Title: M/s Jai Mata Naina Devi Filling Station Vs. Bharat Petroleum Corporation Ltd. & others
Page-546

Code of Civil Procedure, 1908- Order 6 Rule 17- Plaintiffs sought to amend the pleadings to incorporate the relief of challenging the impugned judgment- **Held**, that in view of proviso appended under Order 6 Rule 17 CPC- amendment cannot be allowed as plaintiffs were aware of the judgment in question, brought by them on record in the beginning of the suit- they have not exercised due diligence - no grounds for interference- appeal dismissed.
Title: Gian Chand & others Vs. Kailasho Devi & Ors. Page-158

Code of Civil Procedure, 1908- Order 6 Rule 17- **Rent Petition- Amendment of pleadings**- Defendant moved an application for amendment at first appellate stage adjudicating rent appeal under H.P. Urban Rent Control Act, 1987 pleading therein that he is occupying demised premises as a licencee – He can only be evicted in consequence of a decree of civil suit – **Held**- that defendant was aware of the facts sought be incorporated through amendment right from the beginning – He has not filed the application for amendment at the earliest stage as contemplated in proviso to Order 6 Rule 17 C.P.C.- The Competent Authority had already adjudicated his status as sub-tenant with valid written consent of the landlord, which finding has attained finality- the instant application lacks bonafide – petition dismissed.

Title: Parvinder Kumar Vs. Sain Ram Jhingta & others Page-353

Code of Civil Procedure, 1908- Order 9 Rule 7 read with Section 151- Application under Order 9 Rule 7 readwith Section 151 CPC allowed by the learned Trial Court below by way of a non-speaking order - Challenged before the High Court- **Court Held-** that an order passed by the judicial authority or a quasi judicial authority has to be both reasoned and speaking and the rational behind it is that it enables one to understand as to how the Court has arrived at that conclusion.

Title: Jiwan Lal & another Vs. Varinder Kumar Page-483

Code of Civil Procedure, 1908- OSA- Appeal under Section 10 of the Letters Patent Appeal read with Section 96 of C.P.C- Suit for specific performance of agreement to sell filed- plaintiff had agreed to purchase 65 bighas of agricultural land owned by respondents No.1 and 2 for a sale consideration of Rs.48,00,000/-, out of which 4 lacs was said to have been paid at the time of signing the agreement- while balance the amount was agreed to be paid at the time of registration i.e. on or before 23.4.2007- defendant while denying the agreement, termed it to be an act of fraud and concoction on the part of plaintiff, in connivance with one Ankush Vasishta – in this behalf defendants had even lodged a police complaint on 22.2.2007, he had also filed complaints to the DGP and the Chief Minister- defendants had also filed a suit for declaration against said Ankush Vasishta and the plaintiffs - suit dismissed- in appeal, Division Bench also dismissed the appeal.

Code of Civil Procedure, 1908- Order 20 Rule 5- Held- that if findings returned in respect of any one or more of the issues are sufficient for the decision of the suit, clubbing of the issues does not prejudice the party- **Further held-** that there was nothing on record to remand the matter back for re-adjudication afresh, on all issues.

Title: Raj Kumar Garag Vs. Raj Kumar & others (D.B.) Page-138

Code of Civil Procedure, 1908- Standard of Proof- Further held- that mere admission of document in evidence does not amount to its proof and the standard of proof required in civil cases is dependent upon the balance of probabilities, as opposed to proof beyond reasonable doubt in criminal matters.

Title: Raj Kumar Garag Vs. Raj Kumar & others (D.B.) Page-138

Code of Civil Procedure, 1908- Regular First Appeal- Appeal filed against the dismissal of the probate petition- The appellant/petitioner had filed a probate petition for probate of a will dated July, 1984 executed by his mother, which was duly registered - By virtue of the will his mother had bequeathed her entire movable and immovable properties along with all tangible assets left by her at the time of her death to him– While contesting the probate petition one of the sisters of the appellant/petitioner had contested the same inter alia on the ground that no Will was executed in his favour and the same was false and fictitious- Probate petition came to be dismissed, hence, the first appeal- The High Court while reversing the judgment of the Trial Court **held**- that if a Will is executed as per the provisions of the Section 63 of the Indian Succession Act- the presence of the propounder of the will at the time of execution of the Will per se does not

cast a doubt on the genesis or the validity of the Will, rendering the execution of the Will suspicious- On facts held that there were no suspicious circumstances regarding the execution of the Will and the findings to this extent returned by the Learned Trial Court were thus set aside.

Title: Jeewan Kumar Khanna Vs. The General Public and others Page-411

Code of Civil Procedure, 1908- Regular First Appeal- Appeal filed against the dismissal of the probate petition- Further Held- that once the initial onus of proving the will by the propounder had been discharged the onus then shift to the person assailing the Will, to prove that the Will was false or fabricated.

Title: Jeewan Kumar Khanna Vs. The General Public and others Page-411

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal- Plaintiff filed a suit for permanent prohibitory injunction against the defendants for interfering in the suit land, the suit land being a shop in question- Defendants while contesting the suit denying that plaintiff had no concern with the land and shop of defendant No.1, which was situated in different khasra numbers- The learned Trial Court had dismissed the suit, while learned First Appellate Court had decreed the suit placing reliance upon demarcation reports Ex.PW-6/A and PW-6/B- On appeal the High Court upheld the judgment of the learned 1st Appellate Court holding- that even demarcation proceedings prepared during the proceedings conducted under Section 145 of the Cr.P.C. can be relied upon- The same cannot be simply ignored, if placed on record by the plaintiff if the same has been conducted in accordance with the law and the instructions of the Financial Commissioner.

Title: Shankar & Others Vs. Parkash Kaur & Others Page-326

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal- Suit for recovery- Plaintiffs filed a suit for recovery of Rs. Rs.1,53,817/- for having done some welding work for the defendants- suit dismissed by the learned Trial Court- The learned First Appellate Court partly allowed the suit and the decreed it for an amount of Rs.46,556/- only- Hence the Regular Second Appeal- **The High Court held**- that since, the relevant works are existing at the site and the defendants have failed to show that said work was executed by some other person, dehors all the necessary approvals and sanctions, the plaintiff can seek reimbursement of the expenditure incurred by him for executing the wielding work- Consequently, defendants directed to hold measurements of all executed work reproduced in Ex. PW-1/O and calculate the expenditure incurred thereupon by the plaintiff, as per the rates prevalent at that time and pay the same to the plaintiff.

Title: Fauj Dar Chauhan (since deceased) through his LR's Vs. Secretary (Agriculture), Govt. of H.P. Secretariat, Shimla-2 and another Page-449

Code of Civil Procedure, 1908- Suit for Mandatory Injunction alongwith Permanent Prohibitory Injunction- Held- if the documentary evidence adduced by the plaintiff is infirm and not worth credence oral evidence cannot be a substitute thereof, enabling the plaintiff to prove his case.

Title: Dalbir Singh Pathania & Anr. Vs. Sushil Kumar & Ors. Page-154

Code of Civil Procedure, 1908- Temporary Mandatory Injunction- Principal reiterated that the relief of interlocutory mandatory injunction should be granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy or to restore the wrongful taking of possession.

Title: Akhil Kumar and others Vs. Anil Kumar & others Page-150

Code of Civil Procedure, 1908-Order XVIII Rule 17- Constitution of India- Article 227- Defendant filed application under Order XVIII Rule 17 CPC, seeking re-examination of the plaintiffs' witness- rejected by the Trial Court.

Petition under Article 227 of the Constitution of India filed- dismissed- **Held-** that it cannot be said that Court below failed to exercise or committed any illegality or material irregularity- power under Order XVIII Rule 17 can only be exercised by the Court to remove ambiguity or omission, however, such power cannot be invoked to fill up omission in the evidence already led by a witness- it cannot also be used for the purpose of filling up a lacuna in the evidence.

Also held- that power under Section 151 or under Order XVIII Rule 17 CPC is not intended to be used routinely, merely for the asking - if so used, it will defeat the very purpose of various amendments to the Code to expedite trials.

Title: Hari Krishan @ Krishan Vs. Satish Kumar Sharma & others Page-65

Code of Criminal Procedure, 1973- Section 319- Criminal Revision- Petitioner impleaded as an accused under Section 319 Cr.P.C. for having allegedly committed offences under Sections 120-B, 420, 467, 468, 471 of Indian Penal Code and Section 13(2) of Prevention of Corruption Act, 1988- Order of the Learned Special Judge challenged- **The High Court held** – that power to proceed against other persons appearing to be guilty of an offence, as per Section 319 of the Code of Criminal Procedure, that too at the stage of inquiry envisages that the material available after taking cognizance by a Court and which has come in "evidence" during the course of the inquiry can only be used against the accomplice, whose complicity in the offence may have either been suppressed or escaped the notice of the court – A person cannot be impleaded as an accused, merely on the basis of the material gathered by the prosecution during the investigation of the case.

Title: Rattan Manjari Negi Vs. State of Himachal Pradesh Page-428

Code of Criminal Procedure, 1973- Section 125- Maintenance- Held-oblivious of the fact that the mother is an earning hand – father possessing equal obligation towards the child as far as upbringing and maintenance is concerned- On facts findings of the Learned Courts below that the respondent father was liable to pay maintenance to the daughter- Upheld- Rather maintenance ordered to be enhanced from Rs.8,000/- to 12,000/- per month.

Title: Ridham (minor) through her mother Smt. Raman Kumari Vs. Dr. Vishal Dharwal

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Code of Criminal Procedure, 1973- Section 125- Whether maintenance is to be granted from the date of filing of the application or from the date of passing the order- **Held**- that in the facts and circumstances of the case discretion can be exercised to grant maintenance from the date of filing the application- in case the delay in adjudication of the same is attributable to the respondent- maintenance ought to be ordered from the date of filing of the application and not from the date of order.

Title: Ridham (minor) through her mother Smt. Raman Kumari Vs. Dr. Vishal Dharwal

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Code of Criminal Procedure, 1973- Section 156(3) and 202- The petitioner filed a revision calling for the records from the Court of learned JMIC, Sirmour as well as office of the S.P., Nahan also inter alia seeking directions to respondents No.3 to 5 to file charge sheet under Section 173 Cr.P.C. against respondents No. 7 and 8 and their unidentified accomplices, apart from seeking protection to her life and liberty at the hands of the respondents- As per the

petitioner on 7.9.2016 respondents No.7 and 8 had ravished her in Ratri Vishramghar at Yashwant Chowk, Nahan whereupon she had approached the Police Post Gunnughat - After waiting for sometime, she had gone back to Ludhiana and on the next day approached the Superintendent of Police, Nahan by filing a written complaint, narrating the entire incidents- Since, no action was taken by the police, she filed a private complaint before the learned JMIC, Nahan on 24.9.2016 – During the pendency of the private complaint a communication dated 18.4.2017, referring the private complaint as an application under Section 156(3) Cr.P.C., was received by SHO, P.S. Nahan to register a case and who thereupon registered an FIR No. 53 of 2017 dated 21.4.2017 under Sections 366, 376D, 354, 506 IPC read with Sections 25/54/59 of the Arms Act and Sections 5, 5A, 5B of the Immoral Traffic (Prevention) Act, 1956- While contesting the revision all allegations made by the petitioner were refuted- The alleged complaint dated 8.9.2016 to the S.P. Nahan, was also denied to have been made- The communication sent by the learned JMIC was also stated to be contrary to the procedure prescribed under the Code of Criminal Procedure- On production of record, it was found that no order was passed by the learned JMIC to register the FIR on the basis of such a complaint, rather, the ministerial staff had sent a communication in routine- In fact, a status report had been sought from the SHO concerned- **The High Court thus held** - that the registration of the FIR under Section 156(3) Cr.P.C. was undoubtedly contrary to the provision of Section 202 Cr.P.C. and as a sequel FIR was ordered to be quashed- Further, the learned JMIC was directed to proceed in the matter as a complaint case.

Title: Kawaljit Kaur Vs. State of H.P. & others Page-439

Code of Criminal Procedure, 1973- Section 200- A complaint under Section 200 Cr.P.C filed by one Tirath Ram alleging illegal disbursement of funds under Indira Gandhi Aawas Youzna, the land where construction being done stated to be beyond the territorial domain of the Gram Panchyat concerned – the Learned Sessions Judge on revision setting aside the same- Hence, the present petition- **High Court held** – that in view of report submitted by the police nothing is borne out that the disbursement of the funds was recommended by a Panchayat other than the one in whose territorial jurisdiction the house was being constructed- Even otherwise, the scheme had been duly sanctioned by the BDO and the Deputy Commissioner and, as such, issuance of the process held to be bad in the eyes of law- The learned Sessions Judge had rightly quashed the summoning order.

Title: Tirath Ram Vs. Swaran Dass and others Page-396

Code of Criminal Procedure, 1973- Section 227- Criminal Revision- Petitioners challenged the dismissal of an application preferred by them under Section 227 of the Code of Criminal Procedure for their discharge, in respect of offences relating to Sections 302, 148 and 149 of the I.P.C. readwith Section 25 of the Arms Act- Petitioners challenging the framing of charge under the aforesaid sections- **The High Court Held**- it is not open for the Revisional Court to make deep delvings into the record, for forming an opinion vis-a-vis the admissibility and reliability of the documents existing on record.

Title: Harveer Singh Malik Vs. State of H.P. Page-452

Code of Criminal Procedure, 1973- Section 227- Criminal Revision- Further held- that if incriminatory role ascribed to the accused collected during the course of the investigation show the complicity of an accused and keeping in view the heinousness of the offence committed by the accused and if their identity is cogently established and are borne from the record, the Revisional Court will validate the consequences and opinions framed by the learned Trial Court- On facts the finding returned by the Lower Court upheld- Revision dismissed.

Title: Harveer Singh Malik Vs. State of H.P. Page-452

Code of Criminal Procedure, 1973- Section 23, of, the of Protection of Women from Domestic Violence Act, 2005- Criminal Revision filed against the order granting ad interim maintenance, passed under the Protection of Women from Domestic Violence Act, 2005- Both the sides challenging the grant of interim maintenance, under Section 23 of the aforesaid Act **the High Court held**- that the ad interim ex-parte order squarely falls within the ambit of Section 23 of the Act- The Magistrate concerned has sufficient powers to pass interim orders, as he deems fit and proper in the facts and circumstances of the case keeping in view the provisions borne in Sections 18, 19, 20, 21 and 22 of the Act and more specifically sub Section (2) of Section 23 of the Act- Consequently, the quantum of interim maintenance awarded also upheld- revision decided accordingly.

Title: Amit Mithrani and others Vs. Shobhna Mithrani Page-446

Code of Criminal Procedure, 1973- Section 256(1)- Criminal Appeal- Criminal appeal filed against the orders passed by the learned JMIC disposing of an application filed under Section 256(1) of the Cr.P.C., proceeded to dismiss the complaint by holding that no competent person entitled to continue the lis was before the Court- Hence the present appeal - **The High Court held**- that it was not a case where after the death of the complainant none was before the Court to pursue the matter- Even if a person having no locus standi had approached the Court by way of an application filed under Section 256(1) of the Code of Criminal Procedure, then the least which was expected from the learned Trial Court was to have had afforded at least one opportunity to the legal heirs/legal representatives of the deceased/complainant to pursue the matter by moving an appropriate application- Consequently, matter remanded back to the learned Trial Court with the direction to afford an opportunity to the legal representatives of the deceased/complainant to move an appropriate application to be impleaded as complainants in the case - The same directed to be decided by the learned Trial Court on its own merits.

Title: Puran Chauhan alias Puran Chand Vs. Tara Chand Page-423

Code of Criminal Procedure, 1973- Section 374- Appeal against Acquittal- Section 20 of Narcotic Drugs and Psychotropic Substances Act, 1985- Accused charged under the aforesaid section for having been found in exclusive and conscious possession of 850 grams of charas while travelling in a van on 25.9.2006 at about 8:15 AM, at crossing of a road at Batalghat: in the boot of the van- Subsequently, a challan having been presented- accused were acquitted- Hence, the present appeal- **The High Court held**- the only independent witness not supporting the prosecution case - He denied the search of the van in his presence, though he admitted the weighing of the contraband- Situs of recovery also held to be doubtful as-per the prosecution search of the vehicle took place near the shop of Vinod Kumar (PW-3), whereas as per PW-2 Dinesh Sharma, Photographer he was called at the place called Dam - prosecution case thus held to be doubtful - Recovery of the bag containing charas not proved by PW-2, the sole independent witness- Benefit of doubt given- upheld.

Title: State of H.P. Vs. Dhani Ram & another (D.B.) Page-332

Code of Criminal Procedure, 1973- Section 374- Appeal against Acquittal- Section 20 of Narcotic Drugs and Psychotropic Substances Act, 1985- Further held - that though conviction can be based on the statement of the official witnesses, even if the sole independent witness has not supported the prosecution case, but, only if the statements of the officials inspire confidence- On facts held that there were discrepancies in the statements of the officials witnesses- Benefit extended to the accused- Consequently, acquittal upheld.

Title: State of H.P. Vs. Dhani Ram & another (D.B.) Page-332

Code of Criminal Procedure, 1973- Section 374- Appeal against Conviction- A case was registered under Sections 307, 323 and 341 readwith Section 149 and 147 of I.P.C.- accused convicted for the offences punishable under Sections 323 and 341 of I.P.C. readwith Sections 147

and 149 of I.P.C. – On appeal conviction and sentence set aside- **Held**- name of some of the accused not borne in the FIR, Ex.PW-9/B- their names subsequently recorded by way of a supplementary statements of the victims/informant- independent witnesses not supporting the case of the prosecution – there was improvements and embellishments in the statements of the co-victims too, which renders the genesis of the prosecution case doubtful- accused acquitted.
Title: Ramesh @ Neetu & others Vs. State of H.P Page-305

Code of Criminal Procedure, 1973- Section 374– Appeal against Conviction- Sections 376, 341, 323 and 506 of IPC- Accused convicted for having committed offences punishable under Sections 376, 341 and 323 of I.P.C and sentenced accordingly for different periods under the aforesaid sections, however, no case was found to be made out under Section 506 of I.P.C- Accused challenged the conviction and sentence- **The High Court on appeal held**- that no doubt that sole testimony of the prosecutrix can be made the basis of convicting the accused but the statement of the prosecutrix cannot be mechanically applied to the facts of the case- On facts held that the sole testimony of the prosecutrix cannot be made the basis of convicting the accused as her statement in the Court was different then what she had stated in the statement made under Section 164 Cr.P.C- Since, version of the prosecutrix in the Court is different from her earlier statement under Section 164 Cr.P.C., Further held – that the sole testimony of prosecutrix does not inspire confidence, more so, keeping in view of the fact that the other independent witnesses and the medical on record does not substantiate the version of the prosecutrix
Title: Kishori Lal Vs. State of Himachal Pradesh Page-339

Code of Criminal Procedure, 1973- Section 378- Appeal against Acquittal- Sections 376/506 of the Indian Penal Code, 1860- Accused acquitted of the aforesaid charges- State preferred an appeal against the aforesaid acquittal- **Held** – that the prosecutrix has not been subjected to sexual intercourse forcibly and against her will seeing to her age and the fact that the prosecutrix was well built and able bodied girl, no evidence on record to show any resistance and objection to the commission of such an act nor and there is any medical evidence in this behalf – The act thus held to be consensual.
Title: State of H.P. Vs. Dheeraj Kumar (D.B.) Page-231

Code of Criminal Procedure, 1973- Section 378- Appeal against Acquittal- Sections 376/506 of the Indian Penal Code, 1860- Further held- that ocular evidence led by the prosecutrix herself is not supported by the medical evidence that she had resisted the act- further held- Had the act been forcible the neighbours and the labourers in an around the situs would have been in the know of the incident- The prosecutrix thus did not show any resistance and the act was thus consensual - The Trial Court had rightly acquitted the accused- appeal dismissed.
Title: State of H.P. Vs. Dheeraj Kumar (D.B.) Page-231

Code of Criminal Procedure, 1973- Section 378- Appeal against Acquittal- Sections 147, 148, 149, 341, 325 and 506 of the Indian Penal Code, 1860- Accused came to be acquitted for the aforesaid offences by the learned Trial Court- State assailing the acquittal- **The High Court Held-** that the deposition of the complainant was not as per the narration in the FIR Ex.PW-5/A, the presence of one of the witness Kalo Devi, who was stated to have witness the occurrence, doubtful at the time of occurrence- The version of the said witnessed was also doubtful- The disclosure by PW-1 that the assault was perpetrated by three persons as per Ex.PW-5/A i.e. FIR, not testified by PW-1 in examination-in-chief- The same held to be an improvement besides a stark contradiction vis-à-vis his previously recorded statement – Benefit of doubt rightly extended- Acquittal upheld.
Title: State of H.P. Vs. Ajeet Singh and others Page-433

Code of Criminal Procedure, 1973- Section 378- Sections 354, 323 read with 506 of IPC- Respondent acquitted for the aforesaid offences- appeal against acquittal- **Held**- the testimony of the prosecutrix contradicting the version borne in the FIR thereby causing a doubt to the very genesis of the prosecution version – No medical examination conducted corroborating the version of the prosecution- Hence acquittal affirmed.

Title: State of H.P. Vs. Shamsher Singh Page-303

Code of Criminal Procedure, 1973- Section 397 and 401 read with Section 482- Legality and correctness of a charge under Section 379 I.P.C sought to be challenged- petitioner alleged to have fled away with a truck bearing registration No.HP-38-2588 from the possession of the respondent, the L.R. of the person whose name is reflected in the R.C.- Petitioner however alleges to have purchased the truck for a sale consideration as per a written agreement- **Held**- Issue involved is of civil nature, more so when agreements inter-se parties not disputed. Legal right over the said truck is an issue to be decided by Civil Court – no criminal case made out- revision allowed- order framing charges quashed.

Title: Ram Chand Vs. State of Himachal Pradesh and another Page-5

Code of Criminal Procedure, 1973- Section 397 and 401- Credibility of Witnesses- contradiction inconsistencies and improvements thereupon- effect- Omission amounting to contradiction creates serious doubt about the truthfulness of the witnesses- the magnitude of contradictions if high and going to the root of the prosecution case and strikes at its very foundation- on facts held contradiction fatal- Revision allowed.

Title: Husan Singh Vs. State of Himachal Pradesh Page-41

Code of Criminal Procedure, 1973- Section 397 and 401- Revision- Juvenile Justice (Care and Protection of Children) Act, 2000 (Section 4 & 5) or Juvenile Justice (Care and Protection of Children) Act, 2015 (Section 2 and 7)- Principal Magistrate of the Juvenile Justice Board decided a matter singly - **Held** - bad in the eyes of law, the order passed by the Principal Magistrate was *coram non judis* and thus null and void; both as per the Juvenile Justice Act, 2000 or the newly Amended 2015 Act. Order of the Principal Magistrate quashed and set aside.

Title: State of Himachal Pradesh Vs. Kamal Thakur Page-185

Code of Criminal Procedure, 1973- Section 397 and 401- Revisional jurisdiction- Revisional Jurisdiction under Section 397 Cr.P.C. - extremely limited- the High Court to interfere in case it comes to a conclusion that there is a failure of justice and misuse of judicial mechanism or procedure.

Title: Husan Singh Vs. State of Himachal Pradesh Page-41

Code of Criminal Procedure, 1973- Section 438- Bail Application- Petitioner apprehending arrest in an FIR filed by him approached the Court under Section 438 of the Cr.P.C. – **Held**- provisions of Section 438 of Cr.P.C. cannot be invoked by the complainant in an FIR, which has been lodged at his behest. (Para-5) Title: Lekh Ram Vs. State of Himachal Pradesh Page-420

Code of Criminal Procedure, 1973- Section 439- Bail- Offences alleged to have been committed under Sections 354-A and 342 IPC and Section 10 of Protection of Children from Sexual Offences Act- accused in custody for the last five months- **Held -** that bail petitioner/accused already suffered for more than five months for the alleged offences but his guilt has yet not been proved by the prosecution- it would not be proper to allow the petitioner to be in jail for an indefinite period- liberty of individual cannot be allowed to be curtailed till the time guilt of the petitioner is proved in accordance with law.

Title: Rajinder Kumar Vs. State of Himachal Pradesh Page- 60

Code of Criminal Procedure, 1973- Section 439- Bail- Section 15 of the Narcotic Drugs and Psychotropic Substances Act- Petitioner apprehended with 2.008 kg. poppy husk, a Nepali National- the principles relating to grant of bail reiterated- **On facts held** that thought the bail petitioner hails from the Nepal and it may be difficult for the prosecution to secure his presence during trial, but, the aforesaid apprehension of the prosecution can well be met by directing the bail petitioner to furnish local surety who shall be responsible for the ensuring presence of the bail petitioner during the trial.

Title: Ravi Basnet Vs. State of Himachal Pradesh Page-265

Code of Criminal Procedure, 1973- Section 439- Grant of Bail- Offence alleged to have been committed under Section 376 I.P.C.- accused alleged to have ravished the prosecutrix on the pretext of marrying her- accused in custody for more than two years- held cannot be kept behind bars for an unlimited period before being held guilty- bail granted.

Title: Ankush alias Shivam Vs. State of Himachal Pradesh Page-50

Code of Criminal Procedure, 1973- Section 482- Complainant moved an application under Section 156 (3) Cr.P.C. to the Magistrate- the learned Magistrate ordered the registration of FIR under Sections 420 and 406 IPC read with Section 34 I.P.C.- Police after investigation filed cancellation/closure report- Cancellation report was accepted by the learned Magistrate on the ground that dispute leading to the registration of FIR arose from a partnership agreement containing arbitration clause for redressal of grievances emerging from the said agreement- Revision before learned Sessions Judge also rejected- **Held**, that merely because there is an arbitration clause in the agreement, that cannot prevent criminal prosecution against the accused if an act constituting a criminal offence is made out even prima facie- orders of lower Courts set aside- revision petition allowed.

Title: Yeena Gupta Vs. State of H.P. Page-470

Code of Criminal Procedure, 1973- Section 482- Criminal Revision- Section 304 (A) (aa) of I.P.C readwith Sections 180 and 196 of the M.V. Act- Section 223 Cr.P.C.- Charges have been filed against the accused under Section 304 (A)(aa) of I.P.C read with Sections 180 and 196 of the M.V. Act - ordered to be segregated by the learned Additional Sessions Judge-cum-Special Judge, CBI- Consequently, the accused relegated to the learned Trial Magistrate concerned facing trial under the provisions of Sections 180 and 196 of the M.V. Act – Revision preferred- High Court while setting aside the order of the learned Additional Sessions Judge- **Held** – that in view of the provisions of Section 223 of the Cr.P.C. – persons enumerated in the Section and being tried together for the offences committed during the course of the same transaction are to be tried jointly - Consequently, order of the learned trial Court below set aside and quashed and the Court directed to proceed against the accused jointly as per law.

Title: State of H.P. Vs. Aman Suman & another Page-386

Code of Criminal Procedure, 1973- Section 482- Petitioner seeking to set aside the summoning order passed by the Learned Judicial Magistrate under Section 420 of I.P.C.- the respondent who proclaimed that he was in a live-in-relationship with the present petitioner was being threatened by her to commit suicide- thus he preferred a complaint under Sections 499, 500 & 506 of the I.P.C- the Learned Trial Court however summoned the accused/petitioner only under Section 420 of I.P.C- feeling aggrieved, accused/petitioner had preferred the present petition- **The Court held** - that no offence of cheating were made out as there was nothing on record to hold that the person had been put to disadvantage as there was nothing on record to remotely suggest that accused had ever married the complainant/respondent nor there was no promise by the accused/petitioner to marry the complainant/respondent- summoning order quashed and set aside.

Title: Rajni Devi Dhiman Vs. Abhishek Kaushal & another Page-136

Code of Criminal Procedure, 1973- Section 482- Quashing of FIR- Petitioner and respondent No.2 were classmate and in love with each other- They had physical relations well before marriage- Differences having been cropped up amongst them- an FIR came to be registered against the petitioner that he had been threatening the respondent No.2 to post her nude photographs on social media- Subsequently, marriage having been solemnized amongst them- the petitioner's husband sought quashing of the FIR against him- **Held**- that both petitioner and the respondent having attained majority and thereupon having solemnized marriage, they could seek the quashing of FIR and the pendency of criminal proceedings would be nothing but an abuse of process of law - Solemnization of marriage voluntarily was a ground sufficient enough to quash the FIR- Consequently, FIR ordered to be quashed.

Title: Amit Rangra Vs. State of H.P. & anr Page- 309

Code of Criminal Procedure, 1973- Section 482- Section 142 of the Negotiable Instruments Act, 1881- The learned Trial Court based on the verdict of the Hon'ble Supreme Court in Dashrath Rupsingh Rathor vs. State of Maharastra & another returned the complaint under the Negotiable Instruments Act to the complainant to be presented before the appropriate Court- Order of the learned Trial Court challenged- **The High Court in revision held thus** - that in view of the Negotiable Instruments (Amendment) Ordinance, 2015, wherein, sub section (2) was inserted into Section 142 of the Negotiable Instruments Act- The case can be filed either where the payee or holder of the cheque maintained an account or where the cheque was presented by the payee or holder for payment.

The revision allowed- The complainant directed to present the complaint before the returning Court within two weeks.

Title: Dharam Chand Vs. Inderjeet Singh Page- 278

Code of Criminal Procedure, 1973- Section 482- Sections 471, 468 and Section 109 of the IPC- The allegation against the accused is that they prepared forged will of one Gian Chand- it was contended that the validity of Will in question is pending adjudication before Civil Court and simultaneous institution of criminal proceedings in respect of same allegation is abuse of process of law- **Held**, relying upon the judgment of Supreme Court in **M.S. Sheriff and another versus State of Madras and others, AIR 1954 S.C. 397 that** criminal matter should be given precedence, if it is fair and just to do so in the given facts and circumstances- the mere fact that the civil proceedings are pending cannot create a bar in continuation of criminal proceeding in respect of the same matter- no merit in the petition- petition dismissed.

Title: Saroj Kumari Vs. Suresh Kumar & others Page-365

Code of Criminal Procedure, 1973- Section 482- Sections 498A, 406, 506 read with Section 34 IPC- Petitioner in pursuance of FIR under Sections 498A, 406, 506 read with Section 34 IPC had sought recovery of Istridhan and same were taken into possession by the police vide seizure memo dated 23.3.2017- petitioner however filed a Cr.MMO and appending an additional list of Istridhan**,** which were stated to have not been recovered by the I.O. from the accused- thus, sought transfer of the investigation from the I.O. (respondent No.3)- while dismissing the petition, **Court held**- that the petition apparently was based on sheer contrivance besides stratagem of the petitioner as the list prepared on 23.3.2017 did not reflect any of the items listed subsequently by the petitioner- further held that based on such allegations investigation cannot be transferred- petition dismissed.

Title: Mandeep Kaur Vs. State of H.P. and others Page-125

Code of Criminal Procedure, 1973- Section 482, 173 and 210- Trial Court holding that the allegations made in the FIR only making out a case under Section 323 I.P.C- However, the Learned Trial Court taking cognizance upon a complaint relating to the same occurrence after adducing preliminary evidence. However, refusing to take cognizance upon the FIR- **Held**- the

action of the Learned Trial Court was per-se illegal- the Court directed to take cognizance upon the report furnished by the I.O. under Section 173 Cr. P.C., keeping in view the mandate of Section 210 Cr.P.C.

Title: Kashmiru Ram Vs. State of H.P.& others Page-297

Code of Criminal Procedure, 1973- Sections 482 and 311- Negotiable Instruments Act, 1881- Section 138- Petitioner who was the accused had filed an application under Section 311 Cr.P.C. seeking permission to recall the legal representatives of the deceased/complainant for cross-examination and to produce and prove the documents by which the original complainant had applied for termination and closure of the PMS account- The application came to be rejected – Hence, the Cr.MMO- **The High Court Held-** that Section 311 Cr.P.C has been enacted to enable the Court to find the truth and render a just decision, and with this object in mind the Court can examine or re-examine any person, who is expected to be able to throw light upon the matter in dispute- The object of the provisions as a whole is to do justice not only from the point of view of the accused and the prosecution but also from the point of view of an orderly society.

Title: Arvind Kumar Sankhyan Vs. Dr. M.P. Vaidya (since deceased) Page-472

Code of Criminal Procedure, 1973- Sections 482 and 311- Negotiable Instruments Act, 1881- Section 138- The High Court further Held- that though the pleadings in such cases cannot be construed strictly but nonetheless specific replies to the allegations are required to be made and in case of failure to do so, there is no legitimate ground to oppose the application so filed under Section 311 Cr.P.C. by the complainant.

Title: Arvind Kumar Sankhyan Vs. Dr. M.P. Vaidya (since deceased) Page-472

Code of Criminal Procedure, 1973- Sections 482 and 311- Negotiable Instruments Act, 1881- Section 138- The High Court further Held- that the discretion conferred under Section 311 Cr.P.C has to be exercised judicially for reasons stated- The rejection of the application merely on the ground that despite sufficient opportunities no steps were taken to lead evidence and, as such, no further opportunity could be granted was not legally sustainable.

Title: Arvind Kumar Sankhyan Vs. Dr. M.P. Vaidya (since deceased) Page-472

Constitution of India, 1950- Article 14 and 226- **Civil Writ Petition-** Petitioner running a Nursing College – having been refused NOC/permission to start GNM Course- grievance of the petitioner was that the cabinet had approved NOC only in case of colleges at serial No.1 and 3 for running the said course and though, its name figured at serial No.2 and was duly recommended alongwith other two by the Directorate level Evaluation Committee headed by the Director, Medical Education- still NOC not granted – writ petition filed- **Held**- policy decisions or a cabinet decisions are generally beyond the scope of judicial review but if parameters of Article 14 of the Constitution of India are infringed and decision is not backed by cogent material, or action is arbitrary, the Courts can interfere.

Title: Satyam Educational Society, Puhara and another Vs. State of Himachal Pradesh (D.B.) Page-193

Constitution of India, 1950- Article 14- **Civil Writ Petition-** Reasoning is the sole of the decision, whether administrative, policy decision, cabinet decision or a judicial decision- reasons have to be assigned to justify its decision- absence of reasons renders the decision arbitrary and violative of Article 14 of the Constitution- On facts held that since there was no reason assigned for refusing the grant of NOC – order dated 17.2.2017 quashed and the matter was directed to place before the cabinet for re-consideration.

Title: Satyam Educational Society, Puhara and another Vs. State of Himachal Pradesh (D.B.) Page-193

Constitution of India, 1950- Article 14- Civil Writ Petition - equal pay for equal work- Petitioner designated as Registrar (Administration)-cum- Principal Private Secretary to Hon'ble the Chief Justice and worked as such till 21.8.203, when he sought voluntary retirement. The petitioner laid claim to parity of pay vis-à-vis the pay, drawn by other Registrars.

Held entitled to the pay parity, as he was performing duties alike the ones performed by other Registrars and any candidate imposed by the High Court, terming the placement as a mere re-designation held to be unreasonable and unconscionable.

Title: Bhag Chand Sharma Vs. The Hon'ble High Court of H.P. Page-74

Constitution of India, 1950- Article 226 and 227- Civil Writ Petition- Service- As per the petitioner the qualifying marks altered vide circular dated 27.6.2001- Despite the fact that the petitioner had secured more than 33% marks in each paper but he was not declared as successful, as in the interregnum respondent-department had imposed a condition of 40% aggregate qualifying marks- petitioner had approached the Central Administrative Tribunal – The original application was dismissed- Hence- the writ petition- **High Court held**- that since it was not a case where the rules of the game were changed after issuance of the circular inviting applications - the criteria of securing aggregate 40% marks in addition to securing 33% marks in each paper could not be faulted in any way- the findings returned by the Central Administrative Tribunal affirmed- writ petition stands dismissed.

Title: P.C.Sharma Vs. Central Administrative Tribunal and others (D.B.) Page-236

Constitution of India, 1950- Article 226 and 227- Civil Writ Petition- The Security Interest (Enforcement) (Amendment) Rules, 2002- The respondent bank after initiating auction under The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002 had invited bids for auction of some commercial property which came to be picked up by the petitioner for Rs.4,50,00,000/- (4.50 cr.) - petitioner had been directed to deposit 15% of the auction amount, which was deposited by the petitioner as per the stipulations and the balance amount of Rs.3,37,50,000/- was to be paid within 15 days of the auction- since, petitioner could not do so, he sought to pay the balance amount on or before 20.1.2017 alongwith 13% interest for the delayed period- petitioner had further sought time till 10.2.2017 for deposit of the outstanding amount- however, on 18.3.2017 petitioner was informed by the bank that since the petitioner has failed to make payment within the extended period of time i.e. till 28.2.2017, amount of Rs.1,27,50,000/- which stood deposited by the petitioner stands forfeited as per terms and conditions of auction and as per Rules 9(4) and 9(5) of the Security Interest (Enforcement) (Amendment) Rules, 2002- petitioner challenged the action of the respondent bank- **Held-** that action of the respondent bank was unwarranted and illegal as the amended Rules came into force w.e.f. 4.11.2016 and the auction process had been put into motion on 2.11.2016 – earlier rules were thus in force and the respondent bank could not have forfeited the amount as per the amended rules, wherein a period of three months had been stipulated for making full and final payment- It was further held that every Statute or Statutory Rule is prospective in nature unless it is expressly or by necessary implication made to have retrospective effect.

Title: Mohan Singh Guleria Vs. State of HP and others (D.B.) Page-270

Constitution of India, 1950- Article 226- Bull fighting performed in Sair Mela at Mashobra, Shimla on 16.9.2017- An FIR registered and magisterial inquiry ordered- It is directed that the investigation be completed within two months and inquiry be completed within three months and the compliance be communicated to the Court by filing affidavit within four months and further directed that fair shall not be allowed to be organized till such time there is deployment of adequate police force for ensuring that no bull fighting takes place in the fair besides Temple Committee shall give under taking to the District Collector to this effect- The administration shall ensure that directions issued by Hon'ble Supreme Court in Animal Welfare Board of India vs.

Nagaraja and others, (2014) 7 SCC 547 and by Hon'ble High Court in *Sonali Purewal vs. State of H.P. and others* in CWPIL No. 3 of 2015 be complied with in letter and spirit- Petition stands disposed of.

Title: Court on its own motion Vs. State of H.P. & others (D.B.) (CWPIL No. 139 of 2017) Page-494

Constitution of India, 1950- Article 226- Civil Writ Petition- Article 19 and 301 of the Constitution readwith Section 3 of the Essential Commodities Act- Petitioners filed the present petition seeking to challenge the subsidization scheme on mustered oil- As per the petitioners, respondents-State as per the scheme was providing edible oil including mustard oil to about 14 lac ration card holders @ Rs.50/- per liter per month later on reduced to Rs.45/- - The scheme directly interfered with the freedom of trade and business of the petitioner and, as such, was violative of Article 19 of the Constitution and further rendering Article 301 illusory- The scheme was also stated to be illegal as the Central Government had not delegated power to the State under Section 3 of the Essential Commodities Act to supply and distribute essential commodities on subsidized rates- While dismissing the writ petition, **the High Court held**- that procurement on mustard oil for being sold through public distribution scheme does not infringe Article 19 of the Constitution, for it is not that petitioner had been totally debarred from selling their produce in the State of Himachal Pradesh – Even otherwise, mustard oil was being procured by the State by way of an open tender and the petitioner could well have chosen to participate in the process of procurement.

Title: Puri Oil Mills Ltd. And another Vs. State of HP and others (D.B.) Page-314

Constitution of India, 1950- Article 226- Civil Writ Petition- Article 19 and 301 of the Constitution readwith Section 3 of the Essential Commodities Act- Further held- that Article 301 of the constitution of India does confer constitutional rights but that is always subject to the other provisions of part XIII of the Constitution of India in relation to trade and commerce.

Title: Puri Oil Mills Ltd. And another Vs. State of HP and others (D.B.) Page-314

Constitution of India, 1950- Article 226- Civil Writ Petition- Article 19 and 301 of the Constitution readwith Section 3 of the Essential Commodities Act- Further held – that the action of the respondents/State was not even illegal for want of delegation of powers by the Central Government- A statutory notification already stands issued by the State of Himachal Pradesh on 3.2.2004 under Section 5 of the Essential Commodities Act- the Central Government had already issued GSR 800 dated 9.6.1978 delegating powers on the respondents/State- Consequently, writ petition dismissed.

Title: Puri Oil Mills Ltd. And another Vs. State of HP and others (D.B.) Page-314

Constitution of India, 1950- Article 226- Civil Writ Petition- Award of the Industrial Tribunal-cum-Labour Court challenged- **Held**- Labour Court in exercise of its adjudicatory function while deciding a Reference under Section 10 of the Industrial Disputes Act, 1947 has to answer the reference, as made to it by the appropriate Government - It cannot go beyond the reference - Even if the averments made in the claim by the petitioner are not in sync with the reference, the reference so made by the appropriate Government cannot be ignored by the Labour Court.

Title: Himachal Pradesh State Electricity Board Ltd. and another Vs. Chet Ram and another Page-26

Constitution of India, 1950- Article 226- Civil Writ Petition- Code of Civil Procedure, 1908- Order 23 Rule 1 and Order 2 Rule 2- The question raised in the writ petition was whether after an unconditional withdrawal of an earlier Civil Writ Petition a successive petition was maintainable as per Order 23 Rule 1- If not, whether the petition would still be barred under the

provision of Order 2 Rule 2 of the Code of Civil Procedure- **Held-** that undoubtedly the provisions of Code of Civil Procedure are not applicable in the writ jurisdiction but the principles enshrined therein are applicable- Even if, earlier petition is withdrawn unconditionally without liberty to file the same afresh, still in given circumstances of a particular case- Subsequent petition may be maintainable, but such petition would certainly be barred under the provisions of Order 2 Rule 2 of the Code of Civil Procedure.

Title: Baldev Singh Vs. Union of India & Ors. Page-462

Constitution of India, 1950- Article 226- Civil Writ Petition- Grant of ACP under the Assured Career Progression Scheme- held that financial upgradation under the ACP scheme shall be available only if no regular promotion during the prescribed period has been availed by employee- if an employee gains promotion within 12 years, then he becomes entitled for second upgradation, which is available only after 24 years- it was also held that in case an employee is conferred the benefit under FR 22(I) at the time of officiating appointment, the benefit of ACP is not permissible.

Title: Kundan Lal Sharma Vs. Union of India and others (D.B.) Page-131

Constitution of India, 1950- Article 226- Civil Writ Petition- Grant of Nautor Land- Petitioner was employed as a Sepoy in Dogra Scouts applied for nautor land- The application was duly recommended by all concerned, however, the Sub Divisional Officer rejected the application on the ground that the area was situated at a minimum distance of one kilometer (ground distance) from perennial/natural water source- The petitioner had assailed the same by way of an appeal before the Deputy Commissioner – The same was rejected on the basis of instructions issued by the Government vide letter dated 20.4.2017, that no nautor case is to be considered for issuing pattas in favour of Government employees as SLP (C)CC No. 2044/2016 title State of H.P. vs. Narender Lal Negi was pending before the Supreme Court and as per the report of the Revenue Field Agency, the grantee is a Government employee- Hence, the present petition – While filing reply the State, inter alia, also raised objections that the land applied for was not a part of the allotable pool- **The High Court held**- The petitioner being a Sepoy in Dogra Scouts formed a special category as per Rule 7 of the Himachal Pradesh Nautor Land Rules, 1968, which itself provided for a special preference for serving armed forces personnel and in view of Rule 7, instructions issued by the Government would not have applied to the case of the petitioner - Further held- The land being a part of the allotable pool was clearly an afterthought which was raised after filing of the petition and hence not sustainable.

Title: Jawala Prasad Vs. State of Himachal Pradesh and others (D.B.) Page-436

Constitution of India, 1950- Article 226- Civil Writ Petition- Grant of Nautor Land- Further held- The Appellate Authority could have adjourned the appeal sine die till the time the Hon'ble Supreme Court did not decide the SLP, but in no event the appeal could have been dismissed- Consequently, writ petition allowed and the matter remanded back to the Deputy Commissioner for a decision afresh.

Title: Jawala Prasad Vs. State of Himachal Pradesh and others (D.B.) Page-436

Constitution of India, 1950- Article 226- Civil Writ Petition- Petitioner seeking regularization- cut off mentioned by way of administrative instructions curtailing the benefit to those who had completed 6 years service as on 31.3.2012- petitioner challenging the imposition of cut off date before the H.P. Administrative Tribunal- Original Application allowed- feeling aggrieved State challenge the same before the High Court- while dismissing the writ petition, **High Court held** - that the cabinet had taken a decision to confer the right of regularization on contract employees on completion of six years of service – any subsequent executive instructions curtailing the benefit of regularization to employees having completed 6 years on 31.3.2013 was illegal and

unjust- any instructions in this behalf could not have been passed without the approval of the cabinet- writ petition dismissed.

Title: State of H.P. and others Vs. Dr. Rohit Sharma and another (D.B.) Page-120

Constitution of India, 1950- Article 226- Civil Writ Petition- Reduction in pay scale on the basis of audit objection raised qua irregular grant of ACP to the petitioner. Petitioner challenging his re-fixation on a lower scale as a consequence thereto- Central Administrative Tribunal upholding the action of the respondent as the petitioner had already earned a promotion during the said inter regum**- Held** - that since the petitioner was found to have gained one promotion and as such, petitioner was rightly held not entitled to the financial upgradation. In the facts and circumstances of the case, petitioner could have gained the second financial upgradation under the assured career progression scheme on completion of 24 years of service from the date of his appointment as a Reference Assistant on regular basis. Since the petitioner had not put the requisite 24 years, Petitioner held not entitled to the upgradation under the ACP Scheme. Consequently, the finding of the Tribunal upheld- petition dismissed.

Title: Nokh Ram Vs. Union of India and others Page-102

Constitution of India, 1950- Article 226- Civil Writ Petition- Section 30-B of the Himachal Pradesh Town and Country Planning (Amendment) Act, 2016- Himachal Pradesh Town & Country Planning Act, 1977- The question raised before the Hon'ble High Court was whether insertion of Section 30-B by virtue of the H.P. Town and Country Planning (Amendment) Act, 2016, in the H.P. Town and Country planning Act, 1977 was contrary to the object and purpose of the Principal Act, as also was ultra vires the Constitution of India- **The High Court Held-** that insertion of Section 30-B by amending the Act was contrary to the object and purpose of the Principal Act as also ultra vires the Constitution of India and Section 30-B struck down as unconstitutional and illegal.

Title: Abhimanyu Rathor Vs. State of H.P. & others (D.B.) Page-499

Constitution of India, 1950- Article 226- Civil Writ Petition- Section 30-B of the Himachal Pradesh Town and Country Planning (Amendment) Act, 2016- Himachal Pradesh Town & Country Planning Act, 1977- Also held - Laws/legislations can be struck down on the ground of arbitrariness, if found to be violative of Article 14 of the Constitution of India.

Title: Abhimanyu Rathor Vs. State of H.P. & others (D.B.) Page-499

Constitution of India, 1950- Article 226- Civil Writ Petition- Section 30-B of the Himachal Pradesh Town and Country Planning (Amendment) Act, 2016- Himachal Pradesh Town & Country Planning Act, 1977- Further Held- that duty of the State is the correct implementation of the Statutes in existence – The failure to do so amounts to failure in governance and the same cannot be condoned by incorporation of such amendments, resulting in regularization of unauthorized constructions- On facts the legislations i.e. the Amended Act, held, not to be one time measure, as at least seven policies of retention of unauthorized construction brought by the State in the last one decade- Action of the State held to be arbitrary.

Title: Abhimanyu Rathor Vs. State of H.P. & others (D.B.) Page-499

Constitution of India, 1950- Article 226- Civil Writ Petition- Section 30-B of the Himachal Pradesh Town and Country Planning (Amendment) Act, 2016- Himachal Pradesh Town & Country Planning Act, 1977- Further Held- that a statutory provisions which is destructive of the aim and object of the parent Act and is demonstratively excessive and contradictory is also arbitrary and against the "rule of law", hence violative of Articles 14 and 21 of the Constitution of India.

Title: Abhimanyu Rathor Vs. State of H.P. & others (D.B.) Page-499

Constitution of India, 1950- Article 226- Civil Writ Petition- Section 30-B of the Himachal Pradesh Town and Country Planning (Amendment) Act, 2016- Himachal Pradesh Town & Country Planning Act, 1977- Further Held- that conferment of unfettered powers upon any authority to regularize unauthorized construction is also violative of Article 14 of the Constitution of India as it envisages equality before law and equal protection of law- Unequals cannot be treated alike, by condoning the illegal act of the violators, who carry out construction by violating the provisions of the Planning Act, cannot be treated at par with people following the law- The act is not only arbitrary but violative of Article 14 of the Constitution of India.

Title: Abhimanyu Rathor Vs. State of H.P. & others (D.B.) Page-499

Constitution of India, 1950- Article 226- Civil Writ Petition- Section 30-B of the Himachal Pradesh Town and Country Planning (Amendment) Act, 2016- Himachal Pradesh Town & Country Planning Act, 1977- Further Held- that if the impugned amendment if permitted to remain in the Statute it would violate the very edifice of the Principal Statute- The amending Act also seeks to distinguish between those who carried out unauthorized and illegal construction for residential purposes or personal use, and also those who carried out such construction purely with professional motive – In fact, the amendment puts a person who violated the law with impunity on a higher pedestal than the one who made deviations from the sanctioned plan- The Amending Act thus violate the very aim and object of the principal statute i.e. to make provisions for the preparation of development plans and sectoral plans with a view to ensure that town planning schemes are made properly and are executed efficiently.

Title: Abhimanyu Rathor Vs. State of H.P. & others (D.B.) Page-499

Constitution of India, 1950- Article 226- Civil Writ Petition- Section 30-B of the Himachal Pradesh Town and Country Planning (Amendment) Act, 2016- Himachal Pradesh Town & Country Planning Act, 1977- Further Held- that the importance and significance of plan of strict adherence and application of the Municipal Laws are an integral part of sustainable development which is to be treated as an important facet of Article 21 of the Constitution of India- Planning and development being one of the important attributes of the right to life under Article 21 of the Constitution of India.

Title: Abhimanyu Rathor Vs. State of H.P. & others (D.B.) Page-499

Constitution of India, 1950- Article 226- Civil Writ Petition- Section 30-B of the Himachal Pradesh Town and Country Planning (Amendment) Act, 2016- Himachal Pradesh Town & Country Planning Act, 1977- Further Held- that doctrine of severability is also not applicable to save the Amending act- The provisions in its entirety also liable to be struck down as ultra vires the constitution and the principal Act- Section 30-B of the Amending Act struck down being unconstitutional, illegal and arbitrary.

Title: Abhimanyu Rathor Vs. State of H.P. & others (D.B.) Page-499

Constitution of India, 1950- Article 226- Consumer Protection Act, 1986- Sections 10 and 16- Civil Writ Petition- Appointment as a female member in H.P. State Consumer Dispute Redressal Commission- Name of the petitioner recommended at serial No.2 by the Selection Committee- The candidate reflected at serial No.1 having been appointed in H.P. University not available for appointment- The respondent instead of making offer to the petitioner opted to make an offer to the respondent who was empanelled at serial No.3 by the Selection Committee- The selection made by the State Government thereof challenged by way a writ petition- **The High Court held-** that the action of the Competent Authority to appoint any one out of the empanelled candidate(s) as member irrespective of their position in the merit list, more so, as there was no rule framed, was discriminatory and meted out an arbitrary treatment to the petitioner, which was violative of Articles 14 and 16 of the Constitution of India.

Title: Sunita Sharma Vs. State of H.P. and another (D.B.) Page-388

Constitution of India, 1950- Article 226- Consumer Protection Act, 1986- Sections 10 and 16- Civil Writ Petition- The High Court further held- that the empanelment of the candidate(s) in the select list having been made on merit and that too on the basis of their performances in the interview, in a case of bracketed candidates, the senior in age ranks high as compared to candidate who is junior in age- Since, there were no rules holding the field the rules governing service jurisprudence were applicable and, as such, the petitioner could not have been ignored.

Title: Sunita Sharma Vs. State of H.P. and another (D.B.) Page-388

Constitution of India, 1950- Article 226- Grant of Pension- Petitioner seeking counting of service in the CRPF w.e.f. 10.5.1969 to 31.3.1977 as qualifying service, for pensionery purposes- per the petitioner the CRPF had not paid him pension for the service, he had rendered to the CRPF w.e.f. 10.5.1969 to 30.4.1986- **Held** - Since the petitioner remained as Army Reservist and he continued to draw pension as such till 31.3.1977, the period rightly not counted as qualifying service- petition dismissed.

Title: Amar Nath Vs. Union of India and others Page-14

Constitution of India, 1950- Article 226- Land Acquisition Act- Further held- that respondents should have gracefully acknowledged and conceded its mistake in light of the corrections made by the Settlement Collector- the principle relating to estoppel reiterated- State directed to follow the provisions of the H.P. State Litigation Policy, 2001 to the ensure unnecessary burden on the State exchequer and to avoid unnecessary and unproductive litigation- State directed to acquire the land.

Title: Daulat Ram Vs. State of H.P. and others Page-299

Constitution of India, 1950- Article 226- Land Acquisition Act- Petitioner seeking acquisition of the remaining part of his land, which was earlier being wrongly shown in the possession of PWD- The petitioner had got the revenue entries corrected before the Collector (Settlement) and thereupon raised a claim for compensation for the said land under the Act- Admittedly, the remaining parcel of the petitioner's land had already been acquired- Respondents failed to acquire the land- hence, the writ petition- petition opposed, though the factual matrix was not denied – the respondent raised the objection that the claim was barred by delay and laches – **Held**- While exercising power under Article 226 of the Constitution if there was inordinate delay and that too unexplained, the High Court may decline to intervene- on facts claim held to be not barred by delay and laches- However, no rigid rule can be cast in a straightjacket formula for exercising such discretion.

Title: Daulat Ram Vs. State of H.P. and others Page-299

Constitution of India, 1950- Article 226- Land Acquisition Act- The Chief Secretary to the Government of Himachal Pradesh also directed to issue instructions to all concerned to ensure that before the matters are instituted or defended in the Court, the provisions of the H.P. State Litigation Policy are adhered to and followed in its letter and spirit.

Title: Daulat Ram Vs. State of H.P. and others Page-299

Constitution of India, 1950- Article 226- Letter petition alleging un-authorized construction on the land of Ayurvedic Dispensary entertained.

Held- that because of the existence of a road on the right side of the Ayurvedic Health Centre, no justification for constructing another road through the courtyard of the Ayurvedic Health Centre.

The NOC issued by the Ayurvedic Department to construct road through the courtyard of the Ayurvedic Health Centre also held to be unjustified and ordered to be rectified.

Further held- the grant of NOC and transfer of land by the Ayurvedic Department to the P.W. Department was unjustified- the same quashed and set aside.

Title: Court on its own motion Vs. State of Himachal Pradesh and others (D.B.) CWPIL No. 37 of 2017 Page-23

Constitution of India, 1950- Article 226- Letter Petition- Further held- State to act as an model employer and the following directions came to be issued:-

A. The Chief Secretary to the Government of Himachal Pradesh, shall provide a mechanism for enabling the employees to vent out their grievances of non-disbursement of due and admissible wages/salaries/emoluments. And one such mechanism being of setting up a 'Web Portal' at the level of the Principal Secretary/ Secretary of the concerned Department(s), where the employees can lodge their grievances/complaints. Such grievances/ complaints shall be processed and adequately responded to within a period of one week. This would facilitate speedy redressal of genuine grievances and prevent unnecessary litigation, clogging the wheels of administration of justice. Such endeavour shall not only be in the spirit of Litigation Policy, framed by the State Government. We see great advantage in the use of information and technology. Not only it would result into effective and efficient redressal of grievances, if any, but also improve efficiency in the affairs of governance of the State.

B. All the Head of Departments of Government of Himachal Pradesh/Government Institutes/State Instrumentalities to ensure that in future emoluments to all employees of their respective Departments/Institutes are disbursed in time;

C. In case of said emoluments not being disbursed on schedule, except in the event of the emoluments being withheld as per law, the State/ instrumentality of the State shall be liable to compensate the employees concerned by paying statutory interest or the existing rate for saving bank deposit account provided by the State Bank of India, whichever is higher;

D. Immediately thereto, the Head of the Departments/Instrumentality of the State shall hold an inquiry, which shall be completed within a period of 30 days, to ascertain the omission on the part of the concerned person, resulting in delay of disbursement on schedule; and

E. Pursuant to the findings of the inquiry, the interest which stands paid to such employee, shall be recovered from the erring officer(s)/officials(s).

Title: Court on its own motion Vs. State of H.P. & others (D.B.) CWPIL No.133 of 2017 Page-255

Constitution of India, 1950- Article 226- Petitioner seeking setting aside of the award passed by the Ombudsman under the National Rural Employment Guarantee Act (NREGA) without having provided any opportunity of hearing- **Held** – since as per statutory instruction framed under Section 27 of the Act (NREGA), it was incumbent upon the Ombudsman to give a hearing to the party- The Ombudsman having relied merely in the fact finding enquiry of the B.D.O. had passed the award without hearing the petitioner- Not legally sustainable hence the award quashed- However, liberty granted to the Ombudsman to proceed afresh as per law and instruction in vogue, as the issue pertained to misuse of MGNREGA funds.

Title: Bhim Singh Vs. State of Himachal Pradesh and others Page-16

Constitution of India, 1950- Article 226- Public Interest Litigation- Letter petition taking suo moto cognizance of non-payment of salaries to 99 nurses posted at the Lal Bahadur Shastri Medical College and Hospital, Mandi, H.P.- Salary not disbursed for want of grant-in-aid under the appropriate Head of Account- **Held**- Right to a sum of money is property- Right to livelihood is a part of life under Article 21 of the Constitution- Right to income from the salary affects the Right to Life- It is a fundamental right and cannot be consigned to the limbo of undefined

premises and uncertain applications- deprivation of income thus directly violates the Right to Life under Article 21 of the Constitution of India.

Title: Court on its own motion Vs. State of H.P. & others (D.B.) CWPIL No.133 of 2017 Page-255

Constitution of India, 1950- Article 226- Reinstatement of Service- Petitioner removed from the service in pursuance to an FIR lodged for having allegedly committed offences punishable under Sections 376 and 506 of I.P.C. Show cause notice issued to the petitioner under Rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 for initiating disciplinary action, for having committed offences punishable under Sections 376 and 506 of I.P.C – during the course of disciplinary proceedings the petitioner went missing, who was also declared a proclaimed offender by the Court after charge having been laid against him under Sections 376 and 506 of I.P.C. Disciplinary Authority resorted to the provision of Rule 19 of CCS Rules. Disciplinary Authority proceeded to impose a major penalty, ordering the removal of the petitioner from the service- petitioner having surrendered before the Trial Court on 20.2.2008 came to be acquitted- petitioner thereupon seeking reinstatement. The claim for reinstatement in service dismissed- Holding that the honourable acquittal of the petitioner did not absolve him of the other imputations of misconduct i.e. remaining evidently willfully absent from the duty w.e.f. 28.12.2004 till 12.12.2005, whereupon, he was ordered to be removed from the service- further held that the petitioner even after surrendering before the Learned Additional District Judge on 22.2.2008 not applying for extension of leave nor explaining his willful absence- no evidence led showing that the petitioner was suffering from mental depression- petition dismissed.

Title: Tilak Raj Vs. High Court of Himachal Pradesh & another (D.B.) Page-98

Constitution of India, 1950- Article 226- Section 4 of the H.P. Public Premises and Land (Eviction and Rent Recovery) Act- Unauthorized Construction of Building- Petitioner having encroached upon 47.49 Square meters by way of a roof projection, had been directed to remove the same- Petitioner, however, requesting that encroachments be regularized by the respondents after permitting him to purchase the said area- Respondents however proceeded under Section 4 of the H.P. Public Premises Act, which was allowed by the Collector and the appeal filed by the petitioner had also been dismissed- hence, the present writ petition- **The High Court held**- that the encroachments were not due to the constraints at the site, as alleged- The petitioner on the contrary had expanded vertically and horizontally in all possible directions and raised construction over an area, which was double the area as allotted to him- the plea of site constraints set up by the petitioner to justify his illegal construction was not justifiable and clearly an afterthought.

Title: Anil Aggarwal Vs. H.P. Housing and Urban Development Authority Shimla and another (D.B.) Page-397

Constitution of India, 1950- Article 226- Section 4 of the H.P. Public Premises and Land (Eviction and Rent Recovery) Act- Unauthorized Construction of Building- Further held- that the matter relating to obstruction, illegal construction, unauthorized encroachment and violation of statutory plans and schemes have to be dealt firmly by the Courts and there has to be zero tolerance on the part of courts while deciding such cases- No sympathetic view can be taken in such matters- Petitioner also cannot urge negative parity, that the case of the petitioner be considered for regularization as per the other encroachers- Further held that the concept of equality is a positive concept which cannot be enforced negatively as two wrongs cannot make one right.

Title: Anil Aggarwal Vs. H.P. Housing and Urban Development Authority Shimla and another (D.B.) Page-397

Constitution of India, 1950- Article 226- Section 4 of the H.P. Public Premises and Land (Eviction and Rent Recovery) Act- Unauthorized Construction of Building- Further held- that the encroachments of this magnitude not possible without active support and connivance of the officials of the respondents- Therefore, respondents directed to hold an inquiry within six months and fix responsibility before reporting compliance on or before 18.6.2018.

Title: Anil Aggarwal Vs. H.P. Housing and Urban Development Authority Shimla and another (D.B.) Page-397

Constitution of India, 1950- Article 226- Service matter- Correction of date of birth- Petitioner seeking direction to the respondent to correct his date of birth in his office/service profile as 12.09.1958 instead of 12.09.1957 – further direction to the respondents to superannuate him as per his corrected date of birth – **Held**- representation for the first time made by the petitioner on 14.6.2017 after lapse of 37 years from the date of his initial engagement about 3 ½ months prior to his superannuation – Further held- that it is trite that a civil servant can claim correction of his date of birth, if he is in possession of irrefutable proof in this behalf, though there is no period of limitation prescribed for seeking correction of date of birth- the government servant must do so without any unreasonable delay- On facts held that the petitioner submitted the application for correction of date of birth too late in the day at the fag end of his career, delay was inordinate and as such could not be condoned – petition dismissed.

Title: Harbans Lal Vs. Punjab National Bank & Others (D.B.) Page-280

Constitution of India, 1950- Article 226- Service Matter- Letter Patents Appeal- Appointment of Computer Assistant (Appellant) quashed and set aside by the learned Single Judge primarily for the non-advertisement of the posts, in view of law laid down by the Apex Court in ***Union of India & others vs. N. Hargopal & others, (1987) 3 SCC 308*** and other judgments- It was also held- that appointment was done in undue haste.

The Division Bench on re-consideration held that on the facts and circumstances of the case there was no requirement of the Rule that the post ought to have been advertised in the newspaper- as per Rules in vogue post was notified by the Employment Exchange, as was precisely done in the instant case- as such, held that ratio laid down by the Apex Court in ***Hargopal's*** matter was not applicable to the attending facts and circumstances.

Title: Mamta Goel Vs. Seema Bisht & others (D.B.) Page-68

Constitution of India, 1950- Article 226- Service Matter- Letter Patents Appeal- Also held- that the eligibility criteria was required to be fulfilled as on the date of requisition and not as on the date of registration of the applicant in the Employment Exchange.

Title: Mamta Goel Vs. Seema Bisht & others (D.B.) Page-68

Constitution of India, 1950- Article 226- Service Matter- Letter Patents Appeal- Further held- that mere exhibition of efficiency cannot be a ground to raise presumption of malafide or undue haste- allegation of malice, thus, held to be absolutely vague and unspecific- judgment of the Learned Single Bench set aside and quashed- appointment of the appellant was affirmed.

Title: Mamta Goel Vs. Seema Bisht & others (D.B.) Page-68

Constitution of India, 1950- Article 226- Service Matter- Petitioners seeking placement from the post of Clerk to Junior Assistant on completion of five years of service in the cadre w.e.f. 1.1.1998 along with all consequential benefits- Respondents while contesting the case averred that the Trust had its own service Rules, which were adopted in the year 1991 - As per the service Rules, the petitioners have been regularized in the year 1998 after completion of five years of regular service- The Government had indeed issued a notification on 1.9.1998 that the clerks who have completed five years were to be posted as Junior Assistant but the said notification was not

adopted by the Temple Trust- **The High Court held** - that since the notification in question dated 1.9.1998 had not been adopted by the Baba Balak Nath Temple Trust- No legal rights of the petitioners have been breached by the respondents and as such, the Court cannot issue a writ of mandamus calling upon the respondents to confer a particular status or benefit upon the petitioners from a particular date.

Title: Manoj Kumar & Ors. Vs. State of H.P. & Ors. Page-444

Constitution of India, 1950- Article 226- Service- Petitioner seeking selection to the post of Superintendent Grade-I in the Establishment of District and Sessions Judge's Court- rejection of the application- petitioner submitting that Amended Rules of 1996 were not applicable to the petitioner, as he was already working as Superintendent Grade-II, on regular basis at the time of advertisement, which was a feeder post for the Superintendent Grade-I post. In the alternative the petitioner seeking one time relaxation under Rule 7 of Himachal Pradesh Court Act, 1976. **Held** – amended Rules (1996) inter alia provided for a minimum educational qualification for the post of Superintendent, being graduation or 15 years experience in the feeder post- **Further Held**- that the minimum qualification provided under the amended Rule creating a classification was founded on an intelligible differentia holding a close nexus with the salutary purpose of ensuring the aspirant possessing the enhanced educational qualification and acumen, for his proficiently performing, the higher responsibilities of the post of Superintendent in the Establishment of District and Sessions Judge Court.

Title: Dalip Thakur Vs. High Court of H.P. Page-79

Constitution of India, 1950- Article 226- The court took cognizance of operation of liquor vends near schools in violation of judgment of Supreme Court **State of Tamil Nadu and others vs. K. Balu and another, (2017) 2 SCC 281** and directed the State of Himachal Pradesh to ensure compliance of aforementioned decision of Hon'ble Supreme Court of India- Further directed that distance of the location of the liquor vends notified not be measured from the gate of the school, but from the farthest point of the schools- In the liquor vends, it must be conspicuously displayed that sale of liquor for children is prohibited - CCTV cameras must be installed in the liquor vends to check the violation- there must be sensitization of persons employed in the liquor shops about their duties to protect the interests of the children- petition disposed of.

Title: Court on its own motion Vs. State of H.P. & others (D.B.) Page-381

Constitution of India, 1950- Article 227- Code of Civil Procedure, 1908- Order 6 Rule 17- Section 41 of the Workmen's Compensation Act, 1923- The adoptive parents of the deceased moving an application under Order 6 Rule 17 CPC seeking amendment in a claim filed under Workmen's Compensation Act- Application allowed by the Learned Commissioner- Insurance Company disputing the maintainability of the application by way of a petition under Article 227- **Held**- that the application under Order 6 Rule 17 CPC can be considered by the Commissioner, otherwise, than in accordance with the provision of Section 41 of the W.C. Act, if he is satisfied that the interests of the parties will not thereby be prejudiced- particularly keeping in view the requirement of Section 41(1)(b)- petition filed by the Insurance Company dismissed.

Title: Oriental Insurance Company Vs. Santosh Devi & others Page-94

Constitution of India, 1950- Article 227- Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013- Section 64- National Highways Act, 1956- Section 3H (4)- Petitioners while claiming objection vis-à-vis the land acquired for construction of National Highway laying exclusive claim for the award amount- Land Acquisition Collector however passed an award and issued notices to the petitioners as well as respondent No.1 to receive the compensation for the acquisition. Petitioners filed a Reference under Section 64 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, which was dismissed as not maintainable-

Consequently, petitioners filed a civil suit under Sections 34 to 39 of the Specific Relief Act- Respondents question the jurisdiction of the Civil Court to entertain the suit in view of specific bar under Section 63 of the Rehabilitation and Resettlement Act- **Held**- that acquisition carried out under the National Highways Act, 1956, having been specified in the 4th Schedule of the Rehabilitation and Resettlement Act, 2013 shall be applicable vis-à-vis determination of compensation as per notification dated 28.8.2015 issued by the Central Government- the apportionment of the amount of the compensation, however, can be challenged before the Principal, Civil Court of original jurisdiction within the limits of whose jurisdiction land is situated, as per Section 3H(4) of the National Highways Act.

Title: Gian Dass and others Vs. Daulat Ram and others Page-122

Constitution of India, 1950- Article 26- Public Interest Litigation- Two writ petitions titled as ***Goverdhan Singh versus State of H.P. and others*** and ***Amri Devi versus State of H.P. and others*** to restrain the respondents-authorities from taking any coercive action vis-à-vis the encroachment made by them over the government land- Since, numbers of people were found to have encroached upon the government land- Directions issue to the Deputy Commissioner to take following action against all encroachments;

(a) Enquire as to why the proceedings could not be completed or taken to its logical end.

(b) Wherever proceedings/appeals, save and except before this Court, if any, assailing the orders of demolition/ejectment, are pending, hearing is expedited and the Deputy Commissioner shall ensure that all steps for completion of such proceedings are taken within the next four weeks.

(c) Depute a special team consisting of the officials of I & P H, PWD, HPSEB and Revenue Department(s) for carrying out demolition of unauthorized structures, in all those case where no proceedings are pending before any authority.

(d) Electricity and water connections of such unauthorized structures be disconnected forthwith.

(e) Team so constituted shall ensure removal of all structures within a period of three weeks.

(f) Costs of removal of unauthorized structures shall be recovered as arrears of land revenue from the encroachers and the Deputy Commissioner shall ensure compliance of the order within a period of three weeks.

(g) If required, the Superintendent of Police shall depute adequate police force for executing the order passed by this Court.

As a sequel time sought and granted to the State for removal of the encroachment till 31st December, 2017 - After conclusion of the demolition of the encroachment Assistant Collector 1st Grade, Palampur directed to file affidavit of compliance.

Title: Courts on its own motion Vs. State of H.P. & others (D.B.) Page-295

Constitution of India, 1950- Articles 15(4) and 16(4)- Appointment- Whether a lady marrying a Scheduled Castes / Scheduled Tribes or OBC Citizen, or one transplanted by adoption or any other voluntary act, ipso facto, becomes entitled to claim reservation and thereupon seeks appointment to government service- **Held**- No. Considering the earlier judgments passed by the Apex Court in ***Murlidhar Dayandeo Kesekar v. Vishwanath Pandu Barde, 1995 Supp (2) SCC 549***, ***R. Chandevarappa v. State of Karnataka, (1995) 6 SCC 309***, ***Heikham Surchandra Singh & others v. Representative or "Lois" Kakching, Manipur (A Scheduled Caste Uplift Body) & others, (1997) 2 SCC 523*** and ***State of Tripura & others v. Namita Majumdar (Barman) (Smt), (1998) 9 SCC 217*** held that let alone the General category candidate who marries a person belonging to a Scheduled Caste or a Scheduled Tribe, even a person

belonging to Scheduled Caste or Scheduled Tribe of one State cannot get the benefit of Scheduled Caste or Scheduled Tribe in another State.

The contention of the person that none was misled when the Scheduled Tribes certificate was tendered to gain employment and as such, the appointment of the petitioner could be saved. Contention- repelled- findings returned by the Authorities while dismissing the petitioner from the service on the basis of false Scheduled Tribe certificate- upheld.

Title: Vijaylakshmi Vs. State of H.P. & others (D.B.) Page-107

Constitution of India, 1950- Cancellation of tender- Further Held- that though normally Court should not interfere in the tender/contractual matters while exercising powers of judicial review but it can certainly exercise jurisdiction if the process adopted was malafide or made to favour someone or process adopted or decision made was so arbitrary that no man of ordinary prudence could have reached it- On facts held, that the authority responsible for taking the final decision in the matter had failed to apply its mind while arriving at a final decision in the matter- While cancelling the tender the competent authority had failed to examine the tender in the light of the opinion of the Standing Counsel as well as one of the Members of the Committee (TOC)- Had the same been taken into consideration much time if the department could have been saved from the unnecessary litigation- The process adopted to cancel the tender was held to be arbitrary and irrational – Consequently, action of the respondents cancelling the tender quashed and set aside- respondents also burdened with cost of Rs.1 lac.

Title: RSR Private Limited Vs. State of H.P. & Others (D.B.) Page-241

Constitution of India, 1950- Cancellation of tender- Petitioner being the lowest and the successful bidder was not awarded the rate contract for the purpose of Plant Protection Equipments (A) (Foot, Hand Compression & Knapsack, Sprayer etc.) for the year 2017-2018- writ petition filed- **Held**- the frivolous objections were raised by the Members of the Tenders Opening Committee (TOC) vis-à-vis the petitioner who admittedly was the lowest bidder cannot be sustained- On facts held that there was no overwritings and cuttings made in the tender documents, which was made the basis of cancelling the entire process- Further held- that cancelling the tender was taken in hot haste, without any plausible/reasonable explanation, even it was not a malafide exercise of power, it was certainly without application of mind- Hence, bad in the eyes of law.

Title: RSR Private Limited Vs. State of H.P. & Others (D.B.) Page-241

'H'

H.P. Urban Rent Control Act, 1987- Section 24(3)- An application under Section 11 of the H.P. Urban Rent Control Act filed by the tenant for restoration of certain amenities and also for restoration of possession of the demised premises- The learned Rent Controller passed an interim direction for restoration of the demised premised- The learned First Appellate Court also upheld the order- While reversing the order of the two learned Courts below, **the High Court held**- in face of best documentary evidence in the shape of rent receipts not being produced before the learned Rent Controller- Tenancy having denied by the landlord, it was incumbent upon the learned Rent Controller to have before him some tangible documentary evidence, personifying the fact of tenancy and only thereupon an interim order for restoration of possession could have been passed- Revision petition allowed- impugned order quashed and set aside.

Title: Renu Sood Vs. Ram Prasad Gupta & another Page-230

Himachal Pradesh Urban Rent Control Act, 1987- Section 14(2)- Revision under Rent Control Act- Subletting- The petitioner-tenant raising a plea that the sub-tenant was sitting as a salesman in the demised premises- However, as per evidence on record sub-tenant held to be in exclusive possession of the demised premises and running his business in his own name, which

was proved on record by bills relating to purchase of goods and also receipts issued by the authorities under the Standard of Weights and Measures (Enforcement) Act, 1985- Ample evidence showing the sub-tenant having the bank accounts and revenue record showing him to be in exclusive possession- Sub-tenant did not even step into the witness box to dispute the same- **Held**- The tenant had parted away with the possession of the premises and forfeited his right of re-entry- Demised property held to be sublet.

Title: Sachidanand Vs. Kailash Chand & others Page-321

Himachal Pradesh Urban Rent Control Act, 1987- Section 25- Revision under Rent Control Act- Eviction sought by the landlord on account of arrears of rent as well as subletting- scope of interference in a petition under Section 25 and the revisional powers reiterated.

Title: Sachidanand Vs. Kailash Chand & others Page-321

Hindu Marriage Act, 1955- Section 13- Divorce and Dissertation by petitioner- Marriage between petitioner and respondent solemnized on 12.11.2011- respondent wife withdrew from the company of petitioner without his will and against his consent and without any reasonable cause- Trial Court annulled marriage after appreciation of the evidence on record- petitioner contracted second marriage before expiry of period of limitation for filing appeal against the verdict of trial Court- **Held** - that respondent took a false ground for justifying withdrawal from the martial company of harassment that she was ousted from the matrimonial home in the month of July, 2012- **Further held** - that it is clear from the oral evidence on record that respondent had no reasonable cause to leave the company of husband and withdrew cohabiting with respondent without his consent and against his will and, as such, deserted the petitioner and also subjected him to mental cruelty- **Further held** - relying upon ***Suman Kapur versus Sudhir Kapur, AIR 2009 SC 589*** that petitioner/respondent is entitled to compensate to the tune of Rs.1,00,000/- to meet the ends of justice in view of petitioner having contracted second marriage before expiry of period of limitation- Trial Court has rightly annulled the marriage- no merits in appeal- appeal dismissed.

Title: Reena Devi Vs. Parmod Kumar Page-173

Hindu Marriage Act, 1955- Section 13- Nullity of marriage and divorce- Premarital illicit relation of wife- ten weeks old pregnancy from respondent No.3 at the time of marriage- the records maintained in the Hospital qua hospitalization of the respondent wife after 15 days of the marriage where from it was revealed that wife had ten weeks old pregnancy- Learned Trial Court allowed the petition of divorce- the contention that hospital record does not bear signatures of the wife and as such same does not connect with the respondent wife is rejected- wife had herself admitted that she had terminated her pregnancy at Ghanahatti and failed to disclose the specific time when she conceived- wife also did not adduce any medical evidence to prove that she had conceived after cohabiting with petitioner only- Trial Court has rightly annulled the marriage- no merits in appeal- appeal dismissed.

Title: Seema Kumari Vs. Pradeep Kumar & others Page-176

Hindu Marriage Act, 1955- Section 13- Nullity of Marriage and Divorce- Respondent wife has illicit relation with one 'A'- she was caught alone in matrimonial home with 'A' twice and could not explain the presence of latter- respondent used to pick up quarrels with petitioner and his parents- she did not visit her ailing mother –in- law in the IGMC despite the fact that she was working there as staff nurse- she filed false case against petitioner and his parents under Sections 498-A and 323 of IPC, in consequence of which they were arrested- **Held** relying upon the judgment of the Supreme Court in ***Samar Ghosh versus Jaya Ghosh, (2007)4 SCC 511*** that comprehensive appraisal of the entire matrimonial life of the parties needs to be made and marriage shall be deemed to have irretrievably broken down, if owing to the acute mental pain,

agony and sufferings, the parties cannot be expected to live with each other at all- **Further held** that evidence on record clearly shows that marriage of the parties is fully covered in the parameters of the aforementioned authority and, as such, annulment of their marital status is necessary in given circumstances- Court below has rightly annulled the marriage- petition stands dismissed.

Title: Jayoti Kumari Sharma Vs. Shashi Pal Page- 162

Hindu Marriage Act, 1955- Section 13- Petition for Desertion of marriage and claim of compensation to the tune of Rs.50 lacs- Objection qua non-fixation of ad-volerem Court fee in respect of claimed compensation amount - Petitioner abandoned the claim of compensation and moved an amendment application for seeking appropriate relief- Respondent moved an application under Order 7 Rule 11 CPC for rejecting the petition for non fixing of requisite court fee on the compensation amount originally claimed - application allowed by the concerned Court and petition rejected- **Held**, that the learned District Judge erred in rejecting the petition on the ground of non-payment of court fee as no court can insist a party to prosecute any cause of action and to pay ad-volerem court fee on originally incorporated relief- order set aside- petition allowed.

Title: Anita Chandel Vs. Maneet Khanel and others Page-492

'I'

Income Tax Act, 1961- Section 80-IC- "Initial Assessment Year" and "Substantial Expansion"- The relation thereof explained, further held that the legislature has consciously extended the benefit of "initial assessment year" to a unit that completed a substantial expansion – thus, held that substantial expansion undertaken during the period 7.1.2003 to 1.4.2012 was valid and legal- the units were entitled to 100% deduction on profits.

Title: M/s Stovekraft India Vs. Commissioner of Income Tax (D.B.) Page-199

Income Tax Act, 1961- Section 80-IC- Further held- that thus, appeals were consequently allowed and the order passed by Assessing Officer, The Appellate Authority and the Tribunal were quashed and set aside holding inter alia that undertakings or enterprises which were established and became operational and functional prior to 7.1.2003 and have undertaken the substantial expansion between 7.1.2003 and 1.4.2012 shall be entitled to the benefit of Section 80-IC, for the period for which they were not entitled to the benefit of deduction under Section 80-IB and that units that commenced production after 7.1.2003 and carried out substantial expansion prior to 1.4.2012 would be entitled to the benefit of deduction under Section 80-IC.

Title: M/s Stovekraft India Vs. Commissioner of Income Tax (D.B.) Page-199

Income Tax Act, 1961- Section 80-IC- The question involved was whether undertakings or enterprises established after 7th January, 2003 who carried out "substantial expansion" within the specified window period i.e. 7.1.2003 to 1.4.2012 would be entitled to deduction on profits @ 100%- the Assessing Officer having disallowed the claim of the assessee of granting the deduction @ 100%, for having undertaken "substantial expansion" between the aforesaid time and the same having been affirmed by the Appellate Authority and the Tribunal came to be challenged by the aforesaid appeals- **High Court held**- that in view of provisions of Section 80-IC, (2)(B)(ii) specifically provided that in respect of the State of Himachal Pradesh that the unit which has begun or begins to manufacture or produce any article or thing, specified in the 14th Schedule or commences any operation and "undertake substantial expansion" during the said period, then by the virtue of sub Section (3) it shall be entitled to deduction @ 100%.

Title: M/s Stovekraft India Vs. Commissioner of Income Tax (D.B.) Page-199

Indian Contract Act, 1872- Section 128- Civil Revision- Section 115 C.P.C.- Petitioner who was the guarantor filed objection to the execution solely on the ground that until and unless the Bank did not satisfy the decree against the principal debtor, it could not be permitted to proceed against the guarantor- Objection dismissed by the learned Trial Court- Revision petition filed- **The High Court Held**- that the liability of the surety or guarantor is co-extensive with that of the principal debtor and the surety becomes liable to pay the entire debt and further the liability of the surety or guarantor is immediate and is not deferred until the creditor exhausts his remedies against the principal debtor.

Title: Amar Nath Dhiman Vs. Punjab & Singh Bank Page-458

Indian Evidence Act, 1872- Section 27- Held- that inculpatory evidence recorded during custodial investigation in violation of Section 27 of the Indian Evidence Act renders the entire evidence bald and naked- **Further Held**- cannot be used against the accused and is neither admissible nor relevant.

Title: Ramesh @ Neetu & others Vs. State of H.P Page-305

Indian Penal Code, 1860- Section 306- Accused son of deceased lady- relationship was not cordial as accused wanted her to give him the entire property - Deceased committed suicide by jumping into well – Evidence on record establishes that accused used to misbehave with the deceased- she had to leave her house quite often and take shelter in the house of her niece or her sister- local panchyat and SDM tried to resolve the dispute between the son and mother, five days prior to the suicide - accused threatened to compel the deceased to die in the presence of panchyat and SDM- **Held**, that there is clinching evidence that accused was instrumental in constituting mental condition of the deceased to commit suicide- Trial Court properly appreciated the evidence and rightly concluded about the culpability of the accused- No merits in the appeal- Appeal dismissed.

Title: Rajkumar Vs. State of H.P. Page-539

Indian Penal Code, 1860- Section 307 read with Section 120-B- The learned Trial Court framed charge against the accused/petitioner- Assailed on the ground that FIR did not provide any material wherefrom engaging of the petitioner in the conspiracy could be inferred - **Held**, that role of conspirator is always hidden- Investigating Officer was within his powers to collect evidence of criminal conspiracy and furnish same before the Court- The learned Trial Court was right in relying upon the report of the investigating officer and framed charge under Section 307 read with Section 120-B of I.P.C as for framing the charge, Court needs to prima facie satisfy over the existence of such charge- no merits in the petition- petition allowed.

Title: Rajeev Sharma Vs. State of H.P. Page-498

Indian Penal Code, 1860- Sections 143, 430, 447, 448, 120-B - **Scheduled Caste and Scheduled Tribes Prevention of Atrocities Act, 1989-** Sections 3(1) (5)/3(1) (13)/3(2) (7**)-Quashing of FIR**- Complainant preferred CWP before Hon'ble High Court in respect of the same allegations as alleged in the FIR- the present petitioner not arrayed as co-respondent in said CWP- Nothing on record supports the contention of the complainant that role of the petitioner entailing penal consequences came to his notice after filing CWP- **Held**- relying upon the law laid down in ***State of Harayana v. Bhajan Lal, AIR 1992, S.C., 604*** that where criminal proceedings are manifestly attended with malafide and FIR is result of manipulation and desire of wreaking vendetta in gross abuse of process of law, then such FIR needs to be quashed- accordingly, FIR quashed- Petition disposed of.

Title: Randheer Sharma Vs. State of H.P. & others Page-359

Indian Penal Code, 1860- Sections 451, 147, 149, 323, 427 and 506- Indian Evidence Act, 1872- Section 27- Allegation against the accused persons is that they constituted an unlawful assembly and tresspassed in the house of complainant- accused armed with dandas and hockey sticks, beat the complainant and his family members- The learned Trial Court acquitted the accused persons for want of legally valid and admissible evidence- **Held**, that the mere fact that the weapon of offence was recovered at the instance of the accused does not lead to the conclusion of involvement of the accused persons in the commission of offence, unless, it is not established that said weapon of offence was actually used for commission of the offence – no merit in the appeal- appeal dismissed.

Title: State of H.P. Vs. Sanjeev Kumar and others Page-490

'L'

Land Acquisition Act, 1894- Section 18- Determination of market value of the land- Various parcels of land acquired for widening of Shimla-Mandi, National Highway-88 – Land Acquisition Collector assessed varying rates of compensation for lands bearing different classifications- **Held**, that when land is acquired for common purpose like for widening of National Highway, the factum that different parcels of land are of different and varying classifications in the revenue record becomes insignificant- uniform rate of compensation is liable to be given for every parcel of land notwithstanding contradistinct category- Land Acquisition Collector and 1St Reference Court committed impropriety in calculation of compensation- Rate of compensation for all categories of land shall be payable at the rate assessed by Land Acquisition Collector for land having description 'Bhakal Awal' along with all the statutory benefits qua interest etc- appeal allowed.

Title: Puneet Goel & another Vs. State of H.P. & others Page-356

Land Acquisition Act, 1894- Section 18- Held that lands of which sale deeds are considered for determining the market value of the lands sought to be acquired must have proximity in time to the issuance of necessary notification for the acquisition of the concerned land and must also have proximity in the location vis-à-vis the lands brought under acquisition- further held that Learned Reference Court has rightly appreciated the evidence on record- no merits in appeal- appeal dismissed.

Title: State of H.P. & another Vs. Bhagat Ram Page-179

Land Acquisition Act, 1894- Section 4- Regular First Appeal- An award passed by the Referral Court challenged by way of an appeal and cross-objections- Moot Question being whether deduction of 30% from the exemplar's sale deed on the ground that when large tracks are acquired, the transaction in respect of small properties do not offer a proper guideline and valuation of small transaction cannot be taken as a real basis for determining the compensation for larger tracks of land- **Held-** that the aforesaid deduction can be made- Deduction made for the purposes of development of the site also distinguished from the deduction made on the basis of small tracks of land required to be carried out in an exemplar's sale transaction.

Title: State of H.P. and others Vs. Lekh Ram (died) through LRs & others Page-484

Land Acquisition Act, 1894- Section 4- Regular First Appeal- Further Held- that the respondents/claimants were also entitled to an additional interest by way of damages @ 15% per annum from the date of taking the actual possession till the date of notification under Section 4 of the Act.

Title: State of H.P. and others Vs. Lekh Ram (died) through LRs & others Page-484

'N'

N.D.P.S. Act, 1985- Section 20 and 29- Accused acquitted by the Trial Court for the aforesaid offences- on appraisal of evidence acquittal upheld- **Held** that prosecution failed to prove the exclusive and conscious possession of the contraband and reiterating the settled proposition of law that where two views are possible, Appellate Court should not reverse the judgment of acquittal merely because another view is possible- powers of the Appellate Court while dealing with the appeal against the order of acquittal reiterated.

Title: State of Himachal Pradesh Vs. Ramesh Kumar & others (D.B.) Page-32

N.D.P.S. Act, 1985- Section 20- Appeal under Section 374(2) Cr.P.C- Appellant convicted under Section 20 of the Act and sentenced to undergo rigorous imprisonment for a period of six months and pay a fine of Rs.2,000/-- an appeal preferred against the conviction and sentence- conviction passed on the sole testimony of the police officials- no endeavour made to associate independent witnesses- **Held** that sole testimony of the police official can be relied without any corroboration by other admissible evidence, but provided, it is reliable, trustworthy and cogent. On appreciation of facts held that the testimony of the police officials rendered the genesis of the prosecution version highly doubtful, presence of the police officials on the spot was also shrouded in doubt- Further held that the non-availability of an independent witness, as was proclaimed by the prosecution was also doubtful- Conviction and sentence of the accused set aside.

Title: Davinder Kumar Vs. State of Himachal Pradesh Page-126

Negotiable Instruments Act, 1881- Section 138- Accused had issued a cheque for a sum of Rs.21,65,072/- as purchase price of liquor supplied by the respondent- the cheque was dishonoured due to insufficient funds- accused was tried and convicted by the Trial Court- appeal filed in Appellate Court was dismissed- **Held**- that contention of the accused that complaint has not been filed by a competent persons stands rebutted from the resolution of the respondent federation lying on record - other requirements of Section 138 of NI Act have been fully complied with – there is presumption under Section 139 of NI Act regarding cheque having been issued for consideration- accused had not rebutted the presumption- Trial Court has rightly convicted the accused- appeal is rightly dismissed- revision stands dismissed.

Title: Raj Kumar Vs. Himachal Pradesh State Co-operative Marketing and Consumers Federation Ltd, Shimla and others Page-168

'R'

Regular Second Appeal- Mutation pass without any basis- held to be inoperative - confers no right on the person- the rights of coparcener in ancestral property reiterated.

Title: Joginder Singh Vs. Bhagat Ram & others Page-46

Regular Second Appeal- Permanent Prohibitory Injunction- Plaintiff filed a suit for permanent prohibitory injunction in respect of the suit land claiming exclusive ownership, purportedly on the basis of a Will- Defendants contesting the suit on the ground that plaintiff was not the sole owner of the suit land, but he was one of the coparcener alongwith defendants and was only entitled to $1/12^{th}$ of the share in the suit land- the Learned Trial Court decreed the suit of the plaintiff, however, learned Appellate Court accepting the appeal – dismissed the suit of the plaintiff, hence the regular second appeal- **High Court held-** that on the face of no Will or gift deed having been produced on record and the oral testimony also being shrouded in doubt- it has to be held that deceased died intestate and his inheritance had to devolve on all the legal heirs.

Title: Joginder Singh Vs. Bhagat Ram & others Page-46

Regular Second Appeal- Plaintiff seeking recovery of an amount of Rs.80,000/- along with interest, the amount said to be have been loaned to the husband of the defendant, who had died on 8.3.2001, without repaying the same – as per the plaintiff, the defendants being legal heirs and having inherited the estate of deceased Sanjay Sharma were liable to repay the said loan- the defendants contested the suit, inter alia, on the ground that they had not inherited the estate of late Shri Sanjay Sharma- as he had no movable or immovable property in his name, at the time of his death- Learned Trial Court dismissed the suit of the plaintiff- However, on appeal the learned First Appellate Court allowed the suit - Hence, the Regular Second Appeal- **The High Court held-** that the cheque was duly issued by the plaintiff, but for consideration, there is nothing on record that the same was issued as a loan- plaintiff having failed to prove that amount was paid as a loan- he cannot recover the same from the heirs of the defendants- further held that the plaintiff in order to succeed had to lead convincing evidence to prove that movable and immovable property of the deceased had been acquired at the time of his death, which had been succeeded by the defendants- on the face of there being no evidence, plaintiff cannot lay any claim, particularly based on the estate of the deceased.

Title: Alka Sharma and another Vs. Roshan Lal Verma Page-19

Regular Second Appeal- Suit under Section 38 and 39 of the Specific Relief Act for perpetual and prohibitory injunction- Plaintiff sought a restraint order against the defendant from digging the foundations, raising construction and blocking the path in the suit land- plaintiff also sought a decree for mandatory injunction in the alternative, for restoration of the suit land to its original position- defendant inter alia averred that the suit land was Abadi deh- As per the defendant, the plaintiff was not a co-sharer in the suit land- house was being constructed on the old foundation and there was no path in existence- The Learned Trial Court had dismissed the suit- The Learned First Appellate Court however reversed the findings and decreed the suit- hence the Regular Second Appeal- **Held**- that in case of easement by way of prescription where parties jointly owned and possessed, the suit land, being a *Deodi* (threshold or entrance to the compound), which is main entrance- no co-sharers can raise any type of construction to block the same- consequently, findings of the learned 1st Appellate Court were upheld.

Title: Mohan Lal Vs. Ramesh Chand Page- 188

Regular Second Appeal- Whether a gift deed can be made in respect of coparcenery/ancestral property- held -that since the suit land was coparcenery property and the land having not been divided a gift deed was not sustainable in the eyes of law.

Title: Bhupinder Singh (since deceased) through LRs Vs. Bholu & others

Page-52

Regular Second Appeal- Court Fees Act- The suit land assessed to the land revenue and nothing on record that any structure was existing on the suit land and the value of the land has been increased- **Held** that it is well settled principle of law that if land is assessed to land revenue, the Court fee for suit land for declaration is Rs.19.

Title: Bhupinder Singh (since deceased) through LRs Vs. Bholu & others Page-52

'S'

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act,1989- Section 3(1)(v)- Indian Penal Code, 1860- Section 457- Accused persons harassed the complainant for his being from scheduled caste and forcibly dispossessed him from the shop in his possession owned by the accused persons- **Held**- that failure of the complainant to mention the names of the witnesses in the FIR who apprised him about the incident of dispossession, which had definitely not taken place in his presence and also failure to mention the material facts of the complaint in his pleadings of the civil suit pertaining to same incident created doubt about the correctness of

his allegations- thus, prosecution has failed to prove charges against accused persons- conviction set aside- appeal allowed.

Title: Vijay Kumar and others Vs. State of H.P. Page-181

Specific Relief Act, 1963- Section 5- Plaintiff claimed possession after demolition of the super structure raised on the suit land alleging that possession was forcibly taken during the pendency of the suit filed for relief of permanent prohibitory injunction – The learned Trial Court and First Appellate Court decreed the suit adjudicating that defendant has encroached upon the suit land relying the demarcation report filed on the record- **Held**, that for conducting demarcation it was incumbent upon the concerned Revenue Officer to procure Aks Musabi wherefrom he was required to recognize the pucca points- The demarcation report does not reveal that Aks Musabi was available with the demarcating authority or he ascertained pucca points- Demarcation report is faulty and cannot be believed- Courts below erred in placing reliance on it- suit dismissed- Appeal succeeds.

Title: Col. Mehar Singh Vs. Sudesh Kumari Page-349

Specific Relief Act, 1963- Section 5- Plaintiff filed a suit for possession of the suit property i.e. house - Predecessor-in-interest of the defendant Shri Mangat Ram, was originally tenant in the house in question- Tenancy devolved upon present defendant after his death- tenancy terminated through notice under Section 106 of Transfer of Property Act- defendant denied her status as tenant - she raised plea of adverse possession- suit was dismissed by the Trial Court as well as 1st Appellate Court – **Held-** that plaintiff has himself admitted that the possession of the defendant through her predecessor-in-interest started 1947- hence, omission in the pleading mentioning the commencement of possession is not material- other requirements establishing adverse possession i.e. it being open, continuous and exclusive to the knowledge of everyone and hostile to the true owner have been proved – the devolution of the property of Mangat Ram on the present defendant stands established from the Will executed by Mangat Ram in favour of defendant- both courts below had rightly appreciated the evidence- no merit in the appeal- appeal dismissed.

Title: Tek Singh and others Vs. Ganga Devi Page-377

Specific Relief Act, 1963- Section 5- Suit for Possession- Defendants encroached upon the part of the suit land by raising a retaining wall – encroachment depicted in tatima- suit was dismissed by the learned Trial Court as well as learned 1st Appellate Court on the ground that demarcation report in the consequence of which said tatima is prepared has neither been proved nor tendered in the evidence- **Held**, that evidence on record suggests that defendants have acquiesced the preparation of tatima and the validity of the demarcation report preceding the preparation of tatima – defendants thus, cannot raise objection qua non bringing of the demarcation report on record – in these circumstances, courts below erred in appreciating the evidence- appeal succeeds.

Title: Rup Lal Vs. Mast Ram & another Page-362

Specific Relief Act, 1963- Section 5- Suit land mortgaged to plaintiff for a sum of Rs.400/- creating usufructory mortgage - possession delivered to the plaintiff - The claim of the plaintiff is that mortgage is more than 35 years old and cannot be redeemed as right stands extinguished by way of limitation- The learned Trial Court dismissed the suit while learned First Appellate Court allowed the suit- **Held**, that right to redeem mortgages other than usufructory mortgage starts from the day the mortgage is created and same has to be redeemed within 30 years, but in case of usufructory mortgage the right to recover possession commences when mortgage money is either paid out from rent and profits or partly by such payments and partly by deposit by the mortgagor

- the Learned First Appellate Court did not appreciate the evidence on record properly- Decree of First Appellate Court set aside- Appeal Allowed.

Title: Biaso Devi and others Vs. Sadhu Ram Page-534

Specific Relief Act, 1963- Section 39- Permanent Prohibitory Injunction- Plaintiffs assail the agreement entered into Civil Suit No. 136-I/1986 titled as Mangtu Versus Jai Devi saying that neither they were party to and nor they authorized anyone to enter the said agreement and same is, as such, illegal, null and void- they claimed themselves to be tenants alongwith defendants No.13 to 15 under defendants No.1 to 12 except defendant No.6, a widow and further claimed that they have matured their title- **Held**, that plaintiffs have not challenged the judgment, wherein, the agreement/compromise in question had been entered- they could not have challenged the compromise only without assailing the judgment, so relief is not competent.

Title: Gian Chand & others Vs. Kailasho Devi & Ors. Page- 158

Specific Relief Act- Section 20- Specific relief of contract- Held- that in a suit for specific performance even if the plaintiff proves the issues and establishes his case, it is not that under all circumstances, suit is to be allowed- power is discretionary, more particularly, If the contract is not equal and fair.

Title: Raj Kumar Garag Vs. Raj Kumar & others (D.B.) Page-138

Specific Relief Act, 1963- Section 38- Permanent Prohibitory Injunction- Plaintiffs claimed themselves to be 'bartandaran' qua suit land having rights of grazing cattle, cutting grass etc. – Defendant No.2/State recorded as owner of the suit land leased out the suit land on 4.12.1998 to defendant No.1- Mutation attested in consequence thereof- **Held**, that rights of Bartandari are indefeasible customary rights vested in plaintiffs- State could not have alienated the suit land without giving the plaintiffs right of hearing and without considering the objections of the plaintiffs thereto- Simple order that plaintiffs be dispossessed from the suit land is insignificant, unless, it is established that order was implemented and possession was actually delivered to the defendant/State - no merit in the appeal- Appeal dismissed.

Title: State of H.P. Vs. Sant Ram and others Page-370

'W'

Workman Compensation Act, 1923- Section 4- First Appeal- The Commissioner, Employees Workman Compensation calculated the amount of compensation by taking the income of the deceased at Rs.8,000/- per month, which had come to be increased by way of an amendment w.e.f. 31.3.2010, whereas, the accident had occurred on 25.2.2009- **The High Court Held-** that the income of the deceased could have been taken as Rs.4,000/- per month only as the amendment made in the statute w.e.f. 31.3.2010 could not have been employed retrospectively- Appeal allowed- Claimant held entitled to compensation of Rs.4,19,840/- assessing the income of the deceased as Rs.4,000/- per month- 12% interest per annum allowed since the lapsing of one month from the accident.

Title: Oriental Insurance Company Ltd. Vs. Krishna Wati Devi and others

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Wellington Associates Ltd. Vs. Kirti Mehta, (2000) 4 SCC 272

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

Charan Dass (since deceased) through his legal heirs Smt. Savratu Devi & Ors.
... Appellants

Versus

Het Ram (since deceased) through his legal heirs Smt. Soma Devi & Ors.
... Respondents

RSA No. 426 of 2008
Date of decision: 31.08.2017

Code of Civil Procedure, 1908- Civil Suit for Permanent Prohibitory Injunction and in the alternative for vacant possession- Order 26 Rule 9 C.P.C.- Whether it was incumbent upon the Court to have appointed a Court Commission suo motu or allowed the application under Order 26 Rule 9 C.P.C. to do complete justice- **Held**- Since it was not a boundary dispute simplictor but the defendant was alleged to have encroached on the suit land, onus was on the plaintiff to prove the same , such evidence could not have been permitted to be created in the garb of an application under Order 26 Rule 9 CPC- appeal dismissed, findings of the Courts below affirmed. (Para-13 to 15)

For the appellants: Mr. Sanjeev Kuthiala, Advocate.
For the respondents: Mr. G.R. Palsra, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

By way of the present appeal, the appellants have challenged the judgment passed by the Court of learned District Judge, Mandi, in Civil Appeal No. 107 of 2007 dated 09.06.2008, vide which learned Appellate Court while dismissing the appeal filed by the present appellant upheld the judgment and decree passed by the Court of learned Civil Judge (Junior Division), Court No. 1 Mandi, in Civil Suit No. 60-I/2004 decided on 16.03.2007, whereby learned trial Court had dismissed the suit filed by the predecessor-in-interest of the present appellants for permanent prohibitory injunction and in the alternative for vacant possession.

2. This appeal was admitted on 28.08.2008 on the following substantial questions of law:-

(a) Whether the learned courts below have misread and mis-appreciated the pleadings as also the evidence, both oral and documentary, especially the statements of PWs 1 to 5, Ex. PA, Ex. PB, Ex. PW-1/A, Ex. D-1, Ex. DW1/A and on account of such misreading and mis-appreciation of evidence the findings as such are vitiated?

(b) Whether in a boundary dispute, it was incumbent upon the court to have appointed a court commission suo motu or allowed the application under Order 26 Rule 9 CPC for appointment of commissioner for purpose of elucidation and enabling the court to do complete judgment and whether failure to do so has resulted in the impugned judgment being bad in law and deserves to be set aside?

(c) Whether previous demarcation report not relied upon by the first appellate court, which was relied upon by the trial court and on basis of corroboration suit was decreed, it was incumbent upon the learned first appellate court to have appointed a court commission suo motu for the purpose of correct

demarcation and whether such failure has resulted in the judgment being vitiated, in view of the judgment of this Hon'ble Court in the case of Beli Ram vs. Mela Ram, 2003(1) SLJ 2004?

3. Brief facts necessary for adjudication of the present appeal are that the predecessor-in-interest of the present appellants Charan Dass, hereinafter referred to as the plaintiff filed a suit for permanent prohibitory injunction and in the alternative for vacant possession against the respondents/ defendants, hereinafter referred to as the defendants, on the pleadings that land comprised in Khewat Khatauni No. 225 min/262 min, Khasra No. 888 measuring 0-5-2 Bigha, situated in Mauja Kehar/ 290, Ill. Rajgarh-Balh, Tehsil Sadar, District Mandi, H.P., was owned and possessed by him and that he was having his residential house on a portion of the same, whereas the remaining suit land was being used by the plaintiff as courtyard and kitchen garden. As per the plaintiff, defendants without any right, title or interest over the suit land, had started causing interference over the same with a motive to raise construction thereupon w.e.f. 04.11.2004. It was further mentioned by the plaintiff that as he was serving in District Kullu, he was unaware about the illegal object of the defendants. He was intimated by his family members telephonically regarding illegal interference and encroachment over the suit land by the defendants and thereafter when the plaintiff came on leave on 12.11.2004, he found that the defendants had encroached upon his land measuring 0-1-10 Bigha by carrying out illegal construction over Khasra No. 888/1. Despite his request, defendants did not restraint themselves from raising illegal construction on his land and in these circumstances, the suit was filed by the plaintiff praying for the following reliefs:-

> "It is, therefore, respectfully prayed that in view of the submissions made hereinabove, the suit of the plaintiff may kindly be decreed and a decree for permanent prohibitory injunction restraining the defendants not to cause any interference in the suit land and also not to raise any construction over the suit land in any manner be passed in favour of plaintiff and against the defendants. Further, a decree for vacant possession with regard to the land measuring 0-1-10 bighas shown as khasra No. 888/1 in spot map, may also be passed in favour of the plaintiff and against the defendants. And/or any other relief to which the plaintiff may be found entitled under the facts and circumstances of the case, may also be granted in favour of plaintiff and against the defendants alongwith cost of the suit and justice be done."

4. By way of their written statement, defendants denied the claim of the plaintiff. As per the defendants, they were neither causing interference with the possession of the plaintiff over the suit land nor they had caused any construction over the same. The case of the defendants was that son of defendant No.1 had undertaken construction of his separate house over the land comprised in Khasra No. 896 measuring 0-1-16 Bigha which was exclusively owned and possessed by defendant No. 1 to the extent of half share and defendants had not indulged in any construction operations. Illegal construction as alleged by the plaintiff over the suit land was thus denied by the defendants.

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

> 1. Whether the plaintiff is entitled to the relief of permanent prohibitory injunction and in the alternative for vacant possession of the suit land as claimed for? … OPP
>
> 2. Whether the suit of the plaintiff is false, frivolous and vexatious and is not legally maintainable? … OPD
>
> 3. Whether the plaintiff has no locus standi to file the present suit, as alleged? … OPD
>
> 4. Whether the suit is bad for mi-joinder and non-joinder of necessary parties, as alleged? … OPD

5. Whether the plaintiff has no enforceable cause of action to file the suit, as claimed for? ... OPD

6. Relief.

6. The issues so framed by learned trial Court were answered as under:-

Issue No. 1:	No.
Issue No. 2:	No.
Issue No. 3:	No.
Issue No. 4:	No.
Issue No. 5:	Yes.
Relief:	The suit of the plaintiff is dismissed for operative part of the judgment.

7. Learned trial Court thus vide its judgment and decree dated 16.03.2007 dismissed the suit of the plaintiff. While dismissing the suit, it was held by learned trial Court that the plaintiff had failed to prove the alleged encroachment made by the defendants over a part of the suit land measuring 0-1-10 Bigha depicted as Khasra No. 888/1 in Tatima Ext. PW4/A. It was further held by learned trial Court that as the plaintiff had failed to prove encroachment over part of the suit land, it could not be accepted that the defendants used to interfere over the remaining part of the suit land as was stated in the Court by PW-1 and PW-3. Learned trial Court also held that Tatima Ext. PW4/A was not supported by any demarcation report nor PW-4 i.e. Kishori Lal had testified to the effect that he had prepared Tatima Ext. PW4/A after carrying out the demarcation of the land of the plaintiff as well as defendants. Learned trial Court also took note of the fact that PW-5 Ved Parkash, Kanungo, had admitted that he had not carried out any demarcation on the spot. Learned trial Court also held that a perusal of jamabandi Ext.PA which pertained to the suit land demonstrated that the suit land was recorded as "Gair Mumkin Makan" and no part of the same was recorded as vacant land. It also took note of the fact that PW-4 in his cross-examination had admitted that he had issued Tatima Ext. DI pertaining to the construction being raised by the defendants and his son over Khasra No. 896/1 measuring 0-1-16 Bigha which land was owned by defendant No. 1 alongwith other co-sharers. On these basis, learned trial Court dismissed the suit of the plaintiff.

8. In appeal, the judgment and decree so passed by learned trial Court was upheld by learned Appellate Court vide judgment and decree dated 09.06.2008. While dismissing the appeal so filed by the plaintiff, it was held by learned Appellate Court that even the witnesses of the plaintiff had admitted that the construction raised by the defendants was not over the suit land. It was held by learned Appellate Court that no useful purpose would be served by appointing a Local Commissioner as the land of the defendants was on higher side and evidence on record clearly suggested that the construction carried out by the defendants was upon their land and not over the suit land. It was also held by learned Appellate Court that a perusal of the statements of the plaintiff's witnesses especially the statement of PW-4 Kishori Lal and Kanungo PW-5 clearly demonstrated that no demarcation was done by the Kanungo in the presence of the defendants and no demarcation report was on file so as to prove the factum of encroachment, if any, found over the suit land by PW-5. It was on the basis of these findings learned Appellate Court while concurring with the findings of learned trial Court, dismissed the appeal.

9. I have heard learned counsel for the parties and also gone through the records of the case as well as the judgments and decrees passed by both learned Courts below.

10. I will deal with the three substantial questions of law independently.

(a) Whether the learned courts below have misread and mis-appreciated the pleadings as also the evidence, both oral and documentary, especially the statements of PWs 1 to 5, Ex. PA, Ex. PB, Ex. PW-1/A, Ex. D-1, Ex. DW1/A

and on account of such misreading and mis-appreciation of evidence the findings as such are vitiated?

11. A perusal of the statements made by the plaintiff's witnesses as well as a perusal of Ext. PA, Ext. PB, Ext. PW1/A, Ext. D-1 and Ext. DW1/A, demonstrates that there is neither any misreading nor any mis-appreciation of the evidence by learned Courts below. Concurrent findings recorded by both learned Courts below against the plaintiff that the plaintiff had failed to prove any encroachment over the suit land by the defendants are duly borne out from the records of the case. Ext. PW4/A stands prepared by PW-4. A perusal of the statement of PW-4 demonstrates that in his cross-examination he admitted it to be correct that Tatima Ext. D-1 was prepared by him as per which the construction in issue was being raised by the defendants and his son over Khasra No. 896/1 measuring 0-1-16 Bigha. Now, admittedly, this is not the suit land. Suit land is Khasra No. 888/1. PW-5 Kanungo Ved Parkash deposed in the Court that he had not carried out any demarcation of the disputed land. It has also not come in the statement of PW-4 that Tatima Ext. PW4/A was prepared by him in the presence of the parties after demarcating the land of the plaintiff and defendants. In this background, when we peruse the testimonies of PW-1, PW-2 and PW-3, perusal of the same demonstrates that it is not categorically borne from their statements that there was any encroachment over the suit land by the defendants. In fact, Ext. PA which is a copy of jamabandi of the suit land pertaining to the year 1996-97 contains the entry of "Gair Mumkin Makan". Same is true with regard to the contents of Ext. PB which is jamabandi of the suit land as well as Khasra No. 887 pertaining to the year 1996-97. Now, incidentally there is no Ext. PW1/A on the record as it finds mentioned in the substantial questions of law.

12. Be that as it may, in view of above discussion, in my considered view, there is neither any misreading nor any mis-appreciation of either the statements of plaintiff's witnesses or of Ext. PA and Ext. PB by learned Courts below. Further a perusal of Ext. D-1 as well as Ext. DW1/A also demonstrate that there is no misreading of the said documents by learned Court below. This is for the reason that learned Courts below have not believed Ext. D-1. However, yet they have dismissed the claim of the plaintiff on the ground that the plaintiff has failed to substantiate on record through cogent evidence that the suit land stood encroached upon by the defendants and they had carried out construction over the same. The findings so returned by both learned Courts below are duly borne out from the records of the case and the same are not result of either misreading or mis-appreciation of evidence. The substantial question of law is answered accordingly.

(b) Whether in a boundary dispute, it was incumbent upon the court to have appointed a court commission suo motu or allowed the application under Order 26 Rule 9 CPC for appointment of commissioner for purpose of elucidation and enabling the court to do complete judgment and whether failure to do so has resulted in the impugned judgment being bad in law and deserves to be set aside?

13. Admittedly, at the time of filing of the suit, no demarcation report was appended with the plaint by the plaintiff in support of his case. The application filed by the plaintiff under Order 26 Rule 9 C.P.C. was dismissed by learned trial Court vide order dated 12.01.2007. While dismissing the said application it was held by learned trial Court that it was not a boundary dispute between the parties but the plaintiff had filed the suit for possession of the land encroached upon by the defendants and it was fairly well settled that local investigation can be ordered in order to elucidate the matter in controversy but not to create evidence in favour of any of the party. Learned trial Court further held that had it been boundary dispute simplicitor, then it would have been a different matter but as the plaintiff had alleged the encroachment over a specific portion of the land then it was for the plaintiff to have had proved the alleged encroachment. The order so passed by learned trial Court on the application so filed under Order 26 Rule 9 C.P.C. attained finality.

14. In my considered view, a perusal of the pleadings of the parties as well as the respective evidence led by both the parties in respect of their case, demonstrates that the dispute in between the parties is not a boundary dispute simplictor, the plaintiff has categorically alternatively prayed for vacant possession of the suit land. Averments made in Para-3 of the plaint were that when the plaintiff came back to the place where the suit land was situated on 12.11.2004, he found that illegal construction had been started by the defendants. Now when there was a specific allegation of encroachment made by the defendants over the suit land, onus was upon the plaintiff to have had proved the same. In the absence of there being any material on record to prove and substantiate that the suit land stood encroached upon by the defendants, such evidence could obviously not have been permitted to be created in the garb of application under Order 26 Rule 9 C.P.C. During the course of arguments, learned counsel for the appellant could not satisfactorily respond as to why no demarcation report was appended with the plaint by the plaintiff in support of his contention. In the facts and circumstances of the present case, it cannot be said that it was incumbent upon the Court to have had appointed Court commission suo motu or allowed the application under Order 26 Rule 9 C.P.C. to do justice between the parties. It is settled principle of law that he who alleges has to prove. After the allegation of encroachment stood made by the plaintiff against the defendants, onus was upon him to prove the said allegation. It was not for the Court to create evidence in favour of the plaintiff to prove the said fact. Therefore, there is no illegality committed by learned Courts below by not allowing the application so filed by the plaintiff under Order 26 Rule 9 for the appointment of the Local Commissioner. The substantial question of law is answered accordingly.

(c) Whether previous demarcation report not relied upon by the first appellate court, which was relied upon by the trial court and on basis of corroboration suit was decreed, it was incumbent upon the learned first appellate court to have appointed a court commission suo motu for the purpose of correct demarcation and whether such failure has resulted in the judgment being vitiated, in view of the judgment of this Hon'ble Court in the case of Beli Ram vs. Mela Ram, 2003(1) SLJ 2004?

15. There is no demarcation report on record which purportedly was earlier relied upon by learned trial Court but was not relied upon by learned Appellate Court. In fact, no demarcation report was filed by the plaintiff before learned trial Court. Only three exhibits were filed by the plaintiff i.e. two jamabandis Ext. PA and Ext. PB and one Tatima Ext. PW4/A. It has come on record that no demarcation was carried out when Tatima Ext. PW4/A was prepared. Therefore, here it is not a case where a demarcation report relied upon by learned trial Court erroneously was not relied upon by learned Appellate Court. The substantial question of law is answered accordingly.

16. In view of above discussion, as there is no infirmity with the judgments and decrees passed by both learned Courts below, therefore, while affirming the same, this appeal is dismissed being devoid of any merit. Miscellaneous application(s) pending, if any, stand disposed of. Interim order, if any, also stands vacated.

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

Ram Chand ....Petitioner.

Versus

State of Himachal Pradesh and another ... Respondents.

Cr.R. No. : 68 of 2011.
Decided on: 31.08.2017.

Code of Criminal Procedure, 1973- Section 397 and 401 read with Section 482- Legality and correctness of a charge under Section 379 I.P.C sought to be challenged- petitioner alleged to have fled away with a truck bearing registration No.HP-38-2588 from the possession of the respondent, the L.R. of the person whose name is reflected in the R.C.- Petitioner however alleges to have purchased the truck for a sale consideration as per a written agreement. **Held**- Issue involved is of civil nature, more so when agreements inter-se parties not disputed. Legal right over the said truck is an issue to be decided by Civil Court – no criminal case made out- revision allowed- order framing charges quashed. (Para-5 & 6)

Cases referred:
Sardar Trilok Singh v. Satya Deo Tripathi, (1979) 4 SCC 396
K.A. Mathai v. Kora Bibbikutty, (1996) 7 SCC 212
Charanjit Singh Chadha v. Sudhir Mehra, (2201) 7 SCC 417
Anup Sarmah v. Bhola Nath Sharma and Others, (2013) 1 Supreme Court Cases 400

For the petitioners	Mr. N.S. Chandel, Advocate.
For the respondents	Mr. Vikram Thakur, Deputy Advocate General for respondent No. 1. Mr. Adarsh K. Vashisht, Advocate for respondent No. 2.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge*(Oral)*

By way this petition filed under Section 397/401 read with Section 482 of Criminal Procedure Code, the petitioner has prayed for the following relief:

> "*It is, therefore, respectfully prayed that this Hon'ble Court may be pleased to call for the record of this case for examining and satisfying itself as to the correctness, legality or proprietary of the order dated 04.-03-2011 whereby charge under Section 379 IPC was framed in case in P.H. No. 360-1/2002 instituted on 14-05-2002 titled as State of H.P. verses Ram Chand pending in Court of JMIC(1), Ghumarwin, District Bilaspur, and may set the same in exercise of the revisional powers under Section 397 and 401 Cr.P.C and also in exercise of inherent powers reserved in this Hon'ble Court under section 482 Cr.P.C to prevent the illegality and abuse of the process of the court in the interest of substantial justice.*"

2. The case of the petitioner is that respondent No. 2 filed a complaint before learned Chief Judicial Magistrate, camp at Ghumarwin, alleging that he was owner of Truck bearing registration No. HP-38-2588, which was taken away by the petitioner on the night of 19.10.2000, at about 9:00 p.m. from near the rain shelter at Kothi parking, Pargana Ajmerpur, Tehsil Ghumarwin, District Bilaspur, while driver of the truck had gone to his house. It was further mentioned in the complaint that when respondent No. 2/complainant learnt that the truck was parked in village Gatwar, Tehsil Ghumarwin, District Bilaspur, he went there alongwith his driver to bring back the Truck but there the petitioner allegedly threatened him. On these bases, he filed a complaint in the Court of learned Chief Judicial Magistrate, which was endorsed to Police Station Bharari, on the basis of which, FIR No. 151, dated 20.10.2000, was registered against the petitioner under Sections 379 and 506 of IPC. As per the petitioner, father of respondent No. 2, namely, Shri Rattan Chand took Rs. 80,000/- from him for the purpose of maintenance of Truck in issue and undertook to return said money within one year by way of a written agreement dated 20.07.2009. Thereafter, Rattan Chand on 13.09.1999 again borrowed an amount of Rs. 1,00,000/- for the purpose of repair of Truck and he undertook to return said amount by way of written agreement dated 13.09.1999 within six months. On 16.04.2000, Rattan Chand sold his Truck to the petitioner for an amount of Rs. 1,90,000/- again by way of a written agreement, in which it was agreed and categorically mentioned that Rattan Chand had received a

sum of Rs. 1,80,000/- in cash and remaining amount of Rs. 10,000/- was to be paid by the petitioner to Rattan Chand at the time of handing over of the papers of the Truck. As per the petitioner, Rattan Chand undertook to hand over complete documents of truck within a period of two months and in case, Rattan Chand failed to do so, then the petitioner was to be treated as owner of the Truck for a consideration of Rs. 1,80,000/-. Rattan Chand died and respondent No. 2 being his legal heir and successor continued to be in possession of the vehicle. Further as per the petitioner, after the death of Rattan Chand, respondent No. 2 tried to dispose of the vehicle with intention to defeat rights of the petitioner and in these circumstances, the petitioner had taken the possession of the vehicle in terms of the agreement so entered between him and Rattan Chand and he had become owner of the Truck as per the agreement entered into between him and Rattan Chand. Further as per the petitioner, both he and respondent No. 2 had filed applications under Section 457 of Cr.P.C. for the release of vehicle in issue in the Court of Chief Judicial Magistrate, camp at Ghumarwin, who vide order dated 30.12.2000, passed in Case No. 186/4 of 2000, ordered the release of vehicle in favour of the petitioner. Further as per the petitioner, a trial was pending against him in the Court of learned Additional Chief Judicial Magistrate Ghumarwin, pursuant to lodging of FIR No. 151, dated 20.10.2000, in which charge stood framed against him under Section 379 and 506 of IPC. According to the petitioner, facts categorically demonstrated that no criminal offence as is envisaged under Section 379 of IPC had been committed by him nor any such charge was disclosed from documents on record and accordingly, by way of this writ petition, he prayed for quashing of order dated 04.03.2011, vide which charge stand framed against him under Sections 379 and 506 of IPC.

3. I have heard the learned counsel for the parties and also gone through the records of the case as well as the order dated 04.03.2011 passed by the Court below.

4. It is not in dispute that vehicle bearing registration No. HP-38-2588 was registered in the name of father of respondent Surjeet Singh. Learned Counsel for respondent No. 2 also did not dispute the execution of Ekrarnamas Ext. P-1, Ext. P-2 and Ext. P-3, which stand entered into between the present petitioner and his late father. A perusal of the contents of these Ekrarnamas *inter alia* demonstrates that on 28th of July, 1999, the late father of respondent No. 2 took a loan of Rs. 80,000/- from the petitioner which he had undertaken to repay within a period of one year. Vide Ekrarnama Annexure P-2, dated 13.9.1999, late father of respondent No. 2, further took an amount of Rs. 1,00,000/- from the petitioner for the repair of his vehicle (Truck) bearing registration No. HP-38-2588. It is also not in dispute that vide Ekrarnama dated 16.4.2000, vehicle in issue i.e. Truck bearing No. HP-38-3588, L.P. 1210, was sold by the later father of respondent No. 2 to the petitioner for an amount of Rs. 1,90,000/-, out of which, as is contained in the Ekrarnama Ext. P-3, an amount of Rs. 1,80,000/- already stood received by him. It was also mentioned in this Ekrarnama that balance amount of Rs. 10,000/- was to be received by the late father of respondent No. 2 at the time when he was to hand over the entire documents of the vehicle to the petitioner. It was further mentioned in the said Ekrarnama that in case the documents of the vehicle were not delivered to the petitioner within a period of two months then it would be deemed that vehicle stood sold to the petitioner for an amount of Rs. 1,80,000/-. Father of respondent No. 2 died thereafter and it is in this capacity that respondent No. 2 continued to be in possession of the vehicle. As the terms of the Ekrarnama Ext. P-3 were not complied with by the deceased father of respondent No. 2, petitioner claims to have had taken the possession of the vehicle as he had become owner of the same as per the conditions contemplated in the Ekrarnama.

5. Be that as it may, in my considered view, in this case the issue involved is of civil nature as the execution of the agreements by father of respondent No. 2 with the petitioner has not been disputed nor is the factum of receipt of amount contained therein by the father of respondent No. 2 from the petitioner. Whether or not petitioner could have had taken the possession of Truck in issue and whether or not respondent has any legal right over the said truck simply on the basis of the fact that Truck is registered in the name of his father, is an issue to be decided by a Civil Court. It is settled law that if agreement stands executed with the registered owner of the vehicle for the purpose of sale of the vehicle and he had also received the

amount of consideration, then the registration certificate alone cannot be the sole basis of determining the ownership of the vehicle. It is further settled law that the sale of a motor vehicle is governed by the Sale of Goods Act and is complete when the consideration is paid irrespective of the fact that sale has been registered with the registering authority or not. It is also settled law that registration of the vehicle in the name of transferee is not essential to complete the transfer. (See Mathew Thankachan v. V.G. Manmohan and others AIR 1998 Kerla 128). This important aspect of the matter has not been taken into consideration by the learned Court below while framing charges against the petitioner. Apparently, the charge has been framed in a mechanical manner and without any due application of mind. It has not been appreciated that after framing of charge, an accused has to undergo the ordeal of trial and the very purpose of framing of charge is that if at that stage, it is borne out from the record that prima-facie no criminal case is made out against the accused, then he should be discharged and should not be called upon to undergo the ordeal of trial. Hon'ble Supreme Court in various cases has held that where a financier takes possession of a vehicle in terms of hire purchase agreement as a result of default having been made in payment of installments, no criminal case is made out and terms and conditions incorporated in the agreement gives rise only to a dispute of civil nature and in such a case, civil court has to decide as to what was the meaning of those terms and conditions. This has been so held by Hon'ble Supreme Court in ***Sardar Trilok Singh v. Satya Deo Tripathi***, (1979) 4 SCC 396, ***K.A. Mathai v. Kora Bibbikutty***, (1996) 7 SCC 212, ***Charanjit Singh Chadha v. Sudhir Mehra***, (2201) 7 SCC 417 and ***Anup Sarmah v. Bhola Nath Sharma and Others***, (2013) 1 Supreme Court Cases 400.

6. Therefore, in view of the reasoning given above as well as in light of law discussed above, this petition is allowed and order dated 04.03.2011, passed by learned Judicial Magistrate 1st Class, Court No. 1 Ghumarwin, District Bilaspur and charge of even date, framed in Police Challan No. 360-1/2002, are quashed and set aside.

The petition stands disposed of in above terms, so also pending miscellaneous application(s), if any.

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

Surinder Kumar Chaudhary (deceased) through his legal representatives Smt. Saroj Kumari Chaudhary and others .....Appellants.

Vs.

Devinder Kumar Chaudhry and another .....Respondents.

RSA No.: 660 of 2008
Date of Decision: 31.08.2017

Code of Civil Procedure, 1908- Appeal- Whether one of the tenants in joint possession of the tenanted premises could surrender the tenancy right or possession individually – **Held**- No.

The question whether a decree passed by the learned Court below is not executable, has to be decided by the Executing Court and not by the Court deciding the appeal. In the facts and circumstances of the case held that not only the suit premises were identifiable – even in the written statement defendant (defendant No.1) who was owner had averred that suit premises were handed over to him for the purpose of re-construction by the defendant claiming sole tenancy, nor any evidence led that the character of the suit premises had been changed after the reconstruction- held- it cannot be said that the decree was not executable. (Para-15 to 17)

Case referred:
Vannattankandy Ibrayi Vs. Kunhabdulla Hajee, (2001) 1 Supreme Court Cases 564

For the appellants: Mr. Bharat Thakur, Advocate.
For the respondent: Mr. Ashok Sood, Advocate, for respondent No. 1.
None for respondent No. 2.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)* **:**

By way of this appeal, the appellants have challenged the judgment and decree, dated 19.09.2008, passed by the Court of learned District Judge (F), Shimla in Civil Appeal No. 12-S/13 of 2008/2000, vide which, learned appellate Court while upholding the judgment and decree, dated 25.04.2000, passed by the Court of learned Sub Judge 1st Class, Court No. 1, Shimla in Case No. 110/1 of 90, dismissed the appeal filed against the said judgment and decree, whereby learned trial Court had decreed the suit of the plaintiff filed therein for declaration and joint possession.

2. This appeal was admitted on 17.06.2009, on the following substantial questions of law:

"1. Whether the decree based on findings recorded on Issue Nos. 1, 6, 7 & 8 qua Shop No. 1 in the Meghna Commercial Complex is infructuous and is not executable qua Shop No. 3 in Meghna Commercial Complex which is neither situated at the same site nor of the same specification/dimension as Shop No. 1 in the then Combermere House so pleaded by respondent -1 and as conversely proved on record by the appellant?

2. Whether both the Courts below fell into unsustainable legal error in-as-much as the mere written statement of respondent No. 2 has been misread as conclusive proof of joint tenancy and the uncontroverted deposition of respondent - 2 as DW 2 supporting the sole/exclusive tenancy of the appellant has been ignored in toto?

3. Whether both the judgments below are perverse in-as-much as the onus of issue Nos. 1, 6 and 7 was wrongly shifted upon the appellant in para 16 of the trial Court and paras 14 and 15 of the appellate Court because there is no concurrence on joint tenancy vide Ex. PW8/A and PW8/B (rent receipts) and yet the trial Court judgment has been upheld without an iota of proof quite in oblivion of Ex. DW1/C and DW1/D (rent receipts) which conclusively establish appellant's exclusive tenancy in Shop No. 1 of Combermere House and Exts. DW1/F (sale deed) which shows appellant's exclusive ownership and possession of Shop No. 3 in the new Meghna Commercial Complex?

4. Whether the Apex Court authority cited by the appellant was squarely applicable and has been wrongly distinguished by the appellate Court in its judgment para-21 and thereby injustice has occurred to the appellant?"

3. Brief facts necessary for the adjudication of the present appeal are that a suit was filed by respondent No. 1/plaintiff (hereinafter referred to as "the plaintiff") against the original appellant, namely, Surinder Kumar Chaudhary and respondent No. 2 (hereinafter referred to as "the defendants") on the grounds that plaintiff and defendant No. 2 (Surinder Kumar Chaudhry) before the learned trial Court were joint tenants of Shop No. 1, situated in top storey of Combermere House, The Mall Shimla, i.e., the suit premises. It was further mentioned in the plaint that the suit premises were on rent with plaintiff and defendant No. 2, which were rented from its previous owners Sh. Raghunath Singh Thakur and Ram Dass on yearly rent of Rs. 450/-. As per the plaintiff, he and defendant No. 2 were running business in partnership in the said premises and both were tenants in the aforesaid premises in their own right. It was further mentioned in the plaint that business in the name and style of Himalya Gas Company was being run in partnership by the plaintiff and defendant No. 2 in the said premises. According to the

plaintiff, he came to know that defendant No. 1 had purchased the entire building known as Combermere Estate from its previous owner and he was threatening to demolish the tenanted building and adjoining shops. It was further mentioned in the plaint that plaintiff had also come to know that defendants No. 1 and 2 had entered into a deal, whereby defendant No. 2 was going to surrender his tenancy rights in favour of defendant No. 1, who had even proceeded to hand over possession of the said shop to defendant No. 1, thereby depriving the plaintiff from the tenanted premises. As per the plaintiff, a conspiracy in fact stood hatched by defendants No. 1 and 2 in this regard against him. It was further averred in the plaint that as plaintiff and defendant No. 2 were in joint possession of the tenanted premises, therefore, one of the tenant could not surrender the tenancy rights or possession individually in favour of defendant No. 1. Records demonstrate that during the pendency of the Civil Suit, certain developments took place, which led to the amendment of the plaint, wherein, it stood pleaded by way of amendment by the plaintiff that defendants had illegally and un-authorisedly during the pendency of the suit demolished Shop No. 1 and re-constructed the same despite ad-interim orders passed by the Court. It was further mentioned that plaintiff continued to be joint and co-tenant with defendant No. 2 of premises in dispute. It was on these bases that the suit was filed praying for the following reliefs:

> *"(1) That the defendant No. 1 be restrained from carrying out any kind of digging operations, reconstruction work, demolition work and from dismentalling work in, over, around below the tenanted premises bearing No. 1 situated in Top Storey of building known as Combermere House, The Mall, Shimla and the defendant No. 1 be further restrained from damaging any part or portion of the tenanted shop No. 1 in any manner by way of his own acts or any of his employee, servant agents or contractors and further restraining the defendant No. 1 from dispossessing the plaintiff from the said tenanted premises bearing No. 1 Combermere House, The Mall, Shimla in any manner except in due process of law;*
>
> *(2) Further restraining the defendant from entering into any kind of deal, contract or agreement between themselves whereby the plaintiff is being ousted from the said tenanted Shop No. 1, Combermere House, The Mall, Shimla or whereby the tenancy rights of the plaintiff are being interfered in any manner and further restraining the defendant No. 1 specifically from entering into any kind of deal, agreement or contract whereby the tenancy rights of the plaintiff in respect of the said tenanted premises No. 1 Combermere House, The Mall, Shimla are taken away, interfered or threatened to be hamphered in any manner and further restraining the defendant No. 2 from surrendering the tenancy rights or possession of premises bearing No. 1, the Combermere House, The Mall, Shimla in favour of the defendant No. 1 in any manner which premises are jointly held by the plaintiff and defendant No. 2.*
>
> *(2)(a) The decree for declaration may kindly be passed in favour of the plaintiff against the defendant declaring that the plaintiff continue to be a joint tenant with defendant No. 2 in respect of reconstructed shop No. 1 in place of old shop No. 1 on the same place and same situation in Combermere House building at the Mall Road level which building now is known as Meghna Commercial Complex, The Mall, Shimla and is entitled to joint possession of the said newly constructed shop with tenant No. 2.*
>
> *(2)(b) The decree for joint possession be passed in favour of the plaintiff against the defendants that the plaintiff is in joint possession with defendant No. 2 co-tenant in newly constructed shop in place of old shop on the Mall Road level storey which building is new known as Meghna Commercial Complex, The Mall, Shimla.*
>
> *Necessary Court fee will be fixed on the plaintiff after amendment is allowed by the Court.*

The cost of the suit be awarded to be the plaintiff against the defendant.

Any other relief to which the plaintiff is found to be entitled in the facts and circumstances of the case may also be granted to the plaintiff by this Hon'ble Court."

4. Separate written statements were filed both by defendant No. 1 and defendant No. 2. The stand of defendant No. 1 was that joint tenancy of plaintiff and defendant No. 2 was not denied by him, but he denied that any business was being run in the shop in the name and style of M/s. Himalaya Gas Company by both the brothers. It was further mentioned in his written statement that the premises in issue were made available for re-construction and later on defendant No. 2 directly entered into a sale transaction of the said re-constructed shop in his own name as well as additional premises below the said shop vide agreement dated 01.06.1989. It was further mentioned in the written statement that the shop in question alongwith godown thereafter stood sold to defendant No. 2 vide registered sale deed, dated 21.10.1991 against consideration. On these basis, the claim of the plaintiff was denied by defendant No. 1.

5. Defendant No. 2 also denied the claim of the plaintiff and took the stand that plaintiff was never a joint tenant with defendant No. 2 of the suit premises. As per the said defendant, the premises in the tenancy of defendant No. 2 were previously under Shri Raghunath Singh Thakur and thereafter under the new owner. As per him, plaintiff had no concern whatsoever with the suit premises. It was further mentioned that plaintiff and defendant No. 2 were partners in Himalya Gas Company, which was functioning from its registered office and godown, situated at Cart Road, Near Ice Skating Rink, Circular Road, Shimla. It was further mentioned that the suit premises were in occupation of defendant No. 2 only, from where he was carrying business of his sole proprietorship in the name and style of M/s. Himalaya Electrical Company. It was further mentioned in the written statement that later on he had become owner of the suit premises by virtue of sale deed, dated 21.10.1991 entered into by him with defendant No. 1. On these basis, he denied the claim of the plaintiff.

6. By way of replication so filed to the written statements, plaintiff reiterated his claim and denied the averments made in the written statements.

7. On the basis of pleadings of the parties, learned trial Court framed the following issues:

"1. Whether the plaintiff and defendant No. 2 are in joint possession, as joint tenants in respect of the entire shop bearing Shop No. 1, situated in the building known as Combermere House, The Mall Shimla? OPP.

2. If issue No. 1 is proved, then whether the defendant No. 2 has no right to surrender the tenancy rights or possession individually of the premises in dispute in favour of the defendant No. 1? OPP.

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

4. Whether the plaintiff has no locus standi to file this suit? OPD.

5. Whether the plaintiff is estopped from filing the present suit, due to his acts, deed, conduct and acquiescence? OPD.

6. Whether the plaintiff is entitled for declaration that he continued to be co-tenant with defendant No. 2 in respect of reconstructed shop No. 1? OPP.

7. Whether the plaintiff is entitled for joint possession of reconstructed shop No. 1 with defendant No. 2? OPP.

8. On the basis of evidence adduced by the respective parties in support of their respective claims, the following findings were returned by learned trial Court on the issues so framed:

"Issue No. 1: Yes.

Issue No. 2:	*Yes.*
Issue No. 3:	*No.*
Issue No. 4:	*No.*
Issue No. 5:	*No.*
Issue No. 6:	*Yes.*
Issue No. 7:	*Yes.*
Relief:	*Suit of the plaintiff is decreed as per operative portion of judgment.*

9. Learned trial Court vide its judgment and decree, dated 25.04.2000, decreed the suit of the plaintiff on following terms:

> *"This suit coming on this 25th April, 2000 for final disposal before me, J.K. Sharma, Sub Judge 1st Class (I), Shimla in the presence of Shri Ashok Sood, Advocate for the plaintiff and Shri Satyan Vaidya, Advocate, for the defendants. It is ordered and decreed that the suit of the plaintiff is decreed for declaration and for joint possession as prayed for with cost against both the defendants."*

10. While decreeing the suit, it was held by the learned trial Court that the evidence led by the parties demonstrated that plaintiff and defendant No. 2 were running the business of Himalya Gas Company jointly in the disputed premises, which stood proved from the lease deed Ex. PW8/B. Learned trial Court also held that though defendant No. 2 had claimed that he was sole tenant of disputed premises, however, no documentary evidence was filed by defendant No. 2 to demonstrate the same. Learned trial Court further held that partnership deed also stood executed between the parties, which was also exhibited to demonstrate that the business was being run jointly by the plaintiff and defendant No. 2. Learned trial Court also held that even defendant No. 1 in his written statement has admitted that plaintiff was joint tenant in the premises with defendant No. 2 and that possession thereof for the purpose of reconstruction was handed over to him by defendant No. 2, on the assurance that defendant No. 2 was having the authority of the plaintiff in this regard and further, after re-construction, the re-constructed premises were handed over back to defendant No. 2 on behalf of both the defendants. Learned trial Court also held that plaintiff's witnesses had established that plaintiff and defendant No. 2 were running the business jointly from the suit premises till the year 1990, when the suit premises were handed over to defendant No. 1 for the purpose of re-construction and it was thereafter that the business was shifted to Revoli Bus Stand. On these basis that it was held by the learned trial Court that the plea taken by defendant No. 2 that the plaintiff had relinquished his right of tenancy in the suit premises, could not be accepted, as the written statement of defendant No. 1 clearly demonstrates that defendant No. 2 had handed over the possession of the suit premises on the understanding that he was doing so with the consent of the plaintiff. Learned trial Court also held that plaintiff was entitled to declaration regarding joint tenancy as well as joint possession with defendant No. 2.

11. The judgment and decree so passed by the learned trial Court was assailed by defendant No. 2 alone before the learned first appellate Court. Learned appellate Court vide its judgment and decree, dated 19.09.2008, dismissed the appeal so filed before it by him. Learned appellate Court while concurring with the findings returned by the learned trial Court held that most relevant material on record was the written statement filed by defendant No. 1, i.e., the person who had purchased the building, which consisted of the suit premises from previous owner Raghunath. Learned appellate Court held that it was specifically mentioned in the written statement of defendant No. 1 that suit premises were in joint tenancy of plaintiff and defendant No. 2. Learned appellate Court also held that though defendant No. 1 while in witness box altered his stand, but he could not explain as to why he had made a mention of contrary facts in the written statement. Learned appellate Court also held that as evidence suggested that both plaintiff and defendant No. 2 were tenants of the suit premises, it was incumbent upon defendant

No. 2 to have had proved his sole tenancy by leading cogent and reliable evidence, but he failed to do so. After referring to Ex. PW8/D-7 to Ex. PW8/D-10, learned appellate Court held that these communications suggested that plaintiff and defendant No. 2 were having joint business in the suit premises. Learned appellate Court dismissed the plea of the appellant therein that the subject matter of the tenancy stood destroyed after re-construction and thereafter the tenancy had come to an end. Thus, it was held by the learned appellate Court that the findings returned by the learned trial Court warranted no interference.

12. Feeling aggrieved, the appellant filed this appeal.

13. I have heard the learned counsel for the parties and have also gone through the judgments and decrees passed by both the learned Courts below as well as the records of the case.

14. I will deal with all the substantial questions of law Nos. 1 and 3 together and 2 and 4 independently.

Substantial questions of law Nos. 1 & 3

15. A perusal of the judgments and decrees passed by both the learned Courts below demonstrate that there is a concurrent finding returned by both the learned Courts below against the present appellant that the suit premises were not in the sole tenancy of the present appellant and they were under the joint tenancy of defendant No. 2 and the present appellant. In this background, when we go through the findings returned by the learned trial Court on Issues No. 1, 6, 7 and 8 which stand affirmed by the learned appellate Court, it cannot be said that the decree passed by the learned trial Court is not executable. Even otherwise, whether the decree passed by the learned trial Court is executable or not has to be decided by the Executing Court and this is not to be done by this Court while deciding this appeal. During the course of arguments, it could not be disputed by the learned counsel for the appellant that the suit premises are identifiable. A perusal of the written statement filed by defendant No. 1 demonstrates that he had mentioned therein that after the suit premises were handed over to him by defendant No. 2 for the purpose of re-construction, the same after re-construction were handed over back by him to defendant No. 2. Now, it further stands mentioned in the written statement of defendant No. 1 that later on, the said shop alongwith additional premises were sold to defendant No. 2.

16. Be that as it may, it is nowhere mentioned in the written statement of defendant No. 1 that after the suit premises were handed over to him for the purpose of re-construction by defendant No. 2, in the course of re-construction, the character of the suit premises was so altered and changed that now there is no shop at the spot, as was existing before re-construction. Even the written statement filed by respondent No. 2 demonstrates that it was not his case that suit premises which were handed over to him after re-construction by defendant No. 1 were not the same as were handed over by him to defendant No. 1. In fact, his case in the written statement was that it was he who was the sole tenant of the suit premises and plaintiff had got no interest or claim over the said premises.

17. A perusal of the records of the case also demonstrates that the documents referred to by the learned trial Court in its judgment, i.e., licence deed Ex. PW8/B as well as telephone bill Ex. 8/D-16 conclusively lead to the inference that the suit premises were in fact joint tenancy of the plaintiff and defendant No. 2. Partnership between plaintiff and defendant No. 2 in the name and style of Himalya Gas Company also stands proved vide Ex. P-3. It is further evident from the records that previous owner of the suit premises used to receive rent from both the tenants and their licences were also created. Therefore, in view of the above, it cannot be said that decree based on findings recorded on Issues No. 1, 6, 7 and is not executable. Substantial questions of law Nos. 1 and 3 are answered accordingly.

Substantial question of law No. 2:

18. A perusal of the judgments and decrees passed by both the learned Courts below demonstrate that there is a concurrent finding of fact returned against the present appellant and in favour of the plaintiff that it were the plaintiff and defendant No. 2, who were joint tenants of

the suit premises and the suit premises were not in the sole tenancy of defendant No. 2. Now, while arriving at the said conclusion, learned Courts below have relied upon the lease deed, which was so executed by the plaintiff and defendant No. 2 with the erstwhile owner of the suit premises, namely, Sh. Raghunath Singh Thakur. On the other hand, there is a finding of fact returned by the learned trial Court, which has been concurred by the learned appellate Court to the effect that no document has been placed on record by defendant No. 2 to demonstrate that he was the sole tenant of the suit premises. Findings returned by the learned trial Court to the effect that plaintiff and defendant No. 2 were joint tenants of the suit premises stand substantiated by it by elaborate discussion of evidence on record in this behalf. Now, it is a matter of record that in his written statement, DW-2, i.e., defendant No. 1 had not denied the factum of plaintiff being in joint possession of the suit premises with defendant No. 2. This is evident from the records of the case, i.e., from the perusal of written statement of defendant No. 1. Therefore, findings recorded to this effect by the learned trial Court, which stand affirmed by the learned appellate Court, thus cannot be said to be perverse findings. Now, deposition to the contrary in the Court of law by DW-2, who entered the witness box at the behest of the present appellant, has been rightly ignored by both the learned Courts below. This is for the reason that said witness could not give any cogent justification as to why averments to the contrary were made in the written statement. Not only this, written statement is earlier in time. Besides this, in my considered view, the stand of a party in a Court of law is to be primarily inferred from the pleadings and not from the statement. Therefore, in my considered view, neither of the Courts below have fallen into unsustainable legal error by relying upon the written statement of defendant No. 1, nor they have misread the testimony of DW-2 in this regard. This substantial question of law is answered accordingly.

Substantial question of law No. 4:

19. A perusal of the judgment passed by the Hon'ble Supreme Court in ***Vannattankandy Ibrayi*** *Vs.* ***Kunhabdulla Hajee***, (2001) 1 Supreme Court Cases 564 demonstrates that therein the Hon'ble Supreme Court was dealing with the matter, which pertained to a premises, which after being let out was raised to the ground due to accidental fire and there remained only the vacant land. It was in this factual matrix that it was held by the Hon'ble Supreme Court that when there was no superstructure in existence, the landlord cannot claim recovery of possession of vacant site under the State Rent Act and the only remedy available to him was to file a suit in a Civil Court for recovery of possession of land. In my considered view, the law laid down by the Hon'ble Supreme Court, referred to above, is clearly distinguishable on the basis of the facts of the present case and it cannot be said that the judgment of the Hon'ble Supreme Court has been wrongly distinguished by the learned appellate Court. This substantial question of law is answered accordingly.

20. In view of the findings returned above, as there is no merit in the present appeal, the same is dismissed, so also miscellaneous application(s), if any. No order as to costs.

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

Shri Amar Nath .... Petitioner

Versus

Union of India and others .... Respondents

CWP No. 8153 of 2012.
Date of decision: 25.10.2017.

Constitution of India, 1950- Article 226- Grant of Pension- Petitioner seeking counting of service in the CRPF w.e.f. 10.5.1969 to 31.3.1977 as qualifying service, for pensionery purposes- per the petitioner the CRPF had not paid him pension for the service, he had rendered to the CRPF w.e.f. 10.5.1969 to 30.4.1986- **Held** - Since the petitioner remained as Army Reservist and

he continued to draw pension as such till 31.3.1977, the period rightly not counted as qualifying service- petition dismissed. (Para-5 and 6)

For the petitioner Mr. Vasu Sood, Advocate vice Mr. Neel Kamal Sood, Advocate.
For the respondents : Mr. Vikas Rathore, Senior Panel Counsel.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

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

"i) To quash the letter dated 24.1.2012 issued by respondent No. 2 for not counting the period from 10.5.1969 to 31.3.1977 as qualifying service in CRPF for pension purpose with further directions to the respondents to grant the pension and pensionary benefits to the petitioner in view of his continuous service rendered with the respondents w.e.f. 10.5.1969 to 30.4.1986 with further directions to grant consequential arrears accruing thereto alongwith interest at the rate of 18% per annum from the due date till the date of actual payment.

ii) Any order as this Court may deem fit, just and proper in the facts and circumstances of the present case, may be passed in the interest of justice.

Iii) Entire record pertaining to instant case may please be summoned and examined, which would help this Hon'ble Court to arrive at just conclusion.

iv) Tthe writ petition may kindly be allowed with costs."

2. Grievance of the petitioner is that no pension has been paid to him for the service which he rendered with CRPF w.e.f. 10.5.1969 to 30.04.1986. According to him, the respondents have construed as if he served in CRPF only for a period of nine years and one month. The remaining service rendered by him in CRPF has been completely ignored which act of the respondents is both arbitrary as well as totally unjust.

3. Though no reply has been filed to the petition, however, Mr. Vikas Rathore, learned Senior Panel Counsel for the respondents while drawing the attention of this Court to communication Annexure P-4, dated 24.1.2012, appended with the petition submits that reason for not counting the said service is evident from the contents of the said communication which is self explanatory and thus the petitioner is not entitled for any relief which he is claiming by way of present writ petition.

4. I have heard learned Counsel for the parties and also gone through the records of the case.

5. It is not in dispute that as uptill 31.03.1977, the petitioner remained as Army Reservist and in his capacity as such, he continued to draw pension while also serving in CRPF. Simultaneously, a perusal of communication Annexure P-4, dated 24.01.2012, demonstrates that period up to 31.3.1977 was not counted as qualifying service in CRPF for pension purpose because from 10.05.1969 to 31.03.1977, petitioner drew reservist pension. Period post 31.3.1977 up to the time petitioner served with CRPF accounted for nine years and one month only, for which he was not entitled for pension from CRPF as per rules. Alongwith the writ petition, nothing stands appended by the petitioner from which it could be inferred that period w.e.f. 10.05.1969 to 31.1.1977 i.e. the period, for which the petitioner while serving in CRPF drew reservist pension, could have been simultaneously also counted as qualifying service for the purpose of pension from CRPF. During the course of arguments also, learned Counsel for the petitioner could not draw the attention of this Court to any rule or any departmental notification etc to this effect.

6. Undoubtedly, pension is not a bounty but is the hard earned property of an employee, however, entitlement for pension is governed by the service conditions and grant of pension is not a matter of right. An employee is entitled for pension in accordance with the statutory rules etc. which are in vogue at the time of his superannuation. In the present case, in the absence of there being any statutory provision or rule enabling the petitioner to have had counted the service rendered by him w.e.f. 10.5.1969 to 31.3.1977 in CRPF, for the purpose of getting pension from CRPF, I do not find any merit in the present petition. It cannot be said that the respondents have arbitrarily not counted this particular period as qualifying period for pension under CRPF.

In view of above discussion, as there is no merit in the present petition, the same is dismissed. Pending miscellaneous application(s), if any, also stand disposed of. No orders as to costs.

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

Bhim Singh ....Petitioner

Versus

State of Himachal Pradesh and others ... Respondents

CWP No. 93 of 2012.
Date of decision: 25.10.2017.

Constitution of India, 1950- Article 226- Petitioner seeking setting aside of the award passed by the Ombudsman under the National Rural Employment Guarantee Act (NREGA) without having provided any opportunity of hearing- **Held** – since as per statutory instruction framed under Section 27 of the Act (NREGA), it was incumbent upon the Ombudsman to give a hearing to the party. The Ombudsman having relied merely in the fact finding enquiry of the B.D.O. had passed the award without hearing the petitioner- Not legally sustainable hence the award quashed. However, liberty granted to the Ombudsman to proceed afresh as per law and instruction in vogue, as the issue pertained to misuse of MGNREGA funds. (Para-4 to 6)

For the petitioner Ms. Anjali Soni Verma, Advocate.
For the respondents : Mr. Vikram Thakur, Dy. AG.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

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

"i) That writ in the nature of certiorari may kindly be issued by quashing and setting aside impugned award dated 01.12.2011, Annexure P-5, passed by respondent No. 2, being illegal and arbitrary.

ii) That writ in the nature of mandamus may very kindly be issued directing the respondents not to recover an amount of Rs. 1,62,214/- from the petitioner, in pursuance of award dated 01.12.2011, Annexure P-5, passed by respondent No. 2.

Iii) That the respondents may very kindly be directed to produce the entire record pertaining to the case of the petitioner for the kind perusal of this Hon'ble Court.

iv) Any other order which this Hon'ble Court deems just and proper in the facts and circumstances of the case may also kindly be passed in favour of the petitioner and against the respondents."

2. Brief facts necessary for adjudication of the present case are that as per petitioner, he was elected as Pradhan of Gram Panchayat, Bara Gram, Block Development Office, Baijnath, District Kangra, HP in the year 2005. According to him, he has completed his term in December, 2010 and he worked as such to the best of his abilities and sincerity for the said five years. His grievance is that Ombudsman (MGNREGA) has passed an award vide which the Ombudsman has *inter alia* concluded that the Panchayat, of which the petitioner was Pradhan, had committed financial irregularities of a sum of Rs. 1,62,214/- which needs to be deposited in the Panchayat MGNREGA fund. According to the petitioner, the said award is not sustainable in the eyes of law as he is not guilty of any act of omission in discharge of his duties as a Pradhan of the Gram Panchayat and findings contained to the contrary in the award are not borne out from the records of the case. It is further the case of the petitioner that the impugned award otherwise is also not sustainable in the eyes of law as the same was passed by the Ombudsman without providing any opportunity to the petitioner to put his defence before the Ombudsman.

3. In order to ascertain this fact as to whether the award has been passed by the Ombudsman after affording an opportunity of being heard to the petitioner or not, this Court had directed the State to produce records of the case. Today, learned Deputy Advocate General has produced the records of the case as well as copy of a order so passed by the Joint Secretary (NREGA) under Section 27 of National Rural Employment Guarantee Act, vide which State Governments were directed by the Central Government to set up office of the Ombudsman, as per instructions enclosed with the said order. A perusal of the instructions which are enclosed with the said order *inter alia* demonstrates that they *inter alia* provide for the procedure which has to be adopted by an Ombudsman before passing an award. Clause 13 of the said instructions which is relevant to the facts of this case is quoted herein below.

> *"**13. Award by Ombudsman and Appeal***
>
> *13.1 If the facts are not admitted by the parties in a case, Ombudsman may pass an award after affording the parties reasonable opportunity to present their case. He shall be guided by the evidence placed before him by the parties, the reports of social audits, if any, the provisions of NREGA Act and Scheme and practice, directions, and instructions issued by the State Government or the Central Government from time to time and such other factors which in his opinion are necessary in the interest of justice.*
>
> *13.2 the 'award' passed under sub-clause (13.1) above shall be a speaking order consisting of the following components:*
>
> *13.2.1 Details of the parties of the case.*
>
> *13.2.2 Brief facts of the case.*
>
> *13.2.3 Issues for consideration*
>
> *13.2.4 Findings against issues along with reasons.*
>
> *13.2.5 Direction to the concerned NREGA Authority such as performance of its obligations like expediting delayed matters, giving reasons for decisions and issuing apology to complainants, taking of disciplinary and punitive action against erring persons, etc. except imposition of penalties under the NREGA Act.*
>
> *13.2.6 Costs, if any.*
>
> *13.3 If a complaint is found to be false, malicious or vexatious, the Ombudsman shall, for reasons to be recorded in writing, dismiss the complaint and made an order that the complainant shall pay to the opposite party cost ad deemed appropriate by the Ombudsman.*
>
> *13.4 A copy of the 'award' shall be sent to the complainant and the NREGA Authority complained against.*

13.5 There shall be no appeal against the 'award' passed by the Ombudsman and the same shall be final and binding on the parties.

13.6 A representative of Programme Officer/District Programme Coordinator ma appear in cases where the Programme Officer/District Programme Coordinator is a party. Programme Officer/District Programme Coordinator shall appear only when a proceeding is taken up before the Ombudsman, in which case he shall be provided the opportunity of hearing.

13.7 All cases not involving complicated questions of fact or law shall be disposed within 15 days. Other cases may be disposed within 45 days.

13.8 Representation of parties by the advocates in any proceeding may be made with the prior permission of Ombudsman.

13.9 In any proceeding before the Ombudsman, if the facts reveal a case of illegal gratification, bribery or misappropriation and the Ombudsman is satisfied that the case is fit for further investigation by a criminal court, the same shall be referred by him to the authority competent to sanction criminal prosecution of the persons involved in the case. The competent authority on receipt of such a case shall forward the case to appropriate authority for further action in accordance with law."

4. Perusal of the said clause *inter alia* demonstrates that in case the contents of the complaint are not admitted by a party, then Ombudsman has to pass an award after affording party(s) a reasonable opportunity to present their case. In other words, there is a provision that principles of natural justice have to be followed by the Ombudsman before passing an award and no person is to be condemned unheard. A perusal of the record of the office of Ombudsman demonstrates that in fact Ombudsman himself neither conducted any inquiry nor he gave any opportunity of being heard to the petitioner before passing the impugned award. In fact, no proceedings in the matter were held at all by the Ombudsman and the award was announced by him simply on the basis of a fact finding report which was so submitted to the Ombudsman by BDO-cum-PO (MGNREGA), Baijnath. This is evident from communication dated 03.12.2012, addressed by the office of Ombudsman (MGNREGA), Kangra at Dharamshala to The Director-cum-Special Secretary (RD) SDA Complex, Kasumpati, Shimla-09, relevant extract of which is quoted herein below.

"In the instant case, it is intimated that the award no. MGNREGA/2011-1586-1591 dated 01-12-2011 has been announced on the basis of fact finding report submitted by BDO-cum-PO Baijnath as discussed above and copies of the same were despatched to all concerned for information and further necessary action in the matter. Vide para-3 (I) Ex-Pradhan and Secretary were directed to make the payment of wages to the 26 persons who were engaged for the execution of MGNREGA work viz c/o link road Kukar Gunda to Gadsa Bridge as per attendance record as agreed available by the Secretary G.P. Bara Gram, with in seven days from the receipt of this Award and BD)-cum-PO Baijnath was advised to ensure compliance accordingly as the matter regarding non payment of wages to the MGNREGA workers was a serious matter. Besides, the above vide para 3 item (ii) it has been found on the basis of BD)-cum-PO report that the Panchayat has committed financial irregularities of Rs. 162214/- which needs to be recovered and deposited in Panchayat MGNREGA fund.

As for as question of affording opportunity of being heard to the petitioner Sh. Bhim Singh is concerned, no proceedings were taken up by the office of Ombudsman MGNREGA Kangra at Dharamshala, the Award has been prepared and announced on the basis of prelim fact finding report by BDO-cum-PO MGNREGA Baijnath. Perusal of the record submitted by BDO-cum-PO MGNREGA Baijnath viz letter No. 7385 dated 05-11-2011 which has been addressed to Sh. Bhim Singh Ex Pradhan, G.P. Bara Gram, sub Teh. Multhan reveals that Sh. Bhim

Singh Ex Pradhan has been afforded opportunity to present his case on 07-10-2011 and 16-11-2011 copy of the above letter is enclosed for reference. Thus opportunity of being heard has been provided by the BDO-cum-PO MGNREGA on the basis of above reference. No opportunity of being heard has been provided by this office as no separate proceedings have been conducted by the Lokpal Office MGNREGA Kangra and the Award announced only on the basis of prelim fact finding report submitted by BDO-cum-PO Baijnath.

However, it is further submitted that, in case any other information is required from this office, necessary advised/guidelines as deem fit may be communicated to this office to enable to proceed further."

5. It is settled principle of law that no order can be passed against a person which has civil consequences without affording an opportunity of being heard to the said person. Herein the office of Ombudsman has been set up by the State Governments pursuant to an order which has been so issued by Joint Secretary (NREGA) in terms of Section 21 of the National Rural Employment Guarantee Act. Instructions also stand issued in consonance with the provisions of Section 27 of the National Rural Employment Guarantee Act, with the objective of establishing a system for redressal of grievances and disposal of complaints relating to implementation of NREG Act and the Schemes made under the Act by the States. Now a perusal of these instructions demonstrates that these instructions have been formulated under Section 27 of the Act supra. In other words, these are statutory instructions. The statutory instructions *inter alia* envisage that before passing an award, the Ombudsman has to provide a reasonable opportunity of being heard to the party and only thereafter, it can announce an award. These instructions stand not complied with by the Ombudsman in the present case while passing the impugned award. This is for the reason that it is apparent and evident from the record that the award has neither been passed by the Ombudsman after providing reasonable opportunity of being heard to the petitioner nor any proceedings were undertaken by the Ombudsman and he announced the award solely on the basis of fact finding report submitted to him by the BDO-cum-PO MGNREGA, Baijnath. In fact the modus adopted by Ombudsman in passing the award is in complete breach of the instructions (supra). Ombudsman was required to himself hold an inquiry after associating all the stakeholders and after affording an opportunity of being heard to the affected parties and thereafter, on the basis of said inquiry, the Ombudsman was himself to pass an award. He could not have passed the award on the basis of a fact finding report submitted by the Block Development Officer.

6. Accordingly in view of above, impugned award dated 01.12.2011, Annexure P-5, is quashed and set aside. However, taking into consideration the fact that the award passed by the Ombudsman has been set aside by this Court on technical grounds and the issue pertains to misuse of MGNREGA funds, this Court grants liberty to the Ombudsman to proceed with the matter afresh, strictly in accordance with law and instructions in issue.

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

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

Alka Sharma and another .....Appellants

Versus

Roshan Lal Verma ...Respondent

RSA No. 295 of 2006
Reserved on: 10.10.2017
Decided on: 30.10.2017

Regular Second Appeal- Plaintiff seeking recovery of an amount of Rs.80,000/- along with interest, the amount said to be have been loaned to the husband of the defendant, who had died on 8.3.2001, without repaying the same – as per the plaintiff, the defendants being legal heirs and having inherited the estate of deceased Sanjay Sharma were liable to repay the said loan- the defendants contested the suit, inter alia, on the ground that they had not inherited the estate of late Shri Sanjay Sharma- as he had no movable or immovable property in his name, at the time of his death- Learned Trial Court dismissed the suit of the plaintiff- However, on appeal the learned First Appellate Court allowed the suit - Hence, the Regular Second Appeal- **The High Court held**- that the cheque was duly issued by the plaintiff, but for consideration, there is nothing on record that the same was issued as a loan- plaintiff having failed to prove that amount was paid as a loan- he cannot recover the same from the heirs of the defendants- further held that the plaintiff in order to succeed had to lead convincing evidence to prove that movable and immovable property of the deceased had been acquired at the time of his death, which had been succeeded by the defendants- on the face of there being no evidence, plaintiff cannot lay any claim, particularly based on the estate of the deceased. (Para-13)

For the appellants Mr. Rajiv Jiwan and Mr. Ajit Sharma, Advocates.
For the respondent None.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present regular second appeal is maintained by the appellants, who were the defendants before the learned Trial Court (hereinafter to be called as "the defendants"), laying challenge to the judgment and decree, dated 25.04.2006, passed by learned Additional District Judge, Shimla, H.P., in Civil Appeal No. 60-S/13 of 2001, whereby the judgment and decree, dated 27.08.2003, passed by the then sub-Judge, 1st Class (2), Shimla, District Shimla, H.P., in Civil Suit No. 26/1 of 2001, was set aside and suit was decreed.

2. Briefly, the facts, which are necessary for determination and adjudication of the present appeal, are that the respondent, who was the plaintiff before the learned Trial Court (hereinafter to be called as "plaintiff"), has maintained a suit for recovery of Rs. 80,000/- (Rupees eighty thousand) alongwith interest at the rate of 12% per annum, against the defendants, on account of loan advanced by him to the husband of defendant No. 1. As per the plaintiff, on 28.12.1998, late Sh. Sanjay Sharma, husband of defendant No. 1, approached the plaintiff for a loan of Rs. 80,000/-, which was paid to him by the plaintiff through cheque No. 1500670, dated 28.12.1998 and it was agreed between the parties that the said amount will be returned alongwith interest at the rate of 12% per annum. The said amount was encashed by late Sh. Sanjay Sharma on the same day. It is alleged that earlier also late Sh. Sanjay Sharma had borrowed a sum of Rs. 2,00,000/- from the plaintiff for his business purposes and subsequently the loan of Rs. 80,000/- was advanced to late Sh. Sanjay Sharma on account of their good personal relations, however on 08.03.2001, Sanjay Sharma has expired and left behind defendants No. 1 & 2, being his legal heirs, hence the plaintiff filed the suit for recovery of Rs. 80,000/- against the defendants.

3. The defendants, by filing written statement, denied the contents of the plaint. It has been further averred in the written statement that the defendants have not inherited the estate of late Sh. Sanjay Sharma, as he was having no movable or immovable property in his name at the time of his death and at that time defendant No. 1 was being residing with her parents at Kullu, whereas defendant No. 2 was studying in 5th Class in O.L.S. Public School, Kullu, who was being looked after by the father of defendant No. 1. It has been further submitted that both the defendants are totally dependent upon the parents of defendant No. 1 and are having no source of income. Apart from replying the averments on merits, preliminary objections

qua maintainability, cause of action and jurisdiction has also been taken by the defendant and ultimately they prayed for dismissal of the suit.

4. By filing replication, the plaintiff re-asserted his case.

5. The learned Trial Court on 03.05.2002 framed the following issues for determination and adjudication:

> ***"1. Whether plaintiff is entitled to recover a sum of Rs. 80,000/- being principal amount alongwith interest at the rate of 12% P.A. from the defendants as alleged ? OPP***
>
> ***2. Whether the suit is not maintainable? OPD***
>
> ***3. Whether the plaintiff has no cause of action? OPD***
>
> ***4. Whether this court has no jurisdiction to try and decide the present suit? OPD***
>
> ***5. Relief."***

6. After deciding issues No. 1 and 4 in negative and issues No. 2 and 3 in affirmative, the learned Trial Court dismissed the suit of the plaintiff. Subsequently, the plaintiff maintained an appeal before the learned first Appellate Court, which was allowed and suit of the plaintiff was decreed. Hence the present regular second appeal, which was admitted for hearing on the following substantial question of law:

> ***"1. Whether the first Appellate Court has committed serious illegality in not drawing a presumption that the cheque was issued for consideration, received by the plaintiff at the time of issuance of the cheque?"***

7. Learned counsel for the appellants has argued that the presumption that cheque was issued for the consideration, is required to be taken by the Court, as provided under Section 114 of the Indian Evidence Act, 1872 and the learned Trial Court has rightly presumed that the cheque was for the consideration and that presumption was never rebutted by the plaintiff. He has further argued that except self serving statement of the plaintiff that it was the loan amount, there was no iota of evidence before the learned first Appellate Court to conclude that it was the loan amount. He has argued that the plaintiff in his statement feigned ignorance with respect to the business health of the deceased, however he has admitted that the deceased was having good business at Bilaspur and in these circumstances, the presumption of loan, as taken by the learned first Appellate Court is totally perverse, hence the present appeal be allowed and the judgment and decree, passed by the learned first Appellate Court be set aside.

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

9. PW-1, Mansa Ram (Assistant Manager, Punjab National Bank), in his examination-in-chief, admitted that M/s Sanjay Enterprises has its account, having account No. 113, with their bank and on 02.12.1998, a sum of Rs. 2,00,000/-, vide cheque No. 1500661, has been deposited to the same from some bank of Shimla. This witness has proved on record copy of voucher, Ext. P-1, copy of ledger sheet, Ext. P-2 and admitted the same to be true. In his cross-examination, he feigned ignorance as to by whom the said cheque was issued.

10. PW-2, Roshan Lal (Retired Executive Engineer, HPSEB), has deposed that on 01.12.1998 he issued a cheque of Rs. 2,00,000/- to late Sh. Sanjay Sharma and at that time, he was posted as Executive Engineer, Bilaspur. He has further deposed that on 28.12.1998, he again paid Rs. 80,000- to late Sh. Sanjay Sharma, vide H.P. Co-operative Bank, Branch at Shimla. He has stated that despite asking for money time and again, late Sh. Sanjay Sharma has not returned money to him and on 08.03.2001, Sanjay Sharma has expired. In his cross-examination, he deposed that after the death of Sanjay Sharma, his widow and daughter are inheriting his property. He denied that no cheque was issued by him to late Sh. Sanjay Sharma.

He has admitted that late Sh. Sanjay Sharma, was having healthy business at Bilaspur, however he denied that he was not in need of money.

11. DW-1, Alka Sharma (widow of late Shri Sanjay Sharma), has deposed that in the year, 2001, when her husband has expired, he was not having any movable or immovable property in his name and neither she, nor her daughter has inherited his property. She has further deposed that after the death of her husband, she alongwith her daughter is being residing with her father at Kullu, who is bearing their maintenance, as well as other educational expenses of her daughter. In her cross-examination, she admitted that she may have received a sum of Rs. 50,000/- or Rs. 55,000/- as compensation in respect of the car, however she feigned ignorance about the exact amount. She has further admitted that the industrial plot at Bilaspur was purchased by her in her own name, where she used to work as a partner with Tripat Kaur in respect of electrical goods, however after shifting to Kullu, she relinquished her share in favour of Tripat Kaur. She could not tell whether she had filed any income tax return in her name or not. She deposed that after the death of her husband, she has not operated his bank accounts. She deposed that she has utilized her personal savings and the money given by her father for establishment of the said business. She has further deposed that Partnership Deed, Ext. P-3, was executed by her after the death of her husband. She feigned ignorance about the dealings, which her husband was having with the plaintiff. She denied that neither she, nor her father has ever applied for issuance of succession certificate with regard to the estate of her husband.

12. DW-2, Sunil Kumar (Patwari, main Market, Bilaspur), has admitted that Certificate, Ext. D-1, was issued by him, which bear his signatures. In his cross-examination, he admitted that Ext. D-1 has been issued in favour of Sh. Onkar Nath, father of the deceased and the property was also in his name. He denied that the property was in the name of late Sh. Sanjay Sharma and his widow.

13. From the evidence produced on record, it is clear that the plaintiff though has stated that he paid Rs. 80,000/- as loan to late Sh. Sanjay Sharma, vide cheque, however he could not prove on record any agreement or evidence in this regard. Thus, issuance of cheque, without there being anything on record, does not mean that the cheque was issued as loan. Further the plea taken by the plaintiff that after the death of late Sh. Sanjay Sharma, his widow and minor daughter have inherited his entire estate, as such, they are liable to return the suit amount to the plaintiff, being his legal heirs. So it was incumbent on the part of the plaintiff to lead convincing evidence to prove the moveable and immoveable property, the deceased was acquiring at the time of his death, which has been later on succeeded by the defendants. However, the entire evidence is clearly missing on this aspect also and in these circumstances, this Court is not in a position to infer as to what moveable or immoveable property has been left by the deceased, which was later on succeeded by the defendants, being his legal heirs. In order to hold that a particular property belonged to the estate of the deceased, following points are necessary to take into account:

(1) The property must be in existence at the time before the death of deceased,

(2) The deceased must have beneficial for the property,

(3) The deceased must be in possession and control of such property,

(4) The deceased must have power to dispose of such property.

However, after carefully going through the entire evidence, oral as well as documentary, which has come on record, there is nothing on record to prove the aforementioned facts.

14. Further the plaintiff was working in the Government service, as Engineer HP PWD and the deceased was having nothing to do with the plaintiff in any manner, as he was businessman and having no dealings with PWD Authorities. Simply because in one photograph of the marriage of the son of plaintiff deceased Sanjay Sharma is appearing, nowhere suggests that deceased had taken loan from the plaintiff. In these circumstances, in the absence of plaintiff proving that the amount was paid as a loan, the widow of deceased Sanjay Sharma, cannot be

held liable just on the basis of presumption. Thus, the findings, recorded by the learned first Appellate Court are perverse, there is no evidence on record to conclude that any loan was advanced by the plaintiff to the deceased. So, substantial question of law is answered holding that the learned first Appellate Court has committed serious illegality in not drawing a presumption that the cheque was issued for consideration, received by the plaintiff at the time of issuance of the cheque and was not the loan amount.

15. In view of the aforesaid discussion, the present regular second appeal is allowed and the judgment and decree, passed by the learned first Appellate Court is set aside and the judgment and decree, passed by the learned Court below is restored. However, in view of peculiar facts and circumstances of the case, the parties are left to bear their own costs.

16. Pending miscellaneous application(s), if any, also stand(s) disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Court on its own motion ....Petitioner

Versus

State of Himachal Pradesh and others ....Respondents

CWPIL No. 37 of 2017
Decided on: November 1, 2017

Constitution of India, 1950- Article 226- Letter petition alleging un-authorized construction on the land of Ayurvedic Dispensary entertained.

Held- that because of the existence of a road on the right side of the Ayurvedic Health Centre, no justification for constructing another road through the courtyard of the Ayurvedic Health Centre.

The NOC issued by the Ayurvedic Department to construct road through the courtyard of the Ayurvedic Health Centre also held to be unjustified and ordered to be rectified.

Further held the grant of NOC and transfer of land by the Ayurvedic Department to the P.W. Department was unjustified- the same quashed and set aside. (Para-9 to 11)

For the petitioner : Mr. Kulbhushan Khajuria, Advocate (*Amicus Curiae*)

For the respondents : Mr. Shrawan Dogra, Advocate General with Mr. M.A. Khan, Additional Advocate General and Mr. J.K. Verma, Deputy Advocate Genera.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

By medium of instant letter petition, addressed to Chief Justice of this court, complainant namely Ravinder Singh Rana, resident of Village Behadwain Dhatwalia, Tehsil Bhoranj, District Hamirpur, Himachal Pradesh, invited attention of this Court to the illegal and unauthorized construction of road on the land of Ayurvedic Dispensary situate at Bhakera, Tehsil and District Hamirpur. As per the petitioner, his late father namely Shri Ganga Ram Thakur, donated land measuring 11 Marla in the year 1999 to the Ayurveda Department for the construction of Ayurvedic Dispensary. Similarly, Shri Nanak and Shri Rattan Singh, both residents of Village Tikka Behadwin Dhatwalia also donated land measuring 14 Marla from their joint Khasra No. 87 for the construction of Ayurvedic Health Centre in village Bhakera. It emerges

from the record that Ayurveda Department constructed two rooms on the aforesaid land for being used as Ayurvedic Dispensary, whereas on the remaining land, measuring 11 Marla Public Works Department constructed road. As of today, there is small courtyard left in front of the Ayurvedic Dispensary. In nutshell, grouse/ grievance of the petitioner is that the Public Works Department without verifying the facts and taking consent from the Revenue Department as well as Ayurveda Department proposed to construct a road for village Bhakera, through courtyard of Ayurvedic Dispensary, as a consequence of which no space would be left open in front of the Ayurvedic Dispensary, rather, there can be a danger to the building of Ayurvedic Dispensary. Petitioner has further apprehended that in case courtyard in front of Ayurvedic Dispensary is allowed to be used for the construction of road to Village Bhakera, no place would be left for vaccination as well as other health related programmes, which may be organized occasionally by the Department of Health as well as Ayurveda Department of Himachal Pradesh for the benefit of local residents.

2. Taking cognizance of averments contained in the letter petition, this Court called for response from the State of Himachal Pradesh. Director Ayurveda, Himachal Pradesh in his reply-affidavit dated 29.6.2017, acknowledged the factum with regard to donation of land measuring 11 Marla bearing Khasra No. 216/90/1 by one Shri Ganga Ram for the construction of Ayurvedic Health Centre building for Village Bhakera on 26.7.1999. Director Ayurveda also acknowledged the factum with regard to the donation of land measuring 14 Marla from joint Khasra No. 87 by Shri Nanak and Shri Rattan Singh, residents of Village Tikka Behadwin Dhatwalia for the construction of Ayurvedic Health Centre building at Village Bhakera. As per affidavit, construction of Ayurvedic Health Centre building was completed and taken over by the Department on 8.8.2007 and as of today, Ayurvedic Health Centre is providing basic health care facilities to the residents of above named village Gram Sudhar Sabha Bhakera proposed construction of ambulance road through the courtyard of Ayurvedic Dispensary and in this regard, granted No Objection Certificate qua 1 Marla of the land belonging to the Ayurvedic Dispensary, which now has been actually transferred in the name of Public Works Department on 4.1.2016.

3. In view of the demand of the area, Principal Secretary (Ayurveda) granted No Objection Certificate for the construction of ambulance road on Khasra No. 87/1 and 216/9/1 over 1 Marla of land belonging to the Ayurvedic Health Centre Bhakera. As per Director Ayurveda, said proposed ambulance road may be helpful in providing basic health care facilities to the people at their doorsteps. It clearly emerges from the aforesaid affidavit filed by Director Ayurveda that road already stands constructed by Public Works Department on the right side of the Ayurvedic Health Centre, which leads to village Kharwar. Though, Director Ayurveda has further stated that at present near 12 feet broad and 30 feet long vacant land (Courtyard) is available in Ayurvedic Health Centre and in case road is allowed to be constructed, land measuring 3 feet broad and 30 feet in length shall be left in front of Ayurvedic Health Centre building. Most importantly, Director Ayurveda in his affidavit has stated as under:

> "Paras 8:- That though the construction of the proposed ambulance road may harm the Ayurvedic Health Centre building, but since the executing agency is also a Govt. department and it had assured that no harm/damage will be done to the building as protection/retaining wall alongwith stair case shall be constructed for the said building. The fund to the tune of Rs.40,000/- has already been sanctioned by Deputy Commissioner Hamirpur vide sanction order No. 3003-06 dated 2-3-2017."

4. Director Ayurveda has categorically stated that construction of ambulance road may harm the Ayurvedic Health Centre and little space will be left for conducting health programmes such as IPPI /DPT and similar health related activities. Though in the affidavit, Director Ayurveda has made an effort to justify the construction of ambulance road on the ground of public interest but there is no explanation, if any, that once alternative road is already constructed by the Public Works Department on the right side of the Ayurvedic Health Centre, which leads to village Kharwar, why the courtyard of Ayurvedic Health Centre, which can be

ultimately used for health related programmes, should be allowed to be used for the construction of road.

5. We find from the communication dated 4.7.2012, annexure P-1, annexed by the complainant/petitioner in his response to the reply filed by the Director Ayurveda that District Ayurvedic Officer, District Hamirpur, while submitting report to the Director Ayurveda, Himachal Pradesh categorically informed that there is a dispute of villagers of Village Bhakera and Dhatwalia Behadwin regarding construction of link road on the land, which is not in their own name, rather in the name of Department of Ayurveda. As per District Ayurvedic Officer, Amar Chand and other villagers of Bhakera, forcefully tried to encroach land of the Department by digging the same with JCB in order to construct road, taking advantage of holiday. Since staff of Ayurvedic Health Centre stopped them from encroaching upon the said land, FIR came to be registered against such miscreants and matter is still under consideration. Lastly, District Ayurvedic Officer concluded that if permission to construct road on land of Ayurvedic Health Centre Bhakera is granted, there will be no space left for the building and it will become much difficult to organize programmes like IPPI/DPT camps and larger public interest will suffer.

6. District Ayurvedic Officer has further pointed out that there are some medicinal plant grown in the courtyard of this building and as such it is not in the public interest to provide road through courtyard of the Ayurvedic Health Centre.

7. This Court, after having carefully perused the averments contained in the letter petition as well as reply filed by Director Ayurveda, is in agreement with the learned *Amicus Curiae* Mr. Kulbhushan Khajuria that no fruitful purpose shall be served in case road to Village Bhakera is allowed to be constructed through courtyard of the Government Ayurvedic Health Centre. It also emerges from the pleadings that village Bhakera is already linked to road at Government Middle School Bhakera with Tikker Manooh road, which actually covers whole village. In fact, Gram Sudhar Sabha Bhakera wants to link road at one end with Tikker Manooh road and at other end to Manooh Kharwar road near Ayurvedic Health Centre at Bahkera. But, as clearly emerges from the affidavit filed by Director Ayurveda that road already stands constructed by the Public Works Department on the right side of the Ayurvedic Health Centre, which leads to village Kharwar.

8. We see no justification in using courtyard of Ayurvedic Health Centre for construction of road. It appears that some representative of Gram Sudhar Sabha Bhakera, who wants to construct road through courtyard of Ayurvedic Health Centre has made it a prestige issue, without realizing that Ayurvedic Health Centre at Bhakera provided by the Department of Ayurveda is for general public and in case health programmes like IPPI and DPT apart from other health related activities are organized regularly in the courtyard of Ayurvedic Health Centre, it shall benefit public at large including members of the Gram Sudhar Sabha.

9. Moreover, when road on the right side of Ayurvedic Health Centre leading to Village Kharwar is already existing on the spot, demand of Gram Sudhar Sabha to connect link road with Tikker-Manooh at one end and with other end at Manooh Kharwar road is not justified, rather this action of the Gram Sudhar Sabha Bhakera appears to be an attempt to disrupt smooth functioning of the Ayurvedic Health Centre at Village Bhakera.

10. Consequently, in view of detailed discussion made herein above, this Court, finds the action of the Ayurveda Department in granting No Objection Certificate to the Public Works Department to construct road through courtyard of Ayurvedic Health Centre to be totally unjustified and against public interest as such same deserves to be rectified in accordance with law.

11. Accordingly, No Objection Certificate issued by Principal Secretary (Ayurveda) and thereafter order of transferring land in question in the name of Public Works Department, on 4.1.2016 is quashed and set aside. Department of Ayurveda, Himachal Pradesh is directed not to surrender /make available courtyard of Ayurvedic Health Centre /Ayurvedic Dispensary at Bhakera i.e. land bearing Khasra No. 87/1 and 276/90/1 measuring 1 Marla belonging to the

Ayurvedic Health Centre, Bhakera to the Public Works Department for the construction of road. The Executive Engineer, PWD, Bhoranj, District Hamirpur is also directed to explore some other possibility for the construction of link road as being demanded by Gram Sudhar Sabha, Bhakera. The petition is disposed of in above terms.

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

Himachal Pradesh State Electricity Board
Ltd. and another ....Petitioners.

Versus

Shri Chet Ram and another ...Respondent.

CWP No.: 9695 of 2012.
Decided on: 01.11.2017.

Constitution of India, 1950- Article 226- Civil Writ Petition- Award of the Industrial Tribunal-cum-Labour Court challenged- **Held**- Labour Court in exercise of its adjudicatory function while deciding a Reference under Section 10 of the Industrial Disputes Act, 1947 has to answer the reference, as made to it by the appropriate Government. It cannot go beyond the reference. Even if the averments made in the claim by the petitioner are not in sync with the reference, the reference so made by the appropriate Government cannot be ignored by the Labour Court.

(Para-10 and 11)

Case referred:
Mool Raj Upadhaya's vs State of Himachal Pradesh, 1994 SCC, Supl. (2) 316

For the petitioners : Mr. Satyen Vaidya, Senior Advocate.
For the respondents : None.

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 of award passed by the Court of learned Presiding Judge, Industrial Tribunal-cum-Labour Court, Dharamshala, in Reference No. 141/2006, dated 26.08.2011, vide which learned Labour Court has granted the following relief in favour of the workman therein i.e. the present respondent No. 1.

> *"For the foregoing reasons discussed hereinabove, the reference is allowed partly. It is held that the petitioner was entitled to be brought on work charge status w.e.f. 1.1.1994 as per ratio of Gehar Singh's judgment discussed hereinabove supra, though his regularization was to be dependent upon the availability of post which was rightly done in the year 2001. As sequel thereto the petitioner shall be entitled to all consequential benefits arising thereto after being brought on work charge w.e.f. 1.1.1994. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after due completion consigned to the record room."*

2. As no one appeared on behalf of respondent No. 1 when the case was listed in the Court on 22.09.2017 and 04.10.2017, this Court in the interest of justice, issued Court notices to the said respondent for 26.10.2017. As per report of the registry, Court notice issued to respondent No. 1 stands served after service. As even thereafter no one has put in appearance on behalf of the said respondent, accordingly he is proceeded against *ex parte*.

3. I have heard Mr. Satyen Vaidya, learned Senior Counsel appearing for the petitioners who has taken me through the records of the case. The appropriate government made the following reference for the purpose of adjudication to the learned Labour Court.

> *"Whether the action of the Additional Superintending Engineer, HPSEB Division, Joginder Nagar, District Mandi, H.P. not to regularize the services of Shri Chet Ram S/o Shri Gouru Ram workman after completion of 10 years of continuous service w.e.f. 1989 is legal and justified? If not, what relief of service benefits the above aggrieved workman is entitled to?"*

4. The case pleaded in the claim petition by the workman in brief was that he joined the respondent-Board as a beldar w.e.f. 3.12.1983 and his services stood regularized as T-Mate in the regular pay scale by the HPSEB to the category of work charge after completion of 13 years and 9 months w.e.f. 3.9.1997. By placing reliance on the judgment of the Hon'ble Supreme Court in case titled **Mool Raj Upadhaya's vs State of Himachal Pradesh**, it was submitted by the claimant that he was entitled for regularization as from when persons junior to him stood regularized on work charge status w.e.f. 1989 after completion of 10 years of service. The following reliefs were claimed in the claim petition.

> *"i) The Hon'ble Court determine the facts of the case and directed to respondent to regularize the services of applicant w.e.f. 1989, 1992, 01-01-94 and as per notification dated 11-07-95 in the regular pay scale as fixed by the HPSEB to its employees to the category of the work charge T-Mate Rs. 770-1350/- and revised w.e.f. 1.1.1996.*
>
> *ii) The Hon'ble Court again directed to respondent to pay the balance arrear of payments to the applicant from the due date of his regularization to till the date of his retirement as on 28-02-2002 with all allowances and consequential service benefits.*
>
> *iii) The Hon'ble Court further directed to respondent to pay the litigation cost Rs. 5000/- in the interest of justice and justice be done.*
>
> *iv) Any other relief may kindly be granted in favour of the applicant."*

5. While denying the claim of the workman, in its response filed before the learned Labour Court, the stand taken by the respondent-Board was that the workman was initially engaged as a daily wage beldar w.e.f. 30.12.1983 and as per eligibility of the workman and availability of the post, he stood appointed as T-Mate on work charge and thereafter he was brought in regular cadre w.e.f. 1.2.2001. In the reply, it was also mentioned that the workman stood retired on attaining the age of superannuation on 28.2.2002. It was further mentioned in the reply that the ratio of judgment of the Hon'ble Supreme Court being relied upon by the workman was not applicable to the facts of the case and the workman in fact stood regularized as per his eligibility. It was denied that the workman actually worked under permanent establishment of the respondent-Board as temporary employee. It was mentioned in the reply that w.e.f. 30.12.1983 to 2.9.1997, he rendered services on daily wage basis and utilization of his services was against the casual nature of work. While denying the contention of the workman that persons junior to him were either placed work charge or regularized before him, it was mentioned in the reply that as and when posts of T-Mate work charge were available/vacant with the respondent-Board, the Board held open interviews and candidates were selected on merit in the interview so held. It was also mentioned in the reply that earlier the workman was not selected on account of his low merit and thus, it was denied that any person junior to him was appointed against the said post.

6. On the basis of pleadings of the parties, learned Labour Court framed the following issues.

> (21) *Whether the regularization of the petitioner w.e.f. 3.9.1997 instead of 1.1.1994 is illegal and unjustified, as alleged. If so, to what effect? OPP*
>
> (22) *Whether the petition is barred by time, as alleged. If so, to what effect? OPR*

3. Relief."

7. The following findings were returned by the learned Tribunal on the issues so framed.

"Issue No.1 : Partly yes.
Issue No. 2 : No.
Issue No. 3 (Relief) :Allowed as per operative part of the award."

8. Vide award dated 26.8.2011, learned Labour Court while answering the reference in favour of the workman granted the following relief in favour of the workman.

"For the foregoing reasons discussed hereinabove, the reference is allowed partly. It is held that the petitioner was entitled to be brought on work charge status w.e.f. 1.1.1994 as per ratio of Gehar Singh's judgment discussed hereinabove supra, though his regularization was to be dependent upon the availability of post which was rightly done in the year 2001. As sequel thereto the petitioner shall be entitled to all consequential benefits arising thereto after being brought on work charge w.e.f. 1.1.1994. The reference is answered accordingly. A copy of this award be sent to the appropriate Govt. for publication in the official gazette and the file after due completion consigned to the record room."

9. The award so passed by the learned Labour Court stands assailed by way of this writ petition.

10. A perusal of the reference which was received by the learned Labour Court for the purposes of adjudication from the appropriate government demonstrates that the same was to the effect that as to whether action of the Officer of Joginder Nagar Division of HPSEB not to regularize the services of workman after completion of 10 years of continuous service w.e.f. 1989 is legal and justified and if not, what relief of service benefits the aggrieved workman was entitled to? Neither the averments made in the claim petition appear to be in sinc with the reference which was so made by the appropriate government to the learned Labour Court, nor the issues which were framed by the learned Labour Court are in harmony with the reference. I am referring to the above for the reason that learned Labour Court in exercise of its adjudicatory function while deciding a reference under Section 10 (1) of the Industrial Tribunal Act, 1947 has to answer the reference which is so made before it by the appropriate government and the scope of adjudication, in my considered view, cannot be beyond the reference.

11. Coming to the facts of the present case, the reference which stood so made by the appropriate government to the learned Labour Court stands quoted by me herein above. I find this reference not to have been answered appropriately by the learned Labour Court. Yes, the averments made in the claim petition so filed by the workman before the learned Labour Court are also not in sinc with the reference so made by the appropriate government to the learned Labour Court but then when learned Labour Court is called upon by the appropriate government to answer a reference, then reference which is so made by the appropriate government cannot be put on the back burner by the learned Labour Court and it cannot venture upon to decide a claim so filed by the workman in isolation or by ignoring the reference which is so made to it by the appropriate government. This is exactly what has been done in the present case. By doing so, in my considered view, the learned Labour Court exceeded its jurisdiction. Neither the issues framed by the learned Labour Court are in consonance with the reference which was so made for the purpose of adjudication before it by the appropriate government nor the findings returned by the learned Labour Court while answering the reference can be said to be in harmony with the reference which was to be answered by the learned Labour Court. Therefore, in my considered view, the impugned award is not sustainable in the eyes of law.

12. Accordingly, in view of above discussion, this writ petition is allowed and impugned award dated 26.8.2011, passed in Reference No. 141 of 2006 by the learned Labour Court, Dharmashala is quashed and set aside and the matter is remanded back to the learned

Labour Court to decide the same afresh, strictly in consonance with reference which has been made by the appropriate government to the Labour Court to be answered.

The petition stands disposed of in the above terms, so also pending miscellaneous application(s), if any. No orders as to costs.

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

Suman Aggarwal .....Petitioner.
Versus
Municipal Council and another .....Respondents.

CWP No.915 of 2016.
Reserved on: 11.10.2017
Date of decision: 2nd November, 2017.

Code of Civil Procedure, 1908- Order 23 Rule 1(3)- Maintainability of a subsequent writ petition- Question whether the petitioner after having withdrawn the civil suit with liberty to file a fresh suit on the same cause can be permitted to file a writ petition- **Held**- yes- principle of withdrawal and abandonment as per the provisions of Order XXIII is distinct and different from the principle of resjudicata- liberty having been granted by the Court, it would be for the Court or Authority in the subsequent proceedings to decide upon the maintainability of the subsequent proceedings- further held even otherwise proceedings in the suit are essentially different from the proceedings initiated while invoking the extra ordinary writ jurisdiction- thus writ petition held to be maintainable. (Para-10 to 12)

For the Petitioner : Mr.Bimal Gupta, Senior Advocate with Mr.Vineet Vashistha, Advocate.
For the Respondents: Mr.Ajay Kumar Dhiman, Advocate, for respondent No.1.
Ms.Jyotsna Rewal Dua, Senior Advocate with Ms.Charu Bhatnagar, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The moot question that falls for consideration is whether the petitioner after filing a suit and thereafter having withdrawn the same with liberty to file a fresh suit on the same cause of action can be permitted to file the instant writ petition. However, before considering the question, certain admitted facts are needed to be noticed.

2. The petitioner filed a suit claiming therein the following relief:-

"It is, therefore, respectfully prayed that decree of relief of prohibitory injunction restraining the defendant No.1 from renting out or delivering the possession of a shop which is being constructed over place lying vacant near the shop No.4 of the M.C. Shopping Complex to any other person except the plaintiff, itself, or through its agents, servants and legal representatives in any manner whatsoever and for further restraining the defendant No.2 from carrying any construction work over the place above mentioned, himself or through his agents, servants and legal representatives in any manner whatsoever along with relief of mandatory injunction directing the defendant No.1 to lease/rent out the said shop to plaintiff as per prior acceptance of plaintiff's proposal by defendant No.1 or any other relief

which this Learned Court deems fit may also be passed in favour of the plaintiff and against the defendants, in the interest of justice."

3. The suit was contested by the respondents, who had been arrayed as defendants by filing written statement. The petitioner even filed replication. However, before the suit could be taken to its logical end, the plaintiff filed an application under Order 23 Rule 1(3) read with Section 151 of the Code of Civil Procedure (for short 'CPC') with a prayer to allow the petitioner to withdraw the suit with liberty to file a fresh suit on the same subject matter and on the same cause of action. The reason for filing the said application was spelt out in paras No.2 to 4 of the application which read thus:-

"2. That the applicant/plaintiff instituted the above said civil suit on 14 October, 2013 and respondents/defendants filed their written statements on 05.12.2013 and it transpired from the written statement filed by them that the defendant No.1 i.e. Municipal Council Paonta Sahib passed a resolution dated 30.08.2013 vide which it decided to rent out the said shop to defendant No.2 on a monthly rent of Rupees 1650/- and it also transpired from the written statement filed by the defendant No.1 that possession of the suit property stood delivered/transferred in favour of defendant No.2 on 10.09.2013.

3. That though the applicant/plaintiff disputes the genuineness and legality of said resolution and also disputes the date on which the possession of the suit property was taken over by the defendant No.2 but despite that the suit of the applicant/plaintiff became infructuous and it must fail by reason of such formal defect.

4. That in view of the fact and circumstances given above and due to change in circumstances during the pendency of the suit, it has become necessary for the applicant/plaintiff to withdraw the present suit with the leave to file the fresh suit in respect of the same subject matter."

4. The application so filed by the plaintiff was not objected to by the respondents and consequently the trial Court i.e. Civil Judge (Senior Division), Court No.1, Paonta Sahib, allowed the application vide order dated 19.06.2014 which reads thus:-

"Case is taken up for today for proper order. Ld. plaintiff counsel has already filed an application under Order 23 Rule 1(3) CPC to withdraw the present suit with permission to file the fresh suit on the same subject matter. In view of no objection of ld. defendants counsel as endorsed on said application, the same is allowed. Accordingly, suit of the plaintiff is dismissed as withdrawn with liberty to file fresh suit on the same cause of action. File after due completion, be consigned to Record Room."

5. As observed above, the petitioner had withdrawn the suit by filing the application for withdrawal of the same with liberty to file a fresh suit on the same subject matter and no permission was sought to file a writ petition.

6. It is in this background that the question of maintainability of the writ petition has been raised by the respondents.

7. It is vehemently argued by Ms.Jyotsna Rewal Dua, Senior Advocate assisted by Ms.Charu Bhatnagar, Advocate, for respondent No.2 that the filing of the application that too without any leave of the Court is a gross abuse of process of law and infact amounts to bench hunting. Even otherwise, the petitioner having chosen to withdraw the civil suit with a specific prayer for filing a fresh civil suit on the same subject matter and on the same cause of action is estopped from filing the instant writ petition.

8. On the other hand, Shri Bimal Gupta, Senior Advocate assisted by Shri Vineet Vashistha, Advocate would vehemently argue that once the suit had been withdrawn, the petitioner was entitled to avail of such remedies as were available to her under the law and

merely because she had been granted a liberty to file a fresh suit on the same cause of action and on the same subject matter would not preclude her from filing the instant writ petition as it is not a case where the respondents have been taken by surprise or are being vexed twice for the same subject matter.

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

9. Order 23 Rule 1 of CPC reads thus:-

> *"[**1.Withdrawal of suit or abandonment of part of claim.**- (1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim.*
>
> *PROVIDED that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the court.*
>
> *(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.*
>
> *(3) Where the court is satisfied,—*
>
> *a) that a suit must fail by reason of some formal defect, or*
>
> *(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim,*
>
> *it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim.*
>
> *(4) Where the plaintiff,—*
>
> *(a) abandons any suit or part of claim under sub-rule (1), or*
>
> *(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),*
>
> *he shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.*
>
> *(5) Nothing in this rule shall be deemed to authorise the court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.]"*

10. The principle underlying the provisions for withdrawal and abandonment is that the law confers upon a man no rights or benefits which he does not desire-*invito-beneficium-non-datur* though based on public policy, it is distinct from *resjudicata.*

11. Evidently, the petitioner had withdrawn the suit with liberty to file a fresh suit on the same subject matter and on the same cause of action and it is, thus, clear that this is not a case of abandonment or giving up of a claim by the petitioner. Therefore, the only question which is required to be considered is whether after having obtained leave and granted by the Court for filing a civil suit, the instant petition is maintainable? To my mind, the nomenclature of the proceedings for which liberty has been granted or obtained or sought for is neither final nor conclusive and even otherwise is not decisive, particularly, in the background that this is not a case of abandonment of claim. It would be for the Court or Authority in which subsequent proceedings are initiated pursuant to the liberty granted by the Court to see and adjudicate as to whether the subsequent proceedings before it are legally maintainable. The petitioner cannot be

bogged down to her statement and compelled to file a suit even though there may be equally efficacious or alternate remedies available to her. It is not a case where the withdrawal is malafide or for bench hunting purposes. Even otherwise, proceedings in a suit are essentially different from the proceedings initiated while invoking the extraordinary jurisdiction of the Court under writ jurisdiction of the Court. Therefore, the withdrawal of the suit with liberty to file the same afresh is no bar to resort to the extraordinary remedy of writ, more particularly, when the respondents have not been able to point out any prejudice having been caused to them.

12. Therefore, in such circumstances, it cannot be held that the writ petition would not be maintainable merely because petitioner had only sought the relief for filing civil suit on the same subject matter and on the same cause of action. The opposite party cannot be said to have been vexed twice for the same and even otherwise no prejudice whatsoever has been caused, much less serious prejudice can be said to have been caused to the respondents by filing of the writ petition instead of civil suit.

13. Having said so, the writ petition is held to be maintainable. The question is answered accordingly.

14. List the case for final hearing on **27.11.2017.**

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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

Ramesh Kumar & others .....Respondents.

Cr. Appeal No. 557 of 2012
Reserved on: 05.10.2017
Decided on: 03.11.2017

N.D.P.S. Act, 1985- Section 20 and 29- Accused acquitted by the Trial Court for the aforesaid offences- on appraisal of evidence acquittal upheld- **Held-** that prosecution failed to prove the exclusive and conscious possession of the contraband and reiterating the settled proposition of law that where two views are possible, Appellate Court should not reverse the judgment of acquittal merely because another view is possible- powers of the Appellate Court while dealing with the appeal against the order of acquittal reiterated. (Para-25 to 28)

Cases referred:

State of Punjab vs. Gurnam Kaur & others, (2009) 11 SCC 225
Deep vs. State of H.P. 2016(1) Criminal Court Cases 625 (H.P.)
State of Himachal Pradesh vs. Hottam Ram, 2017(1) Criminal Court Cases 220 (H.P.)
State of Himachal Pradesh vs. Som Nath @ Babi & another, 2017(2) Criminal Court Cases 848 (H.P.)
Bhumika vs. State of Himachal Pradesh, 2012 (3) Shimla Law Cases 1395.
K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258,
T.Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401
Chandrappa vs. State of Karnataka, (2007) 4 SCC 415

For the appellant: Mr. V.S. Chauhan, Additional Advocate General with Mr. J.S. Guleria, Assistant Advocate General.

For respondents No. 1&2: Mr. Bhupinder Ahuja, Advocate.

For respondent No. 3: Mr. Vikas Chauhan, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal has been preferred by the appellant/State (hereinafter referred to as "the appellant") laying challenge to judgment, dated 23.08.2012 passed by learned Sessions Judge, Kullu, District Kullu, H.P., in Sessions Trial No. 12 of 2011, whereby the accused/respondents (hereinafter referred to as "the accused persons") were acquitted for the offence punishable under Section 20 read with Section 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as "the ND&PS Act").

2. The factual matrix, as per the prosecution story, may tersely be summarized as under:

On 04.10.2010, during midnight at 12:30 a.m., police personnel, in their official vehicle, proceeded for laying *nakka* towards Bahnu Pul and to this effect an entry was made in daily diary register. *Nakka* at Bahnu Pul was laid and at about 02:00 a.m. an Alto car, having registration No. HP01K-2458, was spotted, which was signalled to stop. Three persons were sitting in the vehicle, who were overpowered when they tried to flee. The vehicle was being driven by accused Daler Singh, accused Ramesh Kumar was sitting on front passenger seat and accused Tej Singh was sitting in rear seat. As the place, where the accused persons were apprehended, was secluded and it was late night hours, no independent witness was available. Therefore, Investigating Officer associated ASI Rajiv and Head Constable Manohar Lal as witnesses. Firstly, Investigating Officer gave his personal search to accused persons and nothing incriminating was found. Thereafter, vehicle was searched and one polythene packet, containing *charas* in the shape of sticks, was recovered from dashboard of the vehicle. The recovered contraband was weighed on electronic scale and found to be 435 grams. The contraband was sealed in a cloth parcel, sealed at six places. NCB form, in triplicate, was filled in and facsimile seal was taken on cloth pieces. One facsimile seal was handed over to ASI Rajiv Kumar. The recovered contraband and Alto car, without its documents, were taken into possession. Subsequently, *rukka* was prepared and sent, through ASI Rajiv Kumar, to Police Station, Manali, whereupon FIR was registered by Inspector Om Parkash, S.H.O. Police Station, Manali, and the file was sent to Investigating Officer. Spot map was prepared and statements of the witnesses were recorded. The accused persons were arrested and brought to Police Station Manali. Inspector, Om Parkash resealed the case property and filled the relevant columns of NCB form. Facsimile seal was put on NCB forms. Case property alongwith NCB forms and sample seals was deposited with MHC, Police Station, Manali, and the same was entered by MHC at Sr. No. 644 of the *Malkhana* register. On the same day, MHC, Sher Singh, handed over the case property, viz., a parcel sealed with seals 'T' and 'S' alongwith NCB forms, in triplicate, copies of seizure memo and FIR to HHC Gautam Chand, for being depositing in Forensic Science Laboratory, Junga. HHC Gautam Chand after depositing the same at FSL, Junga, returned the RC having receipt to MHC. Special report was produced before Deputy Superintendent of Police, Manali, who, after endorsing it, returned the same to HHC Sher Singh. Report of chemical analysis was obtained, which revealed the recovered material to be extract of cannabis, so report under Section 173 Cr.P.C. was prepared and presented in the Court.

3. The prosecution, in order to prove its case, examined as many as eight witnesses. Statements of the accused persons were recorded under Section 313 Cr.P.C., wherein they pleaded not guilty and claimed to be tried. The accused persons took the stand that no recovery of *charas* was effected from them. Accused Daler Singh pleaded that accused Ramesh Kumar and Raj Singh hired his taxi from Raison to Manali on 03.10.2010, at 11:30 a.m. and he examined one defence witness, whereas defence of accused Tej Singh and Ramesh Kumar is of total denial.

4. The learned Trial Court, vide impugned judgment dated 23.08.2012, acquitted the accused persons of the offence punishable under Section 20 read with Section 29 of the ND&PS Act, hence the present appeal.

5. The learned Additional Advocate General has argued that the prosecution has proved the guilt of the accused persons beyond the reasonable doubt, but the learned Trial Court without appreciating the evidence, which has come on record, to its true perspective, acquitted the accused persons. He has argued that the accused persons are required to be convicted after re-appreciating the evidence. Conversely, learned counsel appearing on behalf of respondents No. 1 and 2 has argued that the prosecution has failed to prove the recovery of contraband from the exclusive and conscious possession of respondents No. 1 and 2, therefore, no interference is required in the well reasoned judgment of learned Trial Court. Similarly, learned counsel appearing on behalf of respondent No. 3 has argued that there are material contradictions in the statements of the witnesses and the incriminating material has not been put to the accused persons under Section 313 Cr.P.C. He has argued that the polythene bag, in which *charas* was found wrapped, has not seen the light of the day. The accused persons have been rightly acquitted by the learned Trial Court, thus no interference in the judgment of the learned Trial Court is required. The learned counsel for respondent No. 3 has relied upon the following judicial pronouncements:

1. ***State of Punjab vs. Gurnam Kaur & others, (2009) 11 SCC 225;***
2. ***Deep vs. State of H.P. 2016(1) Criminal Court Cases 625 (H.P.);***
3. ***State of Himachal Pradesh vs. Hottam Ram, 2017(1) Criminal Court Cases 220 (H.P.);***
4. ***State of Himachal Pradesh vs. Som Nath @ Babi & another, 2017(2) Criminal Court Cases 848 (H.P.); and***
5. ***Bhumika vs. State of Himachal Pradesh, 2012 (3) Shimla Law Cases 1395.***

He has further argued that *rapats*, Ex. PW-2/A to Ex. PW-2/D have not been proved on record, as there is no certificate, as required under Section 65(a) and (b) of the Indian Evidence Act.

6. In rebuttal, the learned Additional Advocate General has argued that minor discrepancies and contradictions are not fatal to the prosecution case. He has further argued that documents have been duly proved as per the law. Lastly, he has argued that the appeal be allowed and the accused persons be convicted.

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

8. PW-1 Shri Kapil Sharma, Assistant Director and Assistant Chemical Examiner NDPS Division, State Forensic Science Laboratory, Junga, has deposed that a cloth parcel, Ex. P-1, having reference letter No. 6508/5A, alongwith Xerox copies of FIR, seizure memo, NCB form, in triplicate, and sample seals of 'S' and 'T' was received through HHC Gautam Chand No. 246, vide RC No. 200/10, dated 05.10.2010. As per this witness, sealed parcel was bearing six seals having impression 'S' and three seals having impression 'T'. He has further deposed that seals were found intact and tallied with specimen seals of 'S' and 'T', as sent by the forwarding authority and the seals impressions impressed on NCB-1 form. On weighment, the recovered material was found 432.0 grams and on chemical examination it was found to be sample of *charas* and quantity of resin was found 30.42% w/w. He has issued report, Ex. PW-1/A, which bears his seal and signatures. This witness, in his cross-examination, has deposed that in the present case he only confined himself for determination of cystolithic hairs and his primary focus was only to determine the cystolithic hairs. He has further deposed that by seeing the cystolithic hair, it cannot be said whether sample was of *charas* or not. Cystolithic hairs do not contribute in resin production. As per this witness, it is correct that he did not mention RF value in his report. He also did not mention in his report the real contents which were found after opening

the sealed cloth parcel. He did not mention about polythene bag and only mentioned about polythene wrappers in which the *charas* was enwrapped.

9. PW-2, Lady Constable Harsh Lata, testified about the Daily Diary Reports, Ex. PW-2/A to Ex. PW-2/D. PW-3, Inspector Om Parkash, deposed that on 04.10.2010 at 4:20 p.m., ASI Rajiv Kumar (PW-6) brought *rukka,* Ex. PW-3/A, whereupon he registered FIR, Ex. PW-3/B, and made endorsement, Ex. PW-3/C, on the *rukka.* He has further deposed that on the same day, at 7:00 a.m., SI Om Parkash (PW-3) produced before him case property, viz., parcel, Ex. P-1, which was stated to have contained 435 grams of *charas* and the same was sealed with six seals having impression 'S' alongwith NCB forms, filled in triplicate, sample seal and the accused persons. As per this witness, he resealed parcel Ex. P-1 with three seals having impression of 'T' and drew sample seal 'T' on cloth pieces and also filled relevant columns of NCB form. Sample seal is Ex. PW-3/D and NCB form is Ex. PW-1/B. He has further deposed that thereafter the case property alognwtih NCB form and sample seals was deposited with MHC. After the receipt of FSL report, Ex. PW-1/A, and conclusion of investigation he prepared the *challan* and presented the same in the Court.

10. PW-4, HHC Sher Singh, Reader to Deputy Superintendent of Police, Manali, deposed that on 04.10.2010 Shri Aashish Sharma, Deputy Superintendent of Police handed over to him special report, Ex. PW-4/A, after making his endorsement, Ex. PW-4/B, thereon. Special report was entered in the concerned register and abstract whereof is Ex. PW-4/C. This witness, in his cross-examination, has deposed that Deputy Superintendent of Police did not put his signature in the register against the entry. In Ex. PW-4/C (Special Report), against column No. 3, the date has been mentioned as 4.1.10, self stated that inadvertently '10' has been mentioned as '1' and 'zero' could not be added and '10' has been mentioned in other columns.

11. PW-5, MHC Sher Singh, deposed that on 04.10.2010 SI Om Parkash (PW-3) deposited with him a parcel, Ex. P-1, which was sealed with six seals of 'S' and three seals of 'T' and the same was stated to have contained 435 grams of *charas* wrapped in a polythene. As per this witness, the charas alongwith sample seals 'S' and 'T' and NCB form, in triplicate, was also handed over to him. He entered the case property in *malkhana* register at Sr. No. 644 and abstract whereof is Ex. PW-5/A. As per this witness, on the same day, parcel, Ex. P-1, vide RC No. 200/10 (Ex. PW-5/B) alongwith sample seals, NCB forms (in triplicate), copies of FIR and seizure memo, was handed over to HHC Gautam Chand (PW-7) for being deposited in FSL, Junga. He also filled column No. 12 of NCB form, one of which is Ex. PW-1/B. As per this witness, HHC Gautam Chand on his return handed over to him receipt, Ex. PW-5/C. Under his custody the case property remained intact. This witness, in his cross-examination, has deposed that Police Station, Manali, did not have government electronic weighing scale till 01.01.2011.

12. PW-6, ASI Rajeev Kumar, deposed that on 04.10.2010, at about 12:30 a.m. he alongwith SI Om Chand, ASI Lal Singh and HC Manohar Lal was on patrol duty and they laid a *nakka* at Bahnu bridge. At about 02:00 p.m. they noticed an Alto car coming from Kalath side and the same was signalled to be stopped. As per this witness, the occupants of the vehicle, after the vehicle was stopped, tried to flee and they overpowered them. The vehicle was bearing registration No. HP-01K-2458. The accused persons disclosed their names as Daler Singh, Ramesh and Tej Singh. He has further deposed that, as the place was secluded and it was mid night, no independent witnesses could be associated, therefore, he and HC Manohar Lal were made as witnesses. In their presence the vehicle was searched and a polythene packet was recovered, which was in the dashboard of the vehicle. On opening the said polythene it contained *charas* and the same was weighed with electronic weighing scale and it was found 435 grams. The recovered contraband was sealed in a cloth parcel with six seals having impression 'S' and NCB-1 form, in triplicate, was filled in on the spot. As per this witness, sample seal was separately drawn on pieces of cloth and one of which is Ex. PW-6/A, which bears his signatures. Parcel, Ex. P-1, was taken into possession vide seizure memo, Ex. PW-6/B, which bears his and the signatures of other witnesses. Seal after its use was handed over to him. The vehicle was seized, but without its documents, as the accused did not have documents of the vehicle. *Rukka,*

Ex. PW-3/A, was prepared by SI Om Chand (PW-8) and the same was handed over to him, which he took to Police Station where he handed over the same to Inspector Om Parkash (PW-3). On the basis of *rukka,* Ex. PW-3/A, FIR, Ex. PW-3/B was registered and Inspector Om Parkash also made an endorsement on the *rukka,* which he delivered to the Investigating Officer. He and HC Manohar Lal signed the arrest memos of the accused persons. This witness has further deposed that prior to conducting the search of the vehicle, Investigating Officer gave his personal search to the accused persons and to this effect memo, Ex. PW-6/F, was prepared. This witness, in his cross-examination, has deposed that he could not bring seal 'S', as the same got misplaced after his transfer from Manali and qua misplacement he neither got recorded any *rapat* in the police station nor reported the matter to his superiors. He has further deposed that the proceedings were conducted by the police while sitting in the vehicle and he was sitting in the rear seat. He prepared memo, Ex. PW-6/B. However, he could not state as to who has scribed Ex. PW-6/C to Ex. PW-6/E, i.e., arrest memos. As per this witness, statement of Manohar Lal was got recorded by him, however, he could not tell that who has recorded his statement. He has deposed that words printed on Ex. P-2, i.e. polythene, did not find mention in the memo. He feigned ignorance that the passengers have hired the vehicle in question for going from Raison to Manali in presence of one Sham Lal.

13. PW-7, HHC Gautam Chand, was handed over parcel, Ex. P-1, by MHC Sher Singh (PW-5), which was sealed with six seals having impression 'S' and resealed with three seals having impression 'T'. As per this witness, alongwith the parcel, NCB form, in triplicate, copy of FIR, samples of seals 'S' and 'T', documents etc. was handed over to him for being deposited in FSL, Junga, which he deposited and receipt and RC qua deposit was handed over to MHC Sher Singh. He has further deposed that under his custody the case property remained intact.

14. PW-8, Inspector Om Chand, reiterated the prosecution story qua recovery of *charas* from the accused persons. He has further deposed that as it was night hours and the place was also secluded, so he alongwith ASI Rajeev and HC Manohar Lal joined as witnesses and in their presence vehicle was searched. During the search, a polythene packet was recovered from the dashboard of the vehicle. He prepared special report, Ex. PW-4/A, which he handed over to Dy.S.P. This witness, in his cross-examination, has deposed that there was frequent traffic on the road and they stopped 8-10 vehicles for checking. As per this witness, after the arrest of the accused persons no other vehicle was stopped. He did not depute any police official for bringing independent witnesses, as it was odd hours. He denied the suggestion that accused Ramesh and Tej Singh protested that the contraband did not belong to them. The weighing scale was electronic and the same was government property. He has denied that Police Station, Manali, did not have electronic weighing scale on 04.10.2010. He has denied that police personnel of Manali usually falsely implicate persons during night hours and spot is shown as Bahnu bridge in most of the cases. He prepared documents, Ex. PW-6/C to Ex. PW-6/E, and recorded the statement of Rajiv Kumar. As per this witness, statement of Manohar Lal was written by him under his instructions. He has further deposed that Hotel Manali Resorts is at a distance of approximately 400 meters from the spot. He did not click any photographs despite having camera in his I.O. kit. The *charas* was kept in the dashboard in a chamber. He could not say that in presence of one Sham Lal of Raison the taxi was hired by accused Tej Singh and Ramesh.

15. The only defence witness, i.e., DW-1, Sri Sham Lal, examined by the accused persons deposed that he knew the accused persons, as they belong to Raison. As per this witness, accused Daler Singh is a taxi driver. On 03.10.2010, at about 11:30 p.m. accused Ramesh Kumar and Tej Singh made an enquiry for hiring a vehicle. Initially accused Daler Singh refused, but on persistent request of accused Ramesh Kumar and Tej Singh he agreed and the taxi fare was settled as Rs.600/-.

16. This is the entire evidence led by the parties, which now needs to be examined on the touchstone of its veracity and credibility. PW-5, MHC Sher Singh, specifically admitted in his cross-examination that electronic weighing scale was not available in Police Station, Manali upto 01.01.2011, but PW-8, Inspector Om Chand, deposed that he weighed the recovered *charas* with

the electronic weighing machine, which was issued by the government and was in the Investigating Officer's kit. In view of conflicting statements of PW-5 and PW-8 the weighment of the recovered *charas* and what was its exact quantum becomes highly doubtful.

17. The prosecution, through the statements of PW-6, ASI Rajiv Kumar, and PW-8, I.O. Inspector Om Chand, has tried to prove search, recovery and seizure of *charas* from the conscious and exclusive possession of the accused persons. As per these two witnesses on 04.10.2010 they laid a *nakka* at Bhanu Pul and around 02:00 a.m. they spotted an Alto car coming from Kalath side, which was stopped. These witnesses have further deposed that the occupants of the vehicle were trying to escape, but they were apprehended. The vehicle was having registration No. HP-01K-2458, which was being driven by accused Diler Singh, accused Ramesh was sitting in front passenger seat and accused Tej Singh was sitting in rear seat. The place was secluded, as such, independent witnesses were not available, therefore, PW-6, ASI Rajiv Kumar and HC Manohar Lal were associated as witnesses. The Investigating Officer gave his personal search to the accused persons and to this effect memo, Ex. PW-6/F, was prepared. The vehicle was searched and a polythene packet, Ex. P-2, containing *charas,* which was in the shape of sticks, was recovered. The recovered contraband, on weighment, was found 435 grams. Both these witnesses also testified proceedings qua seizure of the case property etc..

18. The prosecution evidence demonstrates that the recovered contraband was weighed with government electronic weighing machine, but it has come on record that the same was not available in Police Station, Manali, on that day. It has further come in the prosecution evidence that seal was handed over to ASI Rajiv Kumar (PW-6) and the alleged *charas* was recovered from the dashboard of the vehicle.

19. PW-3, Inspector Om Parkash, while appearing in the witness-box has deposed that *rukka,* Ex. PW-3/A, was produced before him by ASI Rajiv Kumar (PW-6), whereupon he registered FIR, Ex. PW-3/B, and on the same day at about 07:00 a.m. the case property was produced before him, which was stated to be 435 grams sealed with six seals having impression 'S'. As per this witness, he resealed the case property and deposited the same in the *malkhana* with MHC, after filling the left out columns of the NCB form. At the same time, PW-6, ASI Rajiv Kumar, deposed that he lost the seal, which was entrusted to him, as the same was misplaced by him. He has further deposed that the Investigating Officer did not direct him to call the independent witnesses. So the I.O. did not try to associate independent witnesses. In the case in hand no independent witness was associated and the statements of available official witnesses become highly doubtful, as there was no government electronic scale with the I.O. on that day. Non-production of seal is one of the material consideration which goes to the root of the prosecution story. The seal was not handed over to a third person, but to a police official that too of the rank of ASI.

20. The learned counsel for accused No. 1 and 2 has argued that as per the prosecution story the *charas* was recovered from the dashboard of the vehicle, which was in the exclusive knowledge of accused No. 3, as such no case is made out against accused No. 1 and 2. At the same point of time, the learned counsel for accused No. 3 has argued that nothing was recovered and, in fact, he was the driver of the vehicle and his conscious possession has not been established. This court finds that in the present case, the prosecution has failed to prove the conscious possession of any of the accused persons. It has come in the evidence that a polythene bag was recovered, but PW-1, Shri Kapil Sharma, Assistant Director and Assistant Chemical Examiner, did not find any polythene bag.

21. It has been held as under by this Hon'ble High Court in ***Bhumika vs. State of Himachal Pradesh, 2012(3) Shimla Law Cases 1395:***

> ***"15. During the hearing of the case in this Court, the case property was sought to be perused, as such it was ordered to be produced on 4.7.2012. The said parcel contained three seals of District and Sessions Judge, 6 sealsof FSL, 4 seals of "A" and 4 seals of "T" and 4 seals were not***

readable, but when it ws produced in the statement of PW-2 it was having 'six' seals of FSL as against 'five' seals as observed in the statement of PW-5. Therefore, against the aforesaid background Head Constable Chaman Lal to whom the seal was entrusted was required to be examined in order to rule out the possibility of tampering with the parcel and in the absence of the bag which was not found in the parcel for examination creates a reasonable doubt on the probity of the prosecution case and the tampering of the said parcel cannot be overruled. Thus the specific defence taken by the accused assumes importance and stands probablised.

16. Therefore, for the aforesaid reasons, the accused deserves to be acquitted by giving her the benefit of reasonable doubt. Accordingly, the appeal is allowed and the impugned judgment of conviction and sentence is set aside."

In view of the available material coupled with the law, as laid down in the judgment (supra), the prosecution case becomes doubtful.

22. It has been held by this Hon'ble High Court in ***State of Himachal Pradesh vs. Hottam Ram, 2017(1) Criminal court Cases 220 (H.P.) (DB),*** that discrepancies, inconsistencies and contradictions in the statements of PWs creates a serious doubt as to whether accused was actually apprehended by police in the mode and manner as propounded by prosecution or whether *charas* was actually recovered from exclusive and conscious possession of accused. The apt paras of the judgment (supra) is extracted hereunder for ready reference:

"23. Besides this, there are other major discrepancies in the statements of PW-8 and PW-9. According to PW-8 Constable Hira Lal, he reached the spot in a private vehicle and thereafter, he scribed the statement Ext. DB under 19 Section 161 Cr.P.C. and he has also stated that he was a witness to the arrest Memo. The factum of alteration in the time of arrest in the arrest Memo has been admitted by the Investigating Officer PW-9, who stated that Hira Lal in fact had met the police about 1 KM away from the spot. This testimony of his also weakens the case of the prosecution because according to PW-8, he had scribed his statement Ext. DB at the spot and the accused was also arrested at the spot. PW-8 in his statement has also deposed that the Charas which was recovered from the accused was in the shape of pancake and rectangular. On the other hand, PW-9 in his statement has deposed that the Charas which was recovered from the accused was in the shape of pancake and stick shape. A perusal of NCB form demonstrates that the recovered Charas was in the shape of Chapati. All these discrepancies, inconsistencies and contradictions in the statements of the prosecution witnesses creates a serious doubt as to whether the accused was actually apprehended by the police in the mode and manner, as has been putforth by the prosecution and whether the Charas was actually recovered from the exclusive and conscious possession of the accused as prosecution wants this Court to believe.

24. A perusal of the judgment passed by learned trial Court demonstrates that all these aspects of the matter have been gone into in detail by learned trial Court and thereafter, learned trial Court has come to the conclusion that the prosecution was not able to prove its case against the accused beyond reasonable doubt. It was held by learned trial Court that the contradictions in the case of the prosecution led to two views including a view which is in favour of the accused. On these basis it was held by learned trial Court that when two views are possible then the view which favours the accused has to be taken. On these basis, the accused was acquitted by learned trial Court.

> ***25. In our considered view, the findings so returned by learned trial Court are well founded and are borne out from the appreciation of the material placed on record by the prosecution. The evidence which has been produced on record by the prosecution both ocular as well as documentary does not prove beyond reasonable doubt that the accused in fact was apprehended by the police party on 04.07.2010 at village Saran in the mode and manner in which the prosecution wants this Court to believe, nor the prosecution has been able to establish beyond reasonable doubt that 21 1Kg. 500 grams Charas was recovered from the exclusive and conscious possession of the accused beyond reasonable doubt. Therefore, while upholding the findings returned by learned trial Court, we dismiss the present appeal being devoid of any merit. Bail bonds, if any, furnished by the accused are discharged."***

In the present case also, there are discrepancies, inconsistencies and contradictions in the statements of official prosecution witnesses and the benefit of the same goes to the accused persons. Thus, the judgment (supra) is fully applicable to the facts of the present case.

23. In ***Deep vs. State of H.P., 2016(1) Criminal Court Cases 625 (H.P.) (DB),*** this Hon'ble High Court has held that the purpose of joining independent witnesses at the time of arrest, search and sealing process is to inspire confidence that all codal formalities were completed on the spot at the time of arrest, and sealing process, in the absence of same no reliance can be placed on the search and seizure. Relevant paras of the judgment (supra) are reproduced hereunder:

> ***"25. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt for the commission of offence under Section 20 of the N.D & P.S., Act, since the mandatory provisions have not been complied with and the manner in which the case property was taken out and re-deposited, coupled with the fact that no independent witnesses, though available were associated.***
>
> ***26. Accordingly, in view of the analysis and discussion made hereinabove, the appeals are allowed. Judgment of conviction and sentence dated 4/5.1.2011, rendered by the learned P.O. Fast Track Court, Mandi, H.P., in Sessions Trial No. 16 of 2009, is set aside. Accused are acquitted of the charges framed against them by giving them benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to them. Since the accused are in jail, they be released forthwith, if not required in any other case."***

The judgment (supra) is fully applicable to the facts of the present case.

24. The Hon'ble Supreme Court of India in ***State of Punjab vs. Gurnam Kaur and others, (2009) 11 SCC 225,*** has held that it is for the Investigating Officer to prove as to where the contraband had been kept not the respondents. It has been further held that reasons why independent witnesses could not be found and examined have to be explained. Relevant paras of the judgment (supra) are extracted hereunder:

> ***"13. Respondent Gurnam Kaur admittedly is an old lady. Respondent Nos. 2 and 3 are her daughters-in-law. Curiously all of them were found sitting on the same bed beneath whereto the contraband had allegedly been kept. That by itself does not establish that all of them were in conscious possession of the narcotics. They were not even asked any question in regard thereto. Prior to lodging of the first information report, the respondents did not point out the place where the narcotics were found kept. How the raiding party found the same has not been disclosed. The ladies in natural course were in their house. No explanation has been***

furnished, nor the statement of the respondent was recorded. The investigating officer DSP Baldev Singh PW3 was to prove as to where contraband had been kept not the respondents.

14. If by a reason of statements made by an accused some facts have been discovered, the same would be admissible against the person who had made the statement in terms of Section 27 of the Indian Evidence Act. Prosecution has not examined any independent witness. Why independent witnesses could not be found has not been explained.

15. ASI Rajinder Kaur who is said to have been present has not been examined. Who conducted the personal search of the ladies? It is not the case of the prosecution that she had searched the ladies. Sub-section 4 of Section 50 of the Act postulates that personal search of the ladies must be conducted by a lady police officer. Curiously PW8 in his evidence categorically stated that there was no lady constable or lady officer posted at the police station, Harike. If that be so why participation by ASI Rajinder Kaur was introduced is beyond anybody s comprehension. Personal search of the accused was conducted by DSP Baldev Singh which as indicated hereinbefore was violative of the provisions of Sub-section 4 of Section 50 of the Act.

16. It is a matter of great surprise that PW8 DSP Ashutosh, although was not informed by DSP Baldev Singh PW3, was present in the village. His presence in the village is highly doubtful. No explanation has been furnished as to why the first information report was lodged after 11 hours and why the mandatory provisions of Sub-section 2 of Section 42 of the Act had not been complied with.

... ...

18. For the reasons aforementioned we are of the opinion that no case has been made out for interference with the impugned judgment. The appeal is dismissed."

The judgment (supra) is also fully applicable to the facts of the present case.

25. The prosecution has further failed to prove that which of the accused was in exclusive and conscious possession of the contraband, in view of the contradictions in the statements of the official witnesses. The police personnel did not make any effort or took initiative to join independent witnesses and at the same point of time non-production of the seal in the Court as well as the fact that there are material contradictions with regard to the weighing scale, which as per the prosecution witness, was from the I.O. kit and it was electronic weighing scale, but as per the statement of PW-5, MHC Sher Singh, no government electronic weighing scale was available in Police Station, Manali, on that day. Thus, even after re-appreciating the evidence, which has come on record, we are unable to hold that the prosecution has proved the guilt of the accused beyond the shadow of reasonable doubt.

26. It has been held in ***K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258,*** that when two views are possible, appellate Court should not reverse the judgment of acquittal merely because the other view was possible. When judgment of trial Court was neither perverse, nor suffered from any legal infirmity or non consideration/mis-appreciation of evidence on record, reversal thereof by High Court was not justified.

27. 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.

28. 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."***

29. In view of the settled legal position, as aforesaid, and on the basis of material that has come on record, it is more than safe to hold that the prosecution has failed to prove the guilt of the accused persons and the findings of acquittal, as recorded by the learned Trial Court, needs no interference, as the same are the result of appreciating the evidence correctly and to its true perspective. Accordingly, the appeal, which sans merits, deserves dismissal and is accordingly dismissed.

30. In view of the above, the appeal, so also pending application(s), if any, stand(s) disposed of. Bail bonds are cancelled.

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

Cr. Revision No. 121 of 2006 a/w
Cr. Revision No. 142 of 2006
Reserved on: 31.10. 2017.
Date of decision: 06.11.2017

Cr. Revision No. 121 of 2006

Husan Singh ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Cr. Revision No. 142 of 2006

Ramesh Kumar ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Code of Criminal Procedure, 1973- Section 397 and 401- Revisional jurisdiction- Revisional Jurisdiction under Section 397 Cr.P.C. - extremely limited- the High Court to interfere in case it comes to a conclusion that there is a failure of justice and misuse of judicial mechanism or procedure. (Para-10 and 11)

Credibility of Witnesses- contradiction inconsistencies and improvements thereupon- effect- Omission amounting to contradiction creates serious doubt about the truthfulness of the witnesses- the magnitude of contradictions if high and going to the root of the prosecution case and strikes at its very foundation- on facts held contradiction fatal- Revision allowed.

(Para-13 to 17)

Cases referred:

Tehsildar Singh vs. State of UP, 1959 SC 1012

Pudhu Raj & other vs. State 2012 (11) SCC 196

Mahavir Singh vs. State of Madhya Pradesh, 2016 (10) SCC 220

For the Petitioner(s) Mr. D.N. Sharma, Advocate.

For the Respondent Mr. Neeraj K. Sharma, Dy. A.G. for the respondent.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Since common question of facts and law arise for consideration in both revision petitions, therefore, these were taken up together for consideration and are being disposed of by a common judgment.

2. The present revision petitions under Section 397 and 401 of the Code of Criminal Procedure (for short the 'Code') are directed against the judgment passed by the learned Additional Sessions Judge, Simaur District at Nahan, on 31-08-2006 in Criminal Appeal No. 10-N/10 of 2002 whereby he dismissed the appeal filed by the appellants (Petitioner(s) herein) and affirmed the judgment passed by the learned Sub Divisional Judicial Magistrate, Rajgarh, Camp at Sarahan, District Sirmaur on 11.06.2002 in Cr. Case No. 13/2 of 2001 whereby the accused were convicted and sentenced to undergo simple imprisonment of six months each and to pay a fine of Rs. 500/- each for commission of offence punishable under Section 457 IPC read with Section 34 IPC and further sentenced to undergo simple imprisonment for a period of six months each and to pay a fine of Rs. 500/- each for the offence punishable under Section 380 IPC read with Section 34 IPC.

3. The case of the prosecution is that FIR No. 9/01 (Ex.PW1/A) came to be registered on 22.01.2001 by the complainant Gulzari Lal (Ex.PW1) on the allegations that he was running a wholesale and retail Karyana shop at Saharan Bazar and had been noticing that there were certain pilferages in the stock. It was only when one Rajinder Kumar resident of Thakur Dwara apprised the complainant that the accused Husan Singh had sold packets of Biri "Sher Chhap" brand and packets of cigarettes to one Shri Vishal (Shopkeeper) and that the other accused Ramesh Kumar used to accompany and roam with the accused Husan Singh, that he lodged the aforesaid FIR.

4. On the basis of the FIR, statements of the witnesses were recorded and accordingly both the accused were challaned for the offences punishable under the aforesaid sections. Both the accused were put to charges to which they pleaded not guilty and preferred trial.

5. In order to prove its case prosecution examined as many as 12 witnesses and thereafter accused persons were examined under Section 313 of the Code wherein they denied the allegations against them, however, they did not lead any evidence in their defence.

6. The learned trial Court after appreciating the evidence on record vide judgment dated 11.06.2002 convicted and sentenced the accused for committing the offences as per details mentioned above.

7. Aggrieved by the judgment of conviction and sentence, the accused filed an appeal under Section 374 of Cr.P.C. before the learned Additional Sessions Judge, Sirmaur District at Nahan, which came to be dismissed and consequently the judgment rendered by the learned trial Magistrate was upheld, constraining the present petitioner(s) to file the instant appeal.

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

8. It is vehemently contended by Shri D.N. Sharma, learned Advocate that the story of the prosecution is full of contradictions, omissions, improvements and embellishments, which go to the root of the case and therefore the petitioner(s) deserves to be acquitted on this ground alone.

9. On the other hand Shri Neeraj K. Sharma, learned Deputy Advocate General states that the contradictions as being pointed out by the petitioner(s) are minor and trivial in nature which do not affect the case of the prosecution and do not make out a ground for the Court the reject the evidence in entirety. Thus, the findings so recorded by the learned Courts below should not be interfered with particularly while exercising revisional jurisdiction.

10. At the outset, it may be observed that the revisionary jurisdiction of this Court under Section 397 Cr.P.C. is extremely limited and this Court would only interfere in case the petitioners have been convicted and sentenced by examining the material placed on record with a view to ascertain that the judgments so rendered by the learned Courts below are not perverse and are based on the correct appreciation of evidence on record. This Court would definitely interfere in case it comes to the conclusion that there is a failure of justice and misuse of judicial mechanism or procedure or where the sentence awarded is not correct. After all, it is the salutary duty of this Court to prevent the abuse of justice or miscarriage of justice or/and correct irregularities, incorrectness committed by the inferior Criminal Court in its judicial process or illegality of sentence or order.

11. This Court has very limited revisionary jurisdiction as held by this Court in **Criminal Revision No. 50 of 2011, titled as Rajinder Singh vs. State of Himachal Pradesh**, decided on 13.9.2017, wherein the scope of criminal revision has been delineated in the following manner:-

> *"In **Amur Chand Agrawal vs. Shanti Bose and another, AIR 1973 SC 799,** the Hon'ble Supreme Court has held that the revisional jurisdiction should normally be exercised in exceptional cases when there is a glaring defect in the proceedings or there is a manifest error of point of law and consequently there has been a flagrant miscarriage of justice.*
>
> *In **State of Orissa vs. Nakula Sahu, AIR 1979, SC 663,** the Hon'ble Supreme Court after placing reliance upon a large number of its earlier judgments including **Akalu Aheer vs. Ramdeo Ram, AIR 1973, SC 2145**, held that the power, being discretionary, has to be exercised judiciously and not arbitrarily or lightly. The Court held that "judicial discretion, as has often been said, means a discretion which is informed by tradition methodolised by analogy and discipline by system".*
>
> *In **Pathumma and another vs. Muhammad, AIR 1986, SC 1436**, the Hon'ble Apex Court observed that High Court "committed an error in making a re-*

assessment of the evidence" as in its revisional jurisdiction it was "not justified in substituting its own view for that of the learned Magistrate on a question of fact".

*In **Bansi Lal and others vs. Laxman Singh, AIR 1986 SC 1721**, the legal position regarding scope of revisional jurisdiction was summed up by the Hon'ble Supreme Court in the following terms:*

> *"It is only in glaring cases of injustice resulting from some violation of fundamental principles of law by the trial court, that the High Court is empowered to set aside the order of the acquittal and direct a re-trial of the acquitted accused. From the very nature of this power it should be exercised sparingly and with great care and caution. The mere circumstance that a finding of fact recorded by the trial court may in the opinion of the High Court be wrong, will not justify the setting aside of the order of acquittal and directing a re-trial of the accused. Even in an appeal, the Appellate Court would not be justified in interfering with an acquittal merely because it was inclined to differ from the findings of fact reached by the trial Court on the appreciation of the evidence. The revisional power of the High Court is much more restricted in its scope."*

*In **Ramu @ Ram Kumar vs. Jagannath, AIR 1991, SC 26,** Hon'ble Supreme court cautioned the revisional Courts not to lightly exercise the revisional jurisdiction at the behest of a private complainant.*

*In **State of Karnataka vs. Appu Balu, AIR 1993, SC 1126 = II (1992) CCR 458 (SC),** the Hon'ble Supreme Court held that in exercise of the revisional powers, it is not permissible for the Court to re-appreciate the evidence.*

*In **Ramu alias Ram Kumar and others vs. Jagannath AIR 1994 SC 26** the Hon'ble Supreme Court held as under:*

> *"It is well settled that the revisional jurisdiction conferred on the High Court should not be lightly exercised particularly when it was invoked by a private complaint."*

*In **Kaptan Singh and others vs. State of M.P. and another, AIR 1997 SC 2485 = II (1997) CCR 109 (SC),** the Hon'ble Supreme Court considered a large number of its earlier judgments, particularly **Chinnaswami vs. State of Andhra Pradesh, AIR 1962 SC 1788 ; Mahendra Pratap vs. Sarju Singh, AIR 1968, SC 707; P.N. G. Raju vs. B.P. Appadu, AIR 1975, SC 1854 and Ayodhya vs. Ram Sumer Singh, AIR 1981 SC 1415** and held that revisional power can be exercised only when "there exists a manifest illegality in the order or there is a grave miscarriage of justice".*

*In **State of Kerala vs. Puttumana Illath Jathavedan Namboodiri (1999) 2 SCC 452,** the Hon'ble Supreme Court held as under:*

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

*In **State of A.P. vs. Rajagopala Rao (2000) 10 SCC 338,** the Hon'ble Supreme Court held as under:*

> *"The High Court in exercise of its revisional power has upset the concurrent findings of the Courts below without in any way considering the evidence on the record and without indicating as to in what manner the courts below had erred in coming to the conclusion which they had arrived at. The judgment of the High Court contains no reasons whatsoever which would indicate as to why the revision filed by the respondent was allowed. In a sense, it is a non-speaking judgment."*

12. Having set out the legal parameters for exercise of revisional jurisdiction, it cannot be denied that in case findings recorded by the learned Courts below are perverse then obviously this Court would be entitled to interfere with the findings so recorded.

13. Adverting to the plea of so-called contradictions, inconsistencies, embellishments and improvements in the prosecution case, it is a settled position of law that in all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and the other witnesses also make material improvements while deposing in the Court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The Court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

14. It is the duty of the Court to separate chaff from the husk and to dredge the truth from the pandemonium of statements. It is but natural for human beings to state variant statements due to time gap and if such statements go to defeat the core of the prosecution, then such contradictions are material and the Court has to be mindful of such statements. (Refer: ***Tehsildar Singh vs. State of UP, 1959 SC 1012; Pudhu Raj & other vs. State 2012 (11) SCC 196 and Mahavir Singh vs. State of Madhya Pradesh, 2016 (10) SCC 220***).

15. The case in hand is a fit case wherein there are material exaggeration and contradiction which inevitably raises doubt, which is reasonable in normal circumstances and keeping in view the substratum of the prosecution case, this Court cannot infer beyond reasonable doubt that it was the appellants who had caused the pilferage and was thus liable for the punishment as has been imposed by the learned Courts below.

16. It would be noticed that the very genesis of the case of the complaint is that complainant (PW1) came to know about the pilferage only when Rajinder Kumar (PW4) apprised him about the pilferage on 22.01.2001 and it was thereafter he lodged the FIR on 22.01.2001 itself. However, in case, the statement of PW4 is adverted to he has categorically stated that he gave information to complainant (PW1) only on 24.01.2001 and not earlier to that. Thus, this contradiction goes to the roots of the prosecution case and strikes at its very foundation.

17. That apart, it would be noticed that PW2 Bir Dutt stated that the statement of the accused under Section 27 of the Indian Evidence Act was recorded on 22.01.2001 and it was thereafter the recoveries were effected on 22.01.2001. Whereas, PW5 Subhash Garg is emphatic that the statements of the accused were recorded on 24.01.2001 and it was thereafter that the recoveries were effected on 24.01.2001. Even this contradiction in the statements as narrated above are of such magnitude that materially affect the trial and cannot be brushed aside as they hit the very foundation of the prosecution case.

18. Unfortunately, both the Courts below have not at all cared to make note of such contradictions and therefore this Court has no hesitation to conclude that the judgments so rendered by them are perverse and cannot, therefore, withstand judicial scrutiny.

19. In view of the above discussion, I find merit in these revision petitions and the same are allowed and the judgments of conviction and sentence passed by the learned trial Magistrate as also upheld by the learned Additional Sessions Judge are set aside. The petitioner(s) are acquitted from all the charges. Bail bonds, if any, furnished by the petitioner(s) are discharged.

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

Joginder Singh .....Appellant
Versus
Bhagat Ram & others .....Respondents

RSA No. 497 of 2005
Reserved on: 25.10.2017
Decided on: 06.11.2017

Regular Second Appeal- Permanent Prohibitory Injunction- Plaintiff filed a suit for permanent prohibitory injunction in respect of the suit land claiming exclusive ownership, purportedly on the basis of a Will- Defendants contesting the suit on the ground that plaintiff was not the sole owner of the suit land, but he was one of the coparcener alongwith defendants and was only entitled to 1/12th of the share in the suit land- the Learned Trial Court decreed the suit of the plaintiff, however, learned Appellate Court accepting the appeal – dismissed the suit of the plaintiff, hence the regular second appeal- **High Court held** that on the face of no Will or gift deed having been produced on record and the oral testimony also being shrouded in doubt- it has to be held that deceased died intestate and his inheritance had to devolve on all the legal heirs.

(Para-12 and 13)

Regular Second Appeal- Mutation pass without any basis- held to be inoperative - confers no right on the person- the rights of coparcener in ancestral property reiterated. (Para-14 and 15)

For the appellant Mr. T.S. Chauhan and Mr. Abhay Kaushal, Advocates.
For the respondents Mr. Rajnish K. Lal, Advocate, vice counsel for respondents No. 1, 2 and 3(a) to 3(d).
Respondent No. 4 *ex parte*.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present regular second appeal is maintained by the appellant, who was the plaintiff before the learned Trial Court (hereinafter to be called as "the plaintiff"), laying challenge to the judgment and decree, dated 21.06.2005, passed by learned District Judge, Bilaspur, H.P., in Civil Appeal No. 75 of 2002, whereby the judgment and decree, dated 25.05.2002, passed by the then Senior sub-Judge, Bilaspur, District Bilaspur, H.P., in case No. 101/1 of 1999, was set aside.

2. Briefly, the facts, which are necessary for determination and adjudication of the present appeal, are that the plaintiff has filed a suit against the respondents, who were the defendants before the learned Trial Court (hereinafter to the called as "the defendants") for permanent prohibitory injunction with regard to the land, measuring 2-6 bighas, comprising in khewat No. 43, khatauni No. 49, khasras No. 29, 70, 80, 170 and 292, situated at Village Sai Fardian, Pargana and Tehsil Sadar, District Bilaspur, H.P., as per Jamabandi for the year 1995-

96 (hereinafter to be called as "the suit land"). As per the plaintiff, the suit land is owned and possessed by him and the defendants have no right, title and interest over the same. The plaintiff has further alleged that on 18.06.1999, the defendants tried to cut trees from the suit land, in order to dispossess him from there and though he requested them not to interfere in the suit land, however they refused, hence he filed the suit for injunction against them.

3. The defendants, by filing written statement, denied the contents of the plaint. It has been further averred in the written statement that the plaintiff is not sole owner of the suit land, but he is one of the coparcener alongwith defendants No. 1, 3, Hiru, Naratu Ram, Keshav, Vinod Kumar, Jitender Kumar, Anil Kumar, Ashok Kumar, Ram Pal, Dwarka Devi, Ram Piari, Beasan Devi, Rattani Devi, Roshani Devi and Vidya Devi, who are also stated to be co-owners in the suit land. It is has been further stated that defendant No. 1, Bhagat Ram is managing the suit land as co-sharer being head of family and the plaintiff has only 1/12 share in the suit land, which he can get after partition of the land, thus the defendants prayed for dismissal of the suit on the ground that a co-sharer cannot restrain other co-sharers from exercising their rights over the joint property.

4. The learned Trial Court on 22.03.2000 framed the following issues for determination and adjudication:

> "1. Whether the plaintiff is owner in possession of suit land? OPP
>
> 6. Whether the plaintiff is entitled to the relief of permanent prohibitory injunction as prayed? OPP
>
> 7. Whether the suit land is joint Hindu and coparcenary property? OPD
>
> 8. Relief."

5. After deciding issues No. 1 and 2 in favour of the plaintiff and issue No. 3 in favour of the defendants, the learned Trial Court decreed the suit of the plaintiff. Subsequently, the plaintiff maintained an appeal before the learned first Appellate Court, which was allowed. Hence the present regular second appeal, which was admitted for hearing on the following substantial question of law:

> "1. Whether the first Appellate Court could not have accepted the appeal and dismissed the suit of the plaintiff-appellant which was for permanent prohibitory injunction simpliciter with the observation that the appellant-plaintiff had not produced and proved the Will under which he succeeded to the suit property?"

6. Mr. T.S. Chauhan, learned counsel for the appellant has argued that the latest revenue entries are in favour of the appellant-plaintiff and the learned first Appellate Court, after ignoring the latest revenue entries, to which the presumption of truth is attached, set aside the well reasoned judgment, passed by the learned Trial Court. On the other hand, Mr. Rajnish K. Lal, Advocate, vice counsel has argued that the plaintiff is claiming ownership on the basis of Will, however the said Will was never produced on record by the plaintiff. He has further argued that the entries, which have come in favour of the plaintiff, are without any valid order and no presumption of truth is attached to those entries, hence the present appeal deserved to be dismissed. In rebuttal, learned counsel for the appellant has argued that as the plaintiff is recorded as owner-in-possession of the suit land and he was only praying for injunction, the suit was rightly decreed by the learned trial Court, which findings are required to be upheld to meet the ends of justice and the findings recorded by the learned first Appellate Court, which are perverse, are required to be set aside.

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

8. The plaintiff in order to prove his case has examined himself as PW-1 and deposed that on 19.06.1999 when he was going to his field, the defendants forcibly cut grass and trees from his land. He has further deposed that his grandfather, Mansha Ram has executed the Will in his favour and after his death on 14.03.1995, the mutation has been attested in his

favour. In his cross-examination, he admitted that he has not got the probate of the Will. He has further admitted that earlier all the family members were living together. He has also admitted that the defendants used to cut the produce from the suit land.

9. PW-2, Sant Ram, has deposed that the plaintiff is owner-in-possession of the suit land and the defendants used to cut the produce, as well as grass and trees from the suit land. He has further deposed that on the day of occurrence he went there, being god brother of the plaintiff and saw that the defendants were abusing the plaintiff. In his cross-examination, he deposed that suit land is ancestral property, which Mansha Ram has inherited from his father. He has further deposed that all the sons and daughters of Mansha Ram were living jointly with him.

10. PW-3, Roop Lal, has deposed that on 18.06.1999, he was on his land, which is adjacent to the land of plaintiff and seen that the defendants were abusing the plaintiff and also throwing stones upon him. He has further deposed that the defendants had also cut two trees from the suit land and as the plaintiff was all alone he ran away from the spot. In his cross-examination, he deposed that the land in question has been gifted to the plaintiff by his grandfather, Mansha Ram on 18.06.1999, by way of registered deed. However, he feigned ignorance, as to which land has been exactly given to the plaintiff.

11. DW-1, Bhagat Ram, has deposed that suit land was owned by Mansha Ram, who acquired this land by way of succession from his father Tihru Ram. He has further deposed that he, his brothers, his sons and his nephews are all owners of the suit land and having possession over the same. He also stated that he has six sisters and his mother Gaurju Devi was alive when his father expired. He denied that the suit land has been mutated in the name of plaintiff. He also denied that they are not in possession of the suit land. In his cross-examination, he denied that after the death of his father on 14.03.1995, the suit land has been mutated in favour of the plaintiff. He denied that they had forcibly cut the grass and trees from the suit land.

12. The case of the plaintiff is that the land was gifted to him by his grandfather, Mansha Ram, however in this regard neither any Will was produced by the plaintiff, nor any probate was obtained. Further it has also come on record that the suit land is ancestral property and not the individual land of Mansha Ram. PW-3, in his examination-in-chief has specifically stated that the property in dispute was given to the plaintiff by Mansha Ram by way of registered gift deed, dated 18.06.1999, however he has also stated that Mansha Ram has 5 sons and 6 daughters. The statement of PW-3, appears to be contrary, as the plaintiff has deposed a different version. As per the plaintiff, Mansha Ram has expired on 14.03.1995, so it is difficult to believe as to how registered gift deed has been executed by him on 18.06.1999, after about 4 years of his death. The plaintiff has also not proved as to how mutation No. 332 of the property of Mansha Ram came to be sanctioned in his favour on 24.07.1995, when his 5 sons and 6 daughters were alive. The property of Mansha Ram would have been devolve upon the heirs either by way of survivorship or by way of inheritance.

13. Section 8 of Hindu Succession Act, 1956 specifically provides that the property of male Hindu dying intestate shall devolve according to the provisions of this Chapter. The general rules of succession in the case of males are as under:

> ***(a) Firstly, upon the heirs, being the relatives specified in class I of the Schedule;***
>
> ***(b) Secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;***
>
> ***(c) Thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and***
>
> ***(d) Lastly, if there is no agnate, then upon the cognates of the deceased.***

Since no Will, gift or sale deed has been placed on record, it can be said that the Hindu male, i.e. Mansha Ram died intestate and his inheritance shall devolve on his legal heirs.

14. As far as mutation is concerned, it is settled proposition of law that mutation without any basis is inoperative and does not confer any right. There is nothing on record which suggests that mutation was attested on the basis of Will, gift or sale deed, as none of these three documents were produced on record, thus mutation No. 332 appears to be illegal. The defendants, being co-sharers have every right, title or interest in the suit land to enjoy the joint property.

15. This Court in **Kewal Krishan & another vs. Amrit Lal** has enumerated the rights of co-parceners, which are as under:

> ***"(a) A co-owner/co- sharer has an interest/right in the whole property, i.e., in every inch of it.***
>
> ***(b) Possession of joint property by one co-owner/co sharer, is in the eye of law, possession of all even if all, except one are actually out of possession.***
>
> ***(c) A mere occupation of a larger portion or even of an entire joint property by one co-sharer/co-owner does not amount to ouster of the other, as the possession of one is deemed to be on behalf of all. This is subject to an exception when there is complete and conclusive ouster of a co-owner/co-sharer by another, but in order to negative the presumption of joint possession on behalf of all, on the ground of such ouster, the possession of a co-owner/co –sharer must not only be exclusive but also hostile to the knowledge of the other, i.e., when a co-owner openly asserts his own title and denies that of the other.***
>
> ***(d) Lapse of time does not extinguish the right of the co owner/co-sharer ,who has been out of possession of the joint property ,except in the event of abandonment.***
>
> ***(e) Every co-owner/co-sharer has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners /co-sharers.***
>
> ***(f) Where a co-owner/co-sharer is in possession of***
>
> ***separate parcels under an arrangement/consent by the other co-owners/co-sharer , it is not open to any co-sharer/co-owner to disturb the arrangement without the consent of others, except by way of partition.***
>
> ***(g) Whenever there is severance of title and the parties have a long possession on the parcels of joint land ,as far as possible, the partition is required to be made in a manner that party in occupation, as far as possible, be adjusted in that portion or part of that.***
>
> ***(h) Co-sharers/co-owners are expected to respect the right of others even when they are in settled possession on specific portion of the land in a manner that the easementary rights of the others are not obstructed.***
>
> ***(i) The co-sharers/co-owners are required to respect the sentiments of each other to maintain peace among themselves. This is not only a legal, but a moral duty as well, which is required to be follow ed by the co sharers/co-owners and should be recognized as a right while adjudicating the rights of the parties, as the ultimate goal of the administration of justice is to maintain peace in the society, especially among the co-sharers/co-owners.***
>
> ***(j) The eldest co-sharer/co-owner is duty bound to come forward and settle the dispute inter se any two or more co-sharers/co-owners after mediating. This is not only his duty as a co-sharer/co-owner being elder, but also his moral duty to spare some time, experience, mental faculties***

and the respect he command to mediate dispute(s) among the co sharers/co-owners in order to achieve peace. The Courts can also make use of such process by taking help from the elder co-sharer/co-owner by asking him to mediate the matter, so that the peace is achieved among the co-shares/co-owners and ultimately in the society."

16. In view of the above discussion, the findings of the learned first Appellate Court holding that in the absence of production of Will, on the basis of which the plaintiff is claiming exclusion of the defendants from the suit land and non production of any other documents, i.e. Will, as claimed, are as per law and after appreciating the record to its true perspective, so the question of law is answered accordingly.

17. The net result of the above discussion is that the instant appeal, sans merits, deserves dismissal and is accordingly dismissed. However, in view of peculiar facts and circumstances of the case, the parties are left to bear their own costs.

18. Pending miscellaneous application(s), if any, also stand(s) disposed of.

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

Ankush alias Shivam ....Petitioner.

Versus

State of Himachal Pradesh. ....Respondent.

Cr. MP(M) No. 1366 of 2017
Decided on: 7th November,2017

Code of Criminal Procedure, 1973- Section 439- Grant of Bail- Offence alleged to have been committed under Section 376 I.P.C.- accused alleged to have ravished the prosecutrix on the pretext of marrying her- accused in custody for more than two years- **Held-** cannot be kept behind bars for an unlimited period before being held guilty- bail granted. (Para-6)

For the petitioner: Mr. Ajay Sipahiya and Mr. Manoj Bagga, Advocates.
For the respondent: Mr. Rajat Chauhan, Law Officer.
ASI Nokh Ram, Police Station Sadar, Solan, H.P.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge *(oral).*

The present bail application has been maintained by the petitioner under Section 439 of the Code of Criminal Procedure seeking his release in case FIR No. 97 of 2016, dated 18.05.2016, under Section 376 of Indian Penal Code (hereinafter referred to as "IPC"), registered at Police Station Sadar, District Solan, H.P.

2. As per the petitioner, he is innocent and has been falsely implicated in the present case. He is neither in a position to tamper with the prosecution evidence nor in a position to flee from justice, so he may be released on bail.

3. Police report stands filed. As per the prosecution, on 18.05.2016, the prosecutrix, by moving a complaint to the police, alleged that in the year 2015 she used to work in Shoolni Packaging where the petitioner also used to work and they were friends. On 17th August, 2015, the petitioner took the prosecutrix to the room of his friend and he had sexual intercourse with her on the pretext of marrying her. Thereafter, the petitioner many times

sexually assaulted the prosecutrix on the pretext of marrying her. On 20th February, 2016, the petitioner took the prosecutrix to Anand Hotel and there also he sexually assaulted her. As per the prosecutrix, after winding up of Shoolni Packaging the petitioner went to Noida in search of work and they used to talk on phone, however, now the petitioner is refusing to marry her. On the basis of the complaint of the prosecutrix, police machinery was set into motion and an FIR was registered against the petitioner. Spot map was prepared and the statements of the witnesses were recorded. Statement of the prosecutrix was also recorded under Section 164 Cr.P.C. and the petitioner was arrested on 21.05.2016. The prosecutrix and the petitioner were medically examined. Report from State Forensic Science Laboratory was also obtained and the final report of doctor is that the possibility of sexual abuse can not be ruled out. During the course of investigation, it was also unearthed that the prosecutrix became pregnant and she also attempted suicide. As per the prosecution, the *challan* stands presented in the Court and next date of hearing is 21.12.2017. Lastly, it has been prayed that the bail application of the petitioner may be dismissed.

4. Heard. The learned counsel for the petitioner has argued that the petitioner is innocent and he is neither in a position to tamper with the prosecution evidence nor in a position to flee from justice. He has further argued that the prosecutrix was four years elder to the petitioner. The petitioner was just 19 years of age when the offence is alleged to have committed. As per the learned counsel for the petitioner, the only case is that the petitioner was seen by the prosecutrix chatting with another girl on facebook and this is the reason that she lodged the FIR against the petitioner. He has stated that the petitioner is totally innocent and he may be released on bail, as he has already behind the bars since long. He has further argued that the petitioner is not in a position to tamper with the prosecution evidence, as sufficient evidence, including the prosecutrix, stands already examined. Conversely, Law Officer, appearing for the respondent/State has argued that taking into consideration the seriousness of the case, the bail application, so maintained by the petitioner, may be dismissed.

5. I have gone through the rival contentions of the parties and the police report in detail.

6. At this stage taking into consideration the facts that the petitioner is behind the bars for the last more than two years, he is a young man going through the agony of remaining behind the bars, he is not in a position to tamper with the prosecution evidence and also not in a position to flee from justice, this Court finds that the petitioner cannot be kept behind the bars for an unlimited period before he being adjudicated guilty. Therefore, keeping in view the material, which has come on record, and without discussing the same at this stage, this Court finds that the present is a fit case where the judicial discretion to admit the petitioner on bail is required to be exercised in his favour. Accordingly, the present petition is allowed and it is ordered that the petitioner, who has been arrested by the police of Police Station Sadar, Solan, District Solan, H.P., in connection with FIR No. 97 of 2016, dated 18.05.2016, under Section 376 IPC, Police Station, Sadar, District Solan, H.P., he shall be released on bail forthwith, subject to his furnishing personal bond in the sum of Rs.25,000/- (rupees twenty five thousand) with one surety in the like amount to the satisfaction of learned Trial Court. The bail is granted subject to the following conditions:

(i) That the petitioner will appear before the learned Trial Court as and when required.

(ii) That the petitioner will not leave India without prior permission of the Court.

(iii) That the petitioner will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Investigating Officer or Court.

7. In view of the above, the petition is disposed of.

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

Shri Bhupinder Singh (since deceased) through LRs .....Appellants
Versus
Bholu & others .....Respondents

RSA No. 429 of 2003
Reserved on : 31.10.2017
Decided on : 07.11.2017

Regular Second Appeal- Whether a gift deed can be made in respect of coparcenery/ancestral property- held -that since the suit land was coparcenery property and the land having not been divided a gift deed was not sustainable in the eyes of law. (Para-25 to 27)

Regular Second Appeal- Court Fees Act- The suit land assessed to the land revenue and nothing on record that any structure was existing on the suit land and the value of the land has been increased- **Held-** that it is well settled principle of law that if land is assessed to land revenue, the Court fee for suit land for declaration is Rs.19. (Para-24)

Cases referred:
Renikuntla Rajamma (D) by LRs versus K.Sarwanamma, AIR 2014, SC 2906
Ramchandra versus Balla Singh (deceased by LRs) and others, AIR 1986 Allahabad 193
Surjit Singh versus Kaushalya Devi, 2000 (1) Shimla Law Cases, 357

For the Appellants : Mr. K.D. Sood, Senior Advocate with Mr. Rajnish K. Lal, Advocate.
For the Respondents: Mr. R.K. Bawa, Senior Advocate with Mr. Ajay Kumar Sharma, Advocate, for respondents No. 1, 2 & 4.
None for respondents No. 5 to 7.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

By way of the present appeal, the appellants have laid challenge to the judgment, passed by the learned District Judge, Kinnaur, Civil Division at Rampur Bushahr, H.P., in Civil Appeal No. 08 of 2003, dated 23.08.2003, vide which the learned Lower Appellate Court has partly set aside the judgment and decree, dated 31.12.2002, passed by the then learned Sub Judge 1st Class, Anni, District Kullu, H.P. in Case No. 13-1 of 1998.

2. Material facts, necessary for adjudication of this Regular Second Appeal, are that respondents No. 1 & 2/plaintiffs (hereinafter referred to as 'plaintiffs') maintained a suit against the appellants/defendants (hereinafter referred to as 'defendants'), seeking declaration to the effect that gift deed executed by Shri Bhagwan Dass, in favour of defendants No. 2 & 3, through his Power of Attorney, on 18.11.1997 at Ani, is illegal, null and void and in-operative, qua the rights of plaintiffs and proforma defendants with consequential relief of injunction. The plaintiffs have alleged that Finu was the common ancestor and he was having two sons, namely, Shri Bhagwan Dass and Shri Salig Ram, who had expired and proforma defendants No. 4 to 6 are the sons of deceased Salig Ram. They formed Hindu Joint Family and coparcenery and the property inherited by Shri Bhagwan Dass and Shri Salig Ram is ancestral coparcenery qua the plaintiffs in the hands of Shri Bhagwan Dass. The plaintiffs have further alleged that Shri Bhagwan Dass had got executed gift deed of land, bearing Khassra Nos. 1221 and 1222, measuring 6-19 bighas, situated at Mauza Janja, Phati Kungash, Tehsil Anni, District Kullu, through his Power of Attorney, Shri Bansi Lal, on 18.11.1997, in favour of defendants No. 2 & 3, without any legal right, as the property in question is ancestral and coparcenery and Shri Bhagwan Dass had no

right to gift away the suit property to defendants No. 2 & 3, without the consent of other coparceners, including the plaintiffs and as such, the gift deed is illegal, null and void and in-operative and not binding on the rights of the plaintiffs and proforma defendants. The plaintiffs have also pleaded that defendants No. 2 & 3, who are minors, have been sued through their father-natural guardian, Shri Bansi Lal, who has no interest adverse to them. The plaintiffs have further alleged that they requested the defendants to get the gift deed revoked, but in vain.

3. Defendants resisted and contested the suit by raising preliminary objections of non-compliance under Order 32, Rule 3 of the Code of Civil Procedure, suit not being properly valued for the purpose of court fee and jurisdiction, estoppal, locus standi and non-joinder of necessary parties. On merits, the defendants have denied that Shri Bhagwan Dass and Shri Salig Ram formed a Joint Hindu Family and coparcenery property. They had pleaded that after coming into force the Hindu Succession Act, 1956, the concept of ancestral coparcenery property has completely extinguished. The defendants have denied that Shri Bhagwan Dass had no legal right to execute gift deed. The defendants have alleged the gift deed to be legal, valid and operative. They have further alleged that the plaintiffs have been given their share in a family arrangements in the year, 1994 and since then, the parties are living separately The defendants have also alleged that that the suit is frivolous, vexatious and the same has been filed maliciously and with intention to pressurize and harass the defendants.

4. The plaintiffs filed replication, in which the averments contained in the plaint were re-affirmed and re-asserted and the allegations contained in the written statement were denied.

5. On the pleadings of the parties, the learned trial Court framed the following issues on 17.08.1999:-

"1. Whether gift deed dated 18.11.1997 is illegal, null and void, as alleged?...OPP

2. Whether the plaintiffs are entitled for the relief of injunction, as prayed?...OPP

2-A Whether Shri Bhagwan Dass had allotted the land amongst his sons in the year, 1994 by way of family arrangement?...OPD

2-B Whether the parties to the suit are residing separately?....OPD

3. Whether the plaintiffs are estopped from filing the present suit? ...OPD

4. Whether this Court has no jurisdiction to try the present suit?.....OPD

5. Whether the suit is bad for non-joinder of necessary party? ....OPD

6. Relief."

6. The learned Trial Court, after deciding Issues No. 1 & 2 in favour of the plaintiffs and issues No. 2 to 5 against the defendants, decreed the suit, by declaring Gift Deed dated 18.11.1997, attested in favour of defendants No. 2 & 3, to be illegal, null and void and not binding on their rights.

7. Feeling aggrieved by the judgment, passed by the learned Trial Court, the defendants maintained first appeal before the learned District Judge, Kinnaur, Civil Division at Rampur Bushahr, assailing the findings of the learned Trial Court below, being against the law and without appreciating the evidence and pleadings of the parties to its true perspective. The learned Lower Appellate Court affirmed the findings returned by the learned Trial Court on Issues No. 1, 2-A, 2-B, 3, 4 & 5 and set aside the findings returned on Issues No. 2 & 6, by holding that the plaintiffs-respondents are not entitled for the relief of injunction qua mutation because mutation proceedings can be challenged by way of alternative remedy under the H.P. Land Revenue Act, which is a Special Act and mutation proceedings do not confer any title or interest and are only meant for fiscal purpose. The learned Lower Appellate Court further held that

declaratory judgments and decrees passed by the Civil Courts are binding upon the Revenue Court under the provisions of law.

8. Now, the appellants have maintained the present Regular Second Appeal, which was admitted for hearing on 17.10.2003, on the following substantial questions of law:

> ***" 1. Whether the learned trial Court had no pecuniary jurisdiction to try the suit?***
>
> ***2. Whether the suit as framed is not maintainable?"***

9. Mr. K.D. Sood, learned Senior Counsel appearing on behalf of the appellants has argued that the judgment and decree passed by the learned Court below is without appreciating the fact that the suit land was not properly valued for the purpose of court fee and jurisdiction. He has further argued that the suit deserves to be dismissed, as the plaintiffs have not affixed the required court fee. He has also argued that the property was not a coparcenery property and the learned Court below has failed to take into consideration this aspect, also. He has further argued that the appeal is required to be allowed and the case is required to be remanded back to the learned Court below. He has relied upon the judgment passed by the Hon'ble Supreme Court in case titled as **Renikuntla Rajamma (D) by LRs** versus **K.Sarwanamma,** reported in **AIR 2014, SC 2906.**

10. On the other hand, Mr. R.K. Bawa, learned Senior Counsel appearing on behalf of respondents No. 1, 2 & 4 has argued that the judgment and decree passed by the learned Court below is just and reasoned and needs no interference. To support his case, he has relied upon the judgment passed by the Hon'ble Supreme Court in case titled as **Ramchandra versus Balla Singh (deceased by LRs) and others,** reported in **AIR 1986 Allahabad 193** and the judgment passed by this Court in case titled as **Surjit Singh versus Kaushalya Devi** reported in **2000 (1) Shimla Law Cases, 357.**

11. In rebuttal, learned Senior Counsel appearing on behalf of the appellants has argued that as the gift was complete and with possession, it cannot be set aside and prayed that the appeal be allowed.

12. To appreciate the arguments of the parties, I have gone through the record in detail.

13. In order to prove its case, plaintiff No. 1-Shri Bholu Ram, appeared in the witness box as PW-2, who has deposed his grand father Shri Finu Ram has two sons, i.e. Bhagwan Dass and Salig Ram. Shri Bhagwan Dass, the father of the plaintiff, was having further three sons, i.e. plaintiffs No. 1 & 2 and defendant No. 7. Shri Salig Ram had also three sons and two daughters. The pedigree table is as under:-

<table>
<tr><td colspan="7">Finu Ram
{</td></tr>
<tr><td colspan="4">Bhagwan Dass
{</td><td colspan="3">Salig Ram
{</td></tr>
<tr><td><u>Mani Devi (widow)</u></td><td><u>Bholu (plaintiff No. 1)</u></td><td><u>Kewal Ram (plaintiff No. 2)</u></td><td><u>Bansi Lal (defendant No. 7)</u></td><td>Sita Ram (defendant No. 4)</td><td>Lal Dass (defendant No. 5)</td><td>Charan Dass (Defendant No. 6)</td></tr>
<tr><td rowspan="2"></td><td rowspan="2"></td><td rowspan="2"></td><td>Bhupender (appellant No. 1)</td><td rowspan="2"></td><td rowspan="2"></td><td rowspan="2"></td></tr>
<tr><td>Parveen (appellant No. 2)</td></tr>
</table>

PW-1 has also produced copy of mutation No. 985, Ext. PW-1/A on record. He has further deposed that the suit land is ancestral one. Shri Bhagwan Das had executed a power of attorney in favour of defendant No. 7-Shri Bansi Lal. Defendant No. 7, on the basis of that power of attorney, gifted the land to his sons to the tune of three bighas nine biswas, by way of gift deed. He also stated that Shri Bhagwan Dass has no right to execute a gift deed in favour of the sons of defendant No. 7, i.e. defendants No. 2 & 3. He further deposed that Shri Finu Ram, his grand father, had 20 bighas of land, which was divided into two shares of 20 bighas each, between Shri Bhagwan Dass and Shri Salig Ram. He produced on record Gift Deed, Ext. PW-2/A, copy of Mutation, Ext. PW-2/B, its Hindi translation, Ext. PW-3/A and Jamabandi.

14. Defendants examined defendant No. 7-Shri Bansi Lal as DW-1, who deposed that his father-Bansi Lal had executed a power of attorney in his favour for sale, mortgage and gift, of half share of land of Khasra Nos. 1221 and 1222. The power of attorney was executed on 19.05.1997 and on 17.11.1997, he executed a sale deed in favour of defendants No. 2 & 3 on behalf of Shri Bhagwan Dass with respect to the suit land. He further deposed that Shri Gumat Ram accepted the gift on behalf of defendants No. 2 & 3. He also deposed that plaintiffs have acquired no right, title or interest over the suit land. He further deposed that Shri Bhagwan Dass has all right, title and interest of mortgage, sale, gift or will with regard to the suit land. He further deposed that as per the Hindu Succession Act, legal heirs have acquired equal rights in the land. He also deposed that on the death of Shri Bhagwan Dass, suit land was mutated in the name of plaintiff, his name and in the names of Anarkali and Mani Devi. He further deposed that similarly, the land of Shri Bansi Lal was mutated in the names of his sons and daughters, as per mutation of inheritance No. 717, dated 02.11.1965. Same is the case of Shri Shibu, Salig Ram, Kishan Dass and Nand Lal, whose land has been mutated in favour of their widow, sons and daughters in inheritance. As per him, the value of the suit land is more than rupees 2.00 lacs and the plaintiffs have not affixed the proper court fee.

15. The next witness, examined by the defendants, is DW-2 (Shri Dewki Nand), who deposed that Shri Bhagwan Dass and Salig Ram were real brothers and land stood partitioned between them. Shri Bhagwan Dass had also partitioned the land amongst his three sons. He also deposed that as per the custom, sons have got no right in the ancestral land till the father is alive. He has deposed that father has got every right, title or interest to alienate the suit land.

16. DW-3 (Shri Jai Chand) has tried to prove on record Gift Deed dated 18.11.1997 and stated that power of attorney and gift deed are correct as per the record maintained by the Sub Registrar, Anni.

17. Ext. PW-2/A is the Gift Deed, which was executed by defendant No. 7-Shri Bansi Lal in favour of defendants No. 2 & 3, i.e. Shri Bhupinder Singh and Parveen Singh, respectively. Ext. PW-2/B is the copy of mutation, which is written in Urdu. The translated copy of same has been proved in Hindi, after getting it translated in Hindi from PW-1. The true translation of copy of mutation (Ext. PW-2/B) is Ext. PW-1/A. This copy of mutation bearing No. 965 is, in fact, inheritance with mutation attested in favour of Shri Bhagwan Dass and Salig Ram on the demise of Shri Finu Ram.

18. Similarly, ancestral property is a property inherited from paternal ancestral. All property inherited by a male Hindu from his father, father's father or father's father's father is ancestral property. The essential feature of ancestral property according to Mitakshara Law of School is that the sons, grand-sons and great grand-sons of the person, who inherits it, acquire an interest in it by birth. Their right attaches to it at the moment of their birth.

19. The suit land is ancestral and coparcenery. DW-1 (Bansi Lal) admitted that the suit land was inherited by his father, Shri Bhagwan Dass from his grand father, Shri Finu Ram and his grand father had inherited the same from his great grand-father. He again admitted that mutation of inheritance was attested in his favour and the plaintiffs. He also admitted that he

has no knowledge with regard to the partition effected between his father Shri Bhagwan Dass and Shri Salig Ram. He also admitted that there was no active partition effected by meets and bounds between him and the plaintiffs. He further deposed that he did not ask the plaintiffs, while gifting the suit land in favour of his sons. He further admitted that the suit land is joint one and ancestral property. The case of the plaintiffs again stands proved from the mouth of DW-2, who stated that the suit land is ancestral one at the hands of Shri Bhagwan Dass. He further stated that there was no partition effected between the plaintiff and defendants. The defendants themselves have admitted the suit land to be un-partitioned ancestral one. Shri Bansi Lal- (DW-1) has admitted that the suit land was inherited by his father, Shri Bhagwan Dass from Shri Finu Ram, who further inherited the same from his great grand-father. The defendant has thereby proved it on the record that a coparcenery is created between the parties. The plaintiffs have also come with the plea that defendants have got no right, title and interest to gift the suit land in favour of defendants No. 2 & 3, as the suit land is joint un-partitioned and ancestral one.

20. Interestingly, defendant No. 7 has gifted the suit land to defendants No. 2 & 3 on behalf of Shri Bhagwan Dass. In fact, defendant No. 7 is the father of defendants No. 2 & 3. Defendants No. 2 & 3 were minors. The intention of defendant No. 7 becomes clear when he, in order to grab more portion of property, has executed a gift deed in favour his own sons. It is shown in the gift deed that one Shri Gumat Ram appeared before the Sub Registrar on behalf of minors-defendants No. 2 & 3. In fact, Shri Gumat Ram has not been examined by the defendants. There is not even a single averment in the gift deed that the donees-defendants No. 2 & 3 through this Gumat Ram, have accepted the gift or they have received the delivery of possession of the suit land on the spot. There is no iota of evidence either ocular or documentary, pleaded or proved, that for such pious purpose, Shri Bhagwan Dass has gifted the suit land to defendants No. 2 & 3. As per the Hindu Law, 'pious purposes' are 'Apatkal', i.e. the time of distress, 'Kutumbarthe', i.e. for the sake of family and 'Dharmbarthe', i.e. for the performance of indispensable duties. There is no pious purposes either pleaded or proved in the present case. However, a father has a right to make a gift out of natural love and affection. There is no averment to the effect that Shri Bhagwan Dass had executed the gift deed in favour of defendants No. 2 & 3, out of natural love and affection. In fact, the gift deed was executed on behalf of Shri Bhagwan Dass by way of general power of attorney procured by the father of donee, Shri Bansi Lal in favour of defendants No. 2 & 3. Defendant No. 7 cannot make such a gift of immovable property in favour of his own sons, as land was ancestral land and the same is otherwise also suspicious.

21. Examination-in-chief of DW-2-Shri Devki Nand was also recorded by way of affidavit. There is recital in the affidavit that deceased Shri Bhagwan Dass and Shri Salig Ram were brothers, but family partition took place inter-se the parties and they used to reside separately. There is also recital in the affidavit that deceased Shri Bhagwan Dass had allotted the land to his three sons separately during his life time, about 8-9 years ago. There is further recital in the affidavit that sons inherit the property after the death of father, as per the custom of the area and father can alienate the property in any way. In cross-examination, he has stated that Shri Finu Ram was the father of Shri Salig Ram and Shri Bhagwan Dass and he has admitted that Shri Finu Ram had inherited the property from his father. He has also admitted that the suit land is joint inter-se the parties and has not been partitioned.

22. Now, coming to the question-whether the court fee, as required under the Himachal Pradesh Court Fee Act, 1968 (hereinafter referred to as the 'Court Fee Act'), is affixed or not, Section 7(c) and proviso thereto provide as under:

> "***Computation of fees payable in certain suits***-*The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:-*
>
> .....

(C) ***For a declaratory decree and consequential relief;*** *to obtain a declaratory decree or order, where consequential relief is prayed;*

……

Provided further that in suit coming under sub clause (c) in case where the relief sought is with reference to any property such valuation shall not be less than the value of the property calculated in the manner provided by paragraph (v) of this section."

23. The Second Schedule of the Court Fee Act provides as under:-

"**The Second Schedule**

(See Section 3)

(Fixed Fees) ***……***

13.	***Plaint or memorandum of appeal in each of the following suits:-***	
	(i)……	
	(ii)……	
	(iii) To obtain a declaratory decree where no consequential relief is prayed;"	***Nineteen rupees fifty paise.***

24. In the present case, the land is assessed to the land revenue. It is not proved on record that any structure is existing on the land and the value of the land has been increased. The well settled principle of law is that the land is assessed to the land revenue and the court fee is to be affixed as per the Court Fee Act. The Court Fee Act provides that court fee for suit for declaration is Rs. 19/-. I find no force in the arguments of the learned Counsel for the appellants/defendants that the court fee is not properly affixed, as it is not proved that the land is having another structure on it, which has increased its value. Similarly, the statement of defendant No.7 that the value of the suit land is more than Rs. 2.00 lacs, is without any basis and the court fee, as required under the Court Fee Act, has been affixed, and the land is assessed to land revenue.

25. Now, coming to the contention of the learned Counsel for the appellants/defendants that the suit land is a coparcenery property, there is nothing on record to suggest that the land was divided and further there is nothing to come to the conclusion that there was any legal necessity for the *karta* to transfer the property in the name of minors-the sons of Bansi Lal, i.e. the grand sons of the transferee, to the exclusion of the plaintiffs. It has also come on record that general power of attorney was also not given to Bansi Lal for the purpose of transferring the land in favour of his sons by Bhagwan Dass. So, I find no infirmity with the findings recorded by the learned Court below that the gift deed is not sustainable.

26. The contention of the learned Counsel for the appellants/defendants that gift deed was complete, as the delivery of possession was not mandatory in case of immovable property, is considered in view of the judgment passed by the Hon'ble Supreme Court in case titled as **Renikuntla Rajamma (D) by LRs** versus **K.Sarwanamma,** reported in **AIR 2014, SC 2906.** It is apt to reproduce para-15 of the said judgment herein:-

"*The matter can be viewed from yet another angle. Section 123 of the T.P. Act is in two parts. The first part deals with gifts of immovable property while the second part deals with gifts of movable property. Insofar as the gifts of immovable property are concerned, Section 123 makes transfer by a registered instrument mandatory. This is evident from the use of work "transfer must be effected" used by Parliament in so far as immovable property is concerned. In contradiction to*

that requirement the second part of Section 123 dealing with gifts of movable property, simply requires that gift or movable property may be effected either by a registered instrument signed as aforesaid or "by delivery". The difference in the two provisions lies in the fact that in so far as the transfer of movable property by way of gift is concerned the same can be effected by a registered instrument or by delivery. Such transfer in the case of immovable property no doubt requires a registered instrument but the provision does not make delivery of possession of the immovable property of the immovable property gifted as an additional requirement for the gift to be valid and effective. If the intention of the legislature was to make delivery of possession of the property gifted also as a condition precedent for a valid gift, the provision could and indeed would have specifically said so. Absence of any such requirement can only lead us to the conclusion that delivery of possession is not an essential prerequisite for the making of a valid gift in the case of immovable property."

27. However, in the present case, though, had the land been not coparcenery and ancestral one, the delivery of possession could have been presumed in favour of the donees, if it was a written gift deed, but the gift deed otherwise, is not valid, as has been held by the Hon'ble Supreme Court in the case, *supra,* as it is against the legal necessity and from the coparcenery property, on which the donees were having no absolute right.

28. On the other hand, the Hon'ble Supreme Court in case titled as **Ramchandra versus Balla Singh (deceased by LRs) and others,** reported in **AIR 1986 Allahabad 193,** in para 20 has held as under:-

"Thus the plaintiffs were entitled to the cancellation of the sale deed and to recover the possession. This is again a concurrent finding of fact which cannot be disturbed by me in this appeal. Mere fact that defendant No. 1 was occupying a portion in ancenstral house could not make him ostensible owner of such property so as to attract the provisions of S. 41 of Transfer of Property Act."

29. The aforesaid judgment is fully applicable to the facts of the present case. Therefore, the gift deed of the ancestral property is without any basis, as held by the learned Court below.

30. This Court in the judgment rendered in case titled as **Surjit Singh versus Kaushalya Devi,** reported in **2000 (1) Shimla Law Cases, 357,** has laid down the same principle, as laid down by the Hon'ble Supreme Court in ***Ramchandra's*** *case, supra.* It is appropriate to reproduce paras 4 & 5 of the said judgment herein:-

"4. It is also by now settled that the property in which a person acquires interest by birth is called a coparcenery and merely because the right to it is not accepted by the existence of an owner and that the right to it arise from the mere fact of the birth in the family and they become coparceners with the parental ancestral property immediately on their birth. This being the indisputable position of the Hindu Law governing the members governed by Mitakshra law, there can be no hesitation to hold that the grand-son who has acquired on his own, a share in the coparcenery property though no doubt through his father, but which is distinct and separate from the rights and interest of his father, has an indefeasible right to challenge an alienation by any other coparcener or by even a manager provided he could succeed in challenging the sale on the permissible legal grounds. Whatever may be the fate of an individual claim or challenge to an alienation in a particular case, depending upon the merits of the case, the right of a coparcener to challenge cannot be defeated merely because his father, a nearest reversioner, is also alive. As indicated earlier, the rights of the father as well as the son are distinct and separate though held in common in the undivided coparcenery property under the Mitakshra Law. Consequently, the conclusion of the learned first appellate Judge

is non-suiting the plaintiff on the ground that he has no locus standi to file a suit in the teeth or the existence of his father cannot be sustained in law. The same is hereby set aside.

5. On this ground alone, the plaintiff cannot be granted any relief unless he is able to succeed in proving that the sale was not for a necessity legally binding on the family. On this question, it cannot be said to be a mere question of law only. The courts below have concurrently recorded a finding against the plaintiff holding that the alienation in question was proved to have been for necessities, legally binding on the family and all the coparceners including the plaintiff. Though the learned Counsel for the appellant sought to derive inspiration from the observation that there is no cogent evidence on record, it is not with reference to the entirety of the consideration but the observation has to be understood as referable to only in respect of one item of the expenses for which the sale was made, namely, house-hold expenses, but at the same time the other reasons or causes justifying alienation were found acceptable even to the lower appellate Court. Turning to this aspect of the matter into the judgment of the learned trial Judge, considered under issue No. 7, in my view, the learned trial Judge has elaborately and extensively considered the same in paras 20 and 21 meticulously by referring to the recital in the document as also the oral evidence in the justification and support and proof thereof and arrived at a categorical finding that the sale was for binding necessity and, therefore, the same cannot be assailed and was binding upon the interest of the plaintiff also. This finding of fact concurrently recorded by both the courts below for just and sufficient reasons supported by proper and relevant evidence cannot be successfully challenged in this appeal within the limited scope of the second appellate jurisdiction under Section 100 of the Code of Civil Procedure. Nothing could be made against the correctness and legality or propriety of the finding also in this court, even for undertaking any such consideration in this second appeal."

31. This judgment is also fully applicable to the facts of the present case and so this Court holds that the gift deed of the ancestral property is without any basis for the reasons as discussed hereinabove, i.e. there is nothing on record to suggest that the land was divided and further there was no legal necessity for the *karta* to transfer the property in the name of minors-the sons of Bansi Lal, i.e. the grand sons of the transferee, to the exclusion of the plaintiffs.

32. The judgment passed by the Court below is not required to be interfered with and the substantial question of No. 1 is answered, holding that the learned Court below has got the pecuniary jurisdiction to try the suit, as the land was assessed to the land revenue and further, it was within the jurisdiction of the learned Court below and no material has come on record, even otherwise, to show that the learned Court below was having no jurisdiction.

33. Substantial question of law No. 2 is answered holding that the suit, as framed, was maintainable, as one of the coparceners has challenged the gift deed without any necessity made by the son of the doner on the basis of general power of attorney, obtained from his father, in favour of his sons and the property was coparcenery and ancestral and so, the substantial question of law No. 2 is answered against the appellants.

34. The net result of the above discussion is that the appeal, which sans merit, deserves dismissal and is accordingly dismissed.

35. Pending application(s), if any, stand disposed of.

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

Rajinder Kumar ... Petitioner
Versus
State of Himachal Pradesh ... Respondent

CrMP(M) No. 1369 of 2017
Decided on November 7, 2017

Code of Criminal Procedure, 1973- Section 439- Bail- Offences alleged to have been committed under Sections 354-A and 342 IPC and Section 10 of Protection of Children from Sexual Offences Act- accused in custody for the last five months- held that bail petitioner/accused already suffered for more than five months for the alleged offences but his guilt has yet not been proved by the prosecution- it would not be proper to allow the petitioner to be in jail for an indefinite period- liberty of individual cannot be allowed to be curtailed till the time guilt of the petitioner is proved in accordance with law. (Para-8 to 12)

Cases referred:

Sanjay Chandra versus Central Bureau of Investigation (2012)1 Supreme Court Cases 49

Siddharam Satlingappa Mhetre versus State of Maharashtra and others, (2011) 1 SCC 694

Gurbaksh Singh Sibbia vs. State of Punjab, (1980) 2 SCC 565,

Sundeep Kumar Bafna versus State of Maharashtra (2014)16 SCC 623

Prasanta Kumar Sarkar versus Ashis Chatterjee and another (2010) 14 SCC 496

For the petitioner : Mr. Ashwani Dhiman, Advocate.
For the respondent : Mr. P.M. Negi, Additional Advocate General.
ASI Ranjeet Singh, I/O, Police Station, Keylong, District Lahaul & Spiti.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

By way of instant bail petition filed under Section 439 CrPC, prayer has been made for grant of bail in case FIR No. 23/17 dated 14.6.2017 under Sections 354-A and 342 IPC and Section 10 of Protection of Children from Sexual Offences Act, registered at Police Station, Keylong.

2. Sequel to order dated 30.10.2017, ASI Ranjeet Singh, has come present with the record. Mr. P.M. Negi, learned Additional Advocate General has also placed on record status report, prepared on the basis of investigation carried out by the investigating agency till date. Record perused and returned.

3. Record/status report reveals that aforesaid FIR came to be registered against bail petitioner at the behest of one Rakesh Chandel, who at the relevant time, was Head Master of Government Senior Secondary School, Jahlma, alleging therein that he received one complaint from the mother of the prosecutrix that bail petitioner, who at the relevant time was Security Trainer in the School, made an attempt to outrage modesty of her daughter. Aforesaid Headmaster referred complaint to the Sexual Harassment Committee, which in its report conformed and acknowledged the allegations made by the victim/prosecutrix. Record further discloses that bail petitioner taking advantage of innocence of the prosecutrix /victim made an attempt to outrage her modesty, which factum was subsequently disclosed by the prosecutrix to her friends, who at the relevant time were waiting for her outside the lab. It also emerges from the

record that subsequently, aforesaid incident came to be reported by the friends of the victim to the other teachers of the school. After registration of FIR, bail petitioner is in custody since 14.6.2017 i.e. for the last five months.

4. Mr. Ashwani Dhiman, learned counsel representing the petitioner submits that investigation in the case is complete and at this stage, nothing is required to be recovered from the bail petitioner, as such, he deserves to be enlarged on bail, more particularly when he has already suffered for more than five months. Learned counsel representing the petitioner further states that bail petitioner is a local resident of the area and there is no likelihood of his fleeing from justice.

5. Mr. P.M. Negi, learned Additional Advocate General, while opposing aforesaid prayer having been made by the learned counsel representing the petitioner contended that there is overwhelming evidence on record collected by investigating agency suggestive of the fact that bail petitioner has committed offences punishable under Sections 354-A and 342 IPC and Section 10 of the Protection of Children from Sexual Offences Act and as such he does not deserve to be shown any leniency by this Court, rather he needs to be dealt with severely as it would be a deterrence for the others. While referring to the statements made by other students, who verified the version put forth by the prosecutrix/victim, Mr. Negi, contended that this is not the sole incident, which bail petitioner has indulged in, rather there are so many incidents, which have gone unnoticed as is quite evident from the record. However, Mr. Negi, fairly stated that investigation in the case is complete and *Challan* stands presented in the competent Court of law and since 19.6.2017, bail petitioner is in judicial custody.

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

7. Though this Court, after having perused record/status report sees no force in the arguments of learned counsel representing the petitioner that there is no evidence available on record, suggestive of the fact that bail petitioner has not made attempt to outrage modesty of the prosecutrix, rather, this court finds that prosecution has placed on record ample evidence in support of version put forth by the prosecutrix.

8. True it is, that there appears to be delay of 6-7 days in lodging FIR, but that may not be sufficient to conclude that petitioner has been falsely implicated in the case. Though, aforesaid aspect of the matter is to be considered and decided by the trial Court on the basis of evidence adduced on record, but this Court, taking note of the fact that bail petitioner has already suffered for more than five months, for the offence allegedly committed by him and his guilt is yet to be proved by the prosecution by leading cogent and convincing evidence, as such, it would not be proper to allow petitioner to incarcerate in jail for indefinite period. This Court can not lose sight of the fact that freedom of an individual cannot be allowed to be curtailed till the time guilt of the petitioner is proved in accordance with law.

9. By now it is well settled that gravity alone cannot be decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. The Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49; has been held as under:-

> "The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly

tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

10. Law with regard to grant of bail is now well settled. The Apex Court in **Siddharam Satlingappa Mhetre** versus **State of Maharashtra and others**, (2011) 1 SCC 694, while relying upon its decision rendered by its Constitution Bench in **Gurbaksh Singh Sibbia** vs. **State of Punjab**, (1980) 2 SCC 565, laid down the following parameters for grant of bail:-

"111. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case. As aptly observed in the Constitution Bench decision in Sibbia's case (supra) that the High Court or the Court of Sessions to exercise their jurisdiction under section 438 Cr.P.C. by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honour.

112. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

(i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) The possibility of the applicant to flee from justice;

(iv) The possibility of the accused's likelihood to repeat similar or the other offences.

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated

with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail." (Emphasis supplied)

11. Hon'ble Apex Court, in **Sundeep Kumar Bafna** versus **State of Maharashtra** (2014)16 SCC 623, has held as under:-

"8. Some poignant particulars of Section 437 CrPC may be pinpointed. First, whilst Section 497(1) of the old Code alluded to an accused being "brought before a Court", the present provision postulates the accused being "brought before a Court other than the High Court or a Court of Session" in respect of the commission of any non-bailable offence. As observed in Gurcharan Singh vs State(Delhi Admn) (1978) 1 SCC 118, there is no provision in the CrPC dealing with the production of an accused before the Court of Session or the High Court. But it must also be immediately noted that no provision categorically prohibits the production of an accused before either of these Courts. The Legislature could have easily enunciated, by use of exclusionary or exclusive terminology, that the superior Courts of Sessions and High Court are bereft of this jurisdiction or if they were so empowered under the Old Code now stood denuded thereof. Our understanding is in conformity with Gurcharan Singh, as perforce it must. The scheme of the CrPC plainly provides that bail will not be extended to a person accused of the commission of a non-bailable offence punishable with death or imprisonment for life, unless it is apparent to such a Court that it is incredible or beyond the realm of reasonable doubt that the accused is guilty. The enquiry of the Magistrate placed in this position would be akin to what is envisaged in State of Haryana vs Bhajan Lal, 1992 (Supp)1 SCC 335, that is, the alleged complicity of the accused should, on the factual matrix then presented or prevailing, lead to the overwhelming, incontrovertible and clear conclusion of his innocence. CrPC severely curtails the powers of the Magistrate while leaving that of the Court of Session and the High Court untouched and unfettered. It appears to us that this is the only logical conclusion that can be arrived at on a conjoint consideration of Sections 437 and 439 of the CrPC. Obviously, in order to complete the picture so far as concerns the powers and limitations thereto of the Court of Session and the High Court, Section 439 would have to be carefully considered. And when this is done, it will at once be evident that the CrPC has placed an embargo against granting relief to an accused, (couched by us in the negative), if he is not in custody. It seems to us that any persisting ambivalence or doubt stands dispelled by the proviso to this Section, which mandates only that the Public Prosecutor should be put on notice. We have not found any provision in the CrPC or elsewhere, nor have any been brought to our ken, curtailing the power of either of the superior Courts to entertain and decide pleas for bail. Furthermore,

> it is incongruent that in the face of the Magistrate being virtually disempowered to grant bail in the event of detention or arrest without warrant of any person accused of or suspected of the commission of any non-bailable offence punishable by death or imprisonment for life, no Court is enabled to extend him succour. Like the science of physics, law also abhors the existence of a vacuum, as is adequately adumbrated by the common law maxim, viz. 'where there is a right there is a remedy'. The universal right of personal liberty emblazened by Article 21 of our Constitution, being fundamental to the very existence of not only to a citizen of India but to every person, cannot be trifled with merely on a presumptive plane. We should also keep in perspective the fact that Parliament has carried out amendments to this pandect comprising Sections 437 to 439, and, therefore, predicates on the well established principles of interpretation of statutes that what is not plainly evident from their reading, was never intended to be incorporated into law. Some salient features of these provisions are that whilst Section 437 contemplates that a person has to be accused or suspect of a non-bailable offence and consequently arrested or detained without warrant, Section 439 empowers the Session Court or High Court to grant bail if such a person is in custody. The difference of language manifests the sublime differentiation in the two provisions, and, therefore, there is no justification in giving the word 'custody' the same or closely similar meaning and content as arrest or detention. Furthermore, while Section 437 severally curtails the power of the Magistrate to grant bail in context of the commission of non-bailable offences punishable with death or imprisonment for life, the two higher Courts have only the procedural requirement of giving notice of the Bail application to the Public Prosecutor, which requirement is also ignorable if circumstances so demand. The regimes regulating the powers of the Magistrate on the one hand and the two superior Courts are decidedly and intentionally not identical, but vitally and drastically dissimilar. Indeed, the only complicity that can be contemplated is the conundrum of 'Committal of cases to the Court of Session' because of a possible hiatus created by the CrPC."

12. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime. Petitioner is local resident of addresses given in memo of parties and shall remain available to face the trial and to undergo imprisonment, if any, which may be imposed on conclusion of the trial.

13. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496**,** has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

14. In view of the aforesaid discussion, petitioner has carved out a case for grant of bail. Since, statements of prosecutrix as well as other material witnesses are yet to be recorded on 28.11.2017, this Court deems it fit to direct the bail petitioner to ensure that he does not enter Village Jahlma, till such time, statements of prosecutrix and other witnesses are recorded by the trial court.

15. In view of above, present petition is allowed and the petitioner is ordered to be enlarged on bail in the aforementioned FIR, subject to furnishing personal bonds in the sum of Rs.25,000/- with one surety in the like amount to the satisfaction of learned Chief Judicial Magistrate, concerned with following conditions:

a. He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

b. He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

c. He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

d. He shall not leave the territory of India without the prior permission of the Court.

16. It is clarified that if the petitioner misuses the liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

17. 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 present petition alone.

The petition stands accordingly disposed of.

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

Hari Krishan @ Krishan ...Defendant-Petitioner.

Versus

Satish Kumar Sharma & others. ...Plaintiffs-Respondents.

CMPMO No.332 of 2016.
Judgment reserved on : 11.8.2017
Date of Decision : November 8, 2017

Code of Civil Procedure, 1908-Order XVIII Rule 17- Constitution of India- Article 227- Defendant filed application under Order XVIII Rule 17 CPC, seeking re-examination of the plaintiffs' witness- rejected by the Trial Court.

Petition under Article 227 of the Constitution of India filed- dismissed- **Held** - that it cannot be said that Court below failed to exercise or committed any illegality or material irregularity- power under Order XVIII Rule 17 can only be exercised by the Court to remove ambiguity or omission, however, such power cannot be invoked to fill up omission in the evidence already led by a witness- it cannot also be used for the purpose of filling up a lacuna in the evidence. (Para-13)

Also Held that power under Section 151 or under Order XVIII Rule 17 CPC is not intended to be used routinely, merely for the asking - if so used, it will defeat the very purpose of various amendments to the Code to expedite trials. (Para-14)

Cases referred:

Soma Devi vs. Guin Devi & others, AIR 2003 HP 158

Ram Rati vs. Mange Ram (Dead) through LRs & others, (2016) 11 SCC 296

Bagai Construction vs. Gupta Building Material Store, (2013) 14 SCC 1

K.K. Velusamy vs. N. Palanisamy, (2011) 11 SCC 275

Vadiraj Naggappa Vernekar (Dead) through LRs. vs. Sharadchandra Prabhakar Gogate, (2009) 4 SCC 410

For the petitioner	:	Mr. Neeraj Gupta, Advocate, for the petitioner.
For the respondent	:	Mr. Satyen Vaidya, Senior Advocate with Mr. Vivek Sharma, Advocate, for the respondents.

The following judgment of the Court was delivered:

Sanjay Karol, ACJ.

Defendant's application filed under Order XVIII Rule 17 CPC, praying for re-examining the plaintiffs' witness, as defendant's suggestion of being in possession of the suit property, so put during the course of cross examination, was inadvertently left out from being recorded in the testimony, stands rejected by the trial Court vide impugned order dated 23.6.2016, passed in Civil Suit No. 35-1 of 2015/09, titled as *Satish Kumar Sharma & others vs. Hari Krishan,* (Annexure P-7).

2. Plaintiffs filed a suit seeking declaration qua the status and right & title of the defendant in the suit property. Defendant refuted the allegations, setting up his title.

3. On 21.11.2009, trial Court framed as many as fifteen issues. Record reveals that after a period of three years, on 17.10.2012, plaintiffs examined four witnesses. Thereafter, plaintiff No. 1 Satish Kumar Sharma was examined and his statement runs into 20 pages. It was recorded on 13.7.2015. Further two more witnesses were examined on 13.8.2015, on which date plaintiffs closed their evidence, where after matter was adjourned for 10.9.2015 for examination of defendant's witnesses.

4. Instead of leading evidence on 10.9.2015, defendant moved the application in issue, seeking recall of witness Satish Kumar Sharma, *inter alia,* for the following reason:

> "4. That in order to prove the case, the non-applicant No. 1 namely Satish Kumar stepped into the witness box and appeared as PW-1 on dated 13-07-2015. On 13-7-2015 this witness was cross examined on behalf of the applicant/defendant. Specific suggestions were given to this witness i.e. PW-1 (plaintiff No. 1 Satish Kumar) on behalf of applicant/defendant that as per the family arrangement of partition of the suit land, in between Sh. Geeta Ram predecessor in interest of non-applicant and Sh. Hari Krishan, applicant/defendant is in possession of that part of suit land which is also recorded so and that the possession of the applicant over that part of suit land is

from the time of Sh. Geeta Ram. These suggestions however denied by the non-applicant No. 1/PW-1."

5. Plaintiffs denied the same in the following terms:

"4. That the contents of para 4 are denied as being wrong and frivolous. It is submitted that the reason as assigned by the applicant is nothing but just an afterthought to fill in the lacunas as submitted supra."

6. Having heard learned counsel for the parties as also perused the record, this Court is unable to persuade itself to interfere with the impugned order, so assailed in a petition filed under Article 227 of the Constitution of India. It cannot be said that the court below failed to exercise its jurisdiction or in the exercise thereof, it committed any illegality or material irregularity. Also the order cannot be said to be perverse. Though specifically not pleaded, but defendant finds fault with the trial Court in not correctly recording the statement of the witness. Well aspersions, though oblique, are not well founded and are totally unsustainable.

7. Record reveals that the case is hotly contested. Almost on every date of hearing, learned counsel for both the parties have been appearing.

8. Statement of witness Satish Kumar Sharma (PW-5) sought to be recalled was recorded on 13.7.2015. It is hand written and runs into twenty pages. In fact, cross examination part of the testimony itself runs into sixteen pages. The handwriting is clear, legible and readable. The witness, after reading the statement has signed the same. It is not the case of the defendant that statement of the witness was recorded in a casual manner or not under the direct supervision of the Presiding Officer or in the absence of the learned counsel. As such, this Court is not inclined to accept the contention that suggestion of the defendant of being in possession of the suit land, by virtue of a family settlement, though put to the witness, was inadvertently left out from being recorded. Also, application is not accompanied by affidavit of the learned counsel.

9. That apart, one finds that subsequently on 13.8.2015, two other witnesses of the plaintiffs were examined, when also no objection was raised or matter brought to the notice of the Court by the parties or their counsel.

10. There is nothing on record to establish that certified copies of the statements were either applied for or obtained only with the closure of plaintiffs' evidence.

11. Order XVIII Rule 17 CPC reads as under:

"17. Court may recall and examine witness:

The court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the court thinks fit."

12. Now court cannot exercise such power for filling up lacuna, if any, or correct the mistake of the party. Discretion has to be exercised judiciously. The power is wide and can be exercised at any time prior to the pronouncement of the judgment, but to remove ambiguity or omission. It has to be exercised with great care and in exceptional circumstances and that also only to prevent failure of justice. [*Soma Devi vs. Guin Devi & others,* AIR 2003 HP 158].

13. The basic purpose of Rule 17 is to enable the Court to clarify any position or doubt, and the Court may, either suo motu or on the request of any party, recall any witness at any stage in that regard. This power can be exercised at any stage of the suit. No doubt, once the Court recalls the witness for the purpose of any such clarification, the Court may permit the parties to assist the Court by examining the witness for the purpose of clarification required or permitted by the Court. The power under Rule 17 cannot be stretched any further. The said power cannot be invoked to fill up omission in the evidence already led by a witness. It cannot also be used for the purpose of filling up a lacuna in the evidence. "No prejudice is caused to either party" is also not a permissible ground to invoke Rule 17. No doubt, it is a discretionary power of the Court but to be used only sparingly, and in case, the Court decides to invoke the

provision, it should also see that the trial is not unnecessarily protracted on that ground [*Ram Rati vs. Mange Ram (Dead) through LRs & others,* (2016) 11 SCC 296].

14. The power under Section 151 or Order XVIII Rule 17 CPC is not intended to be used routinely, merely for the asking. If so used, it will defeat the very purpose of various amendments to the Code to expedite trials. But where the application is found to be *bona fide* and where the additional evidence, oral or documentary, will assist the Court to clarify the evidence on the issues and will assist in rendering justice, and the Court is satisfied that non production earlier was for valid and sufficient reasons, it may exercise its discretion to recall the witnesses or permit the fresh evidence. But if it does so, it should ensure that the process does not become a protracting tactic. The Court should firstly award appropriate costs to the other party to compensate for the delay. Secondly, the Court should take up and complete the case within a fixed time schedule so that the delay is avoided. Thirdly, if the application is found to be mischievous, or frivolous, or to cover up negligence or lacunae, it should be rejected with heavy costs. [*Bagai Construction vs. Gupta Building Material Store,* (2013) 14 SCC 1 and *K.K. Velusamy vs. N. Palanisamy,* (2011) 11 SCC 275]

15. The apex Court in *Vadiraj Naggappa Vernekar (Dead) through LRs. vs. Sharadchandra Prabhakar Gogate,* (2009) 4 SCC 410, observed that:

> "31. Some of the principles akin to Order 47 CPC may be applied when a party makes an application under the provisions of Order 18 Rule 17 CPC, but it is ultimately within the court's discretion, if it deems fit, to allow such an application."

16. As such, finding no merit in the present petition, the same is dismissed.

17. One finds that the parties have been litigating since the year 2009. As such trial is expedited with a direction that suit be positively decided within a period of one year. Parties are directed to appear before the trial Court on 30th November, 2017. Records be immediately sent back. Registry to take appropriate action.

Pending application(s), if any, also stand disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE, SANDEEP SHARMA, J.

Mamta Goel ... Appellant

Versus

Seema Bisht & others ...Respondents

LPA No. 177 of 2010.
Judgment reserved on: 12.10.2017
Date of Decision: November 8 , 2017

Constitution of India, 1950- Article 226- Service Matter- Letter Patents Appeal- Appointment of Computer Assistant (Appellant) quashed and set aside by the learned Single Judge primarily for the non-advertisement of the posts, in view of law laid down by the Apex Court in ***Union of India & others vs. N. Hargopal & others, (1987) 3 SCC 308*** and other judgments- It was also held- that appointment was done in undue haste.

The Division Bench on re-consideration held that on the facts and circumstances of the case there was no requirement of the Rule that the post ought to have been advertised in the newspaper- as per Rules in vogue post was notified by the Employment Exchange, as was precisely done in the instant case- as such, held that ratio laid down by the Apex Court in ***Hargopal's*** matter was not applicable to the attending facts and circumstances. (Para-9 to 12)

Also held that the eligibility criteria was required to be fulfilled as on the date of requisition and not as on the date of registration of the applicant in the Employment Exchange. (Para-13)

Further held that mere exhibition of efficiency cannot be a ground to raise presumption of malafide or undue haste- allegation of malice, thus, held to be absolutely vague and unspecific- judgment of the Learned Single Bench set aside and quashed- appointment of the appellant was affirmed. (Para-17)

Cases referred:

Union of India & others vs. N. Hargopal & others, (1987) 3 SCC 308
Excise Superintendent Malkapatnam, Krishna District A.P. vs. K.B.N. Vishweshwara Rao & others, (1996) 6 SCC 216
Nagendra Chandra & others vs. State of Jharkhand & others, (2008) 1 SCC 798
National Fertilizers Limited & others vs. Somvir Singh, (2006) 5 SCC 493
State of Bihar vs. Upendra Narayan Singh & others, (2009) 5 SCC 65
Union of India & others vs. Pritilata Nanda, (2010) 11 SCC 674 [2010 (7) Scale 269
Tungeshwar Nath vs. State of U.P. & others, 2008 (119) FLR 196
Dr. M.V.Nair vs. Union of India & others, (1993) 2 SCC 429
Bhupinderpal Singh & others vs. State of Punjab & others, (2000) 5 SCC 262
Nihal Singh & others vs. State of Punjab & others, (2013) 14 SCC 65
K. Gunavathi vs. V. Sangeeth Kumar & others, (2014) 11 SCC 491
National Thermal Power Corporation, Kahalagaon & others vs. Nakul Das & others, (2014) 9 SCC 385

For the petitioner	:	M/s. Sunil Mohan Goel and Ashish Jamalta, Advocates, for the petitioner.
For the respondent	:	Mr. Shashi Shirshoo, Advocate, for respondent No. 1. Mr. Hamender Chandel, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Justice Sanjay Karol, ACJ.

On 6.8.1997, one post of Computer Assistant was notified to be filled up by the Municipal Corporation, Shimla, for which names were requisitioned from the Regional Employment Exchange Officer, Shimla. On 19.8.1997, names of twenty eligible candidates were sponsored in accordance with the single chance rotation norms. On 23.8.1997 candidates were interviewed. Same day, the Selection Committee declared the result and Mamta Goel (appellant herein) who was found most meritorious and suitable, was issued letter of appointment.

2. It is this letter of appointment dated 23.8.1997 (Annexure A-1) which became subject matter of challenge by writ petitioner Seema Bisht (respondent No. 1 herein) by way of CWP(T) No. 4704 of 2008 [OA No. 2153 of 1997], *inter alia,* praying as under:

> "(i) The appointment of the respondent No. 4 may kindly be quashed which is illegal and contrary to the guidelines laid down by the Government for recruitment and also contrary to the provisions of section-4 of the Employment Exchange (Compulsory Notification of Vacancies) Act, 1959.
>
> (ii) That the respondents No. 1 & 3 be directed to produce the whole record pertaining to the selection of the respondent No. 4, as Computer Assistant, in the Municipal Corporation Shimla.
>
> (iii) That the respondent No. 1 & 3 may kindly be directed to consider the name of the applicant for the selection of Computer Assistant after quashing the

appointment of the respondent No. 4, on priority basis due to the instances enumerated above in the application."

3. Vide impugned judgment dated 31.8.2010, learned Single Judge quashed such order of appointment. Primarily what weighed with the learned Single Judge was non advertisement of the post in view of law laid down by the Apex Court in *Union of India & others vs. N. Hargopal & others,* (1987) 3 SCC 308; *Excise Superintendent Malkapatnam, Krishna District A.P. vs. K.B.N. Vishweshwara Rao & others,* (1996) 6 SCC 216; *Nagendra Chandra & others vs. State of Jharkhand & others,* (2008) 1 SCC 798; *National Fertilizers Limited & others vs. Somvir Singh,* (2006) 5 SCC 493; *State of Bihar vs. Upendra Narayan Singh & others,* (2009) 5 SCC 65; and *Union of India & others vs. Pritilata Nanda,* (2010) 11 SCC 674 [2010 (7) Scale 269] as also the Division Bench of Allahabad High Court in *Tungeshwar Nath vs. State of U.P. & others,* 2008 (119) FLR 196.

4. The principles laid down by the Apex Court can be culled out as under:

(a) It is not mandatory for the employer to appoint persons sponsored by the employment exchanges;

(b) The field of choice can be enlarged and otherwise applications can be invited from the general public;

(c) Factum of vacancies to be filled up must be given wide publicity by adopting all modes and means;

(d) The selection and appointment of candidates only out of the candidates sponsored by the Employment Exchanges, wherever Rules otherwise provide for advertisement is violative of Articles 14 and 16 of the Constitution of India; and

(e) Article 16 of the Constitution mandates every appointment to public post or office, wherever required, to be made by way of an open advertisement.

5. Applying the aforesaid principles, learned Single Judge held that it was obligatory on the part of the Municipal Corporation, Shimla, to have advertized the post in various newspapers and given wide publicity through other means and modes of communication. Also while choosing the successful candidate, undue haste was shown. By sending a Peon with a peon-book on 11.8.1997, names were got sponsored from the Employment Exchange which was so done on 19.8.1997 and the candidates were interviewed on 23.8.1997 and immediately thereafter, in fact same day, selected candidate was given appointment.

6. The judgment is assailed on the ground that: (i) appointment of the appellant is totally in consonance with the settled principles of law and more specifically the Recruitment and Promotion Rules for the Post of Computer Operator/Assistant (Non-Gazetted) Class-III in Municipal Corporation, Shimla (hereinafter referred to as the Rules); (ii) it was not the requirement of law that the post was to be advertized in newspapers; (iii) the decisions rendered by the Apex Court, so relied upon by the learned Single Judge pertain to the period subsequent to the appointment of the appellant. It was neither the practice nor requirement of law that the post was required to be advertized; and (iv) findings with regard to undue haste are factually incorrect and legally unsustainable.

7. On the other hand Mr. Shashi Shirshoo, learned counsel for the respondent has argued the matter making the following submissions:

(i) That the judgment rendered by the learned Single Judge, is in the line of the decisions rendered by the Hon'ble Supreme Court, warranting no interference; (ii) In any event, the method of selection adopted by the respondent-Corporation was illegal inasmuch as (a) no names were called for from all the employment exchanges within the District as per manual "Hand Book on Personnel Matters, Vol-I (Second Edition), page 176"; (b) no attendance sheet was maintained regarding presence of all the 20 candidates called for the interview for the post in question; (c) in any event, appellant herein was ineligible to have applied for the post in question for the reason that in the year 1992, when she

got herself registered with the employment exchange, she had not acquired the diploma in computer from a recognized institution, a condition essential for the post of Computer Assistant. Even though, post was requisitioned in August, 1997, the date of eligibility is to be reckoned from the date of registration and not thereafter; and (iii) Simply because appellant herein has worked for more than 20 years, she cannot claim any equity, more so, in the light of the judgment rendered by the Apex Court as reported in *Binod Kumar Gupta & others vs. Ram Ashray Mahoto & others,* (2005) 4 SCC 209.

8. At the threshold we may only observe that since 23.8.1997, appellant has been successfully discharging her duties as a Computer Assistant with the Municipal Corporation, Shimla. There is nothing on record indicating lack of competence or dereliction of duty on her part. Soon she is to retire.

9. On 4.7.2012 this Court, after perusing the record observed as under:

> "The Employment Officer, Shimla is present and he has produced the record. It is seen that the employment exchange had forwarded twenty names to the Municipal Corporation, Shimla pursuant to their notification to the requisition on 19.8.1997. The appellant (respondent No. 4) is at serial No. 6 and she had registered with the employment exchange on 14.12.1992, whereas the writ petitioner got registered only on 14.3.1995. It is seen that twenty names forwarded by the employment exchange is only as per the seniority in the employment exchange and none among twenty is junior to the writ petitioner, in terms of the date of registration. It is also pointed out by the employment officer that as per Government instruction dated 16th May, 1994, twenty names against one vacancy are to be forwarded, for a district level vacancy.
>
> Post for further orders on 6.7.2012."

Noticeably, appellant was registered prior in point of time.

10. Rules specifically prescribe age limit for direct recruitment to be reckoned on the first day of the year in which the post is advertized for inviting applications or notified by the Employment Exchanges or as the case may be. Now in the instant case, post was notified sometime in the year 1997.

11. It is not in dispute that the post was not advertized in the newspaper. But then it is not the requirement of the Rule that it ought to have been so done. In fact, from Rule 6 it is apparent that post could be notified by the Employment Exchange(s) and this is precisely what has been done in the instant case. It is under these circumstances, we are of the considered view that the ratio of law laid down by the Apex Court in the decisions referred to by the learned Single Judge (supra), are in-applicable to the attending facts and circumstances. In fact, challenge to the appointment was not on this ground. It was only on account of ineligibility of the appellant. The grievance of the writ petitioner primarily rested on the fact that the Employment Exchange failed to sponsor her name despite the fact that on the date of registration she was fulfilling the criteria which the appellant was not possessing.

12. To contend that eligibility for the post has to be reckoned as on the date of registration with the Employment Exchange and not the date on which the requisition was sent would not be legally correct. We may take note of instructions dated 17.1.1977 (Annexure PC) that of the Government of Himachal Pradesh to the effect that all employing agencies were obliged to make recruitment only through Employment Exchanges. Other sources were to be tapped only if the Exchanges failed to sponsor suitable candidates. These instructions came to be reiterated on 1.8.1983 (Annexure PD). It is only in the year 2000, vide office memorandum dated 9.3.2000 (Annexure PE) the Government clarified that names for filling up the vacancies were to be invited not only from the Employment Exchanges but also directly by way of publication. As per the then prevalent Rules/Instructions all employing agencies in Himachal Pradesh were obliged to make

appointment of only such of those candidates whose names were sponsored by the Employment Exchanges.

13. In the instant case, appellant as on the date of such requisition fulfilled the eligibility criteria. She was a graduate from a recognized university. The desirable qualification of having a Computer Diploma from an institution recognized by the State Government was also there, which she clarified to have acquired as on the date of the requisition [*Dr. M.V.Nair vs. Union of India & others,* (1993) 2 SCC 429 and *Bhupinderpal Singh & others vs. State of Punjab & others,* (2000) 5 SCC 262].

14. In fact, the principles of law laid down by the Apex Court in *N. Hargopal & others,* (supra) to the effect that recruitment through Employment Exchanges advances rather than restricts the rights guaranteed under Articles 14 and 16 of the Constitution stands reiterated by the Apex Court in *Nihal Singh & others vs. State of Punjab & others,* (2013) 14 SCC 65.

15. Similar view stands taken by the Apex Court in *K. Gunavathi vs. V. Sangeeth Kumar & others,* (2014) 11 SCC 491.

16. It is true that the "Hand Book on Personnel Matters, Vol-I (Second Edition)" provides that 20 names from all the Employment Exchanges within the district ought to be sponsored. As per the manual only nine names could have been sponsored from the Regional Employment Shimla and remaining eleven names should have been sponsored by seven Sub Employment Exchanges within the District. Without going into the issue of applicability of these instructions to the post of a statutory body and as to whether the post in question is really a district level post to which sponsorship also was required to be from the Sub Employment Exchanges, we are of the considered view that the challenge even on this ground pales into insignificance, in view of the fact that out of the 20 candidates sponsored by the Regional Employment Exchange, Shimla, name of the appellant was at Sr. No. 6. Since nine names could have been sponsored by the said Employment Exchange, in view of the fact that she fell within the zone of consideration of such nine names, it cannot be said that in any event her name could not have been sponsored.

17. We now deal with the allegation of malafides and undue haste exhibited, if any, by the Corporation in favour of the present appellant. We notice allegations of malice to be absolutely vague and unspecific. It also did not find favour with the learned Single Judge. It is not that the appellant is related to any one of the members of the Selection Committee. It is also not that appellant was not meritorious or of average caliber and competence. It is also not that the appellant was not registered with the Employment Exchange. It is also not that name of the appellant was not sponsored by the said Employment Exchange. It is not that the name of the appellant was surreptitiously included in the list of the candidates to be interviewed. The process of filling up the post was initiated only with the State Government having sanctioned the post in question. It is not that overnight applications were invited and order of appointment issued. As already observed, name of the appellant was registered much prior to the registration of the name of the writ petitioner. It took more than a fortnight for the process to be completed. Mere exhibition of efficiency cannot be a ground sufficient enough, raising presumption of malafides or undue haste. It has come on record that none of the other participating candidates challenged the selection. The reason for petitioners challenge is quite apparent. On contract basis, she was discharging duties of the said post and wanted to be absorbed dehors the Rules, ignoring seniority of other candidates.

18. While relying on the following observation made by the Apex Court in *Binod Kumar Gupta* (supra), learned counsel contends that the appellant cannot claim equity solely for the reason that she had been working on the post in question for the last twenty years:

> "13. ... ... If we allow the appellants to continue in service merely because they have been working in the posts for the last 15 years we would be guilty of condoning a gross irregularity in their initial appointment. The High Court has

been more than generous in allowing the appellants to participate in any fresh selection procedure as may be held and in granting a relaxation of the age limit."

19. We are afraid that the principle enunciated is inapplicable to the attending facts, for (i) appointment of the appellant cannot be said to be dehors the Rules. She was fully eligible and the process of selection cannot be said to be vitiated at all, be it for whatever reason; (ii) Even subsequently the Apex Court in *National Thermal Power Corporation, Kahalagaon & others vs. Nakul Das & others,* (2014) 9 SCC 385 has observed as under:

> "10. It is the submission of the learned counsel appearing for NTPC that having regard to the facts of this case, namely where requirement is confined to class/category of persons (land oustees in the present case), it would not be necessary to bring out advertisements in newspapers and recruitment through the employment exchange and local circulation of notice would be consistent with the principles of Articles 14 and 16 of the Constitution of India. It was argued that the land oustees reside in the village and sub-divisional towns and local circulation of notice in addition to the requisition from the employment exchange was appropriate. Distinction was sought to be drawn between direct recruitment opon to public and recruitment confined to a particular class/category of persons. It was submitted that in the latter category, this Court has held in *Nihal Singh vs. State of Punjab,* (2013) 14 SCC 64, that such a procedure making recruitment through the employment exchanges is consistent with the requirement of Articles 14 and 16 of the Constitution, following the judgment in *Union of India vs. N. Hargopal,* (1987) 3 SCC 308. The learned counsel also relied on the judgment in *Arun Tewari vs. Zila Mansavi Shikshak Sangh,* (1998) 2 SCC 332 where the earlier judgments in *N. Hargopal (supra)* and *K.B.N. Visweshwara Rao,* (1996) 6 SCC 216 were duly considered."
>
> … …
>
> "16. The position which emerges from the aforesaid narration of events is this: the persons who were selected were admittedly eligible to be considered as they were also land oustees. No doubt, the posts were not advertized by publication in the newspapers. Fact remains that only two persons, namely Respondents 1 and 2 made a grievance in this behalf. These two persons have also been considered for the posts under the orders of this Court. However, they have failed in the selection. Others who were selected have already joined the posts. In a matter like this, no useful purpose would be served in carrying out the directions of the High Court to have fresh selection process after issuing advertisements in the newspapers. We may record at this stage that about 70 other persons have also filed IAs supporting the stand of Respondents 1 and 2. However, it is of significance to mention that all these persons had duly participated in the selection process but could not make their mark and failed to get selected. Therefore, these persons have no right to raise any grievance about non-publication of the advertisement in the newspapers."

20. For all the aforesaid reasons, we are of the considered view that the findings returned by the learned Single Judge cannot be said to be in line with the settled principles of law. The material so placed by the Corporation obliging them to call names to fill up the post only from the candidates sponsored from the Employment Exchanges was not considered at all. Findings of undue haste are legally unsustainable and not borne out from the record.

21. As such, for all the aforesaid reasons, we allow the present appeal and quash and set aside the impugned judgment dated 31.8.2010, passed in CWP(T) No. 4704 of 2008, titled as *Smt. Seema Bisht vs. Municipal Corporation & others,* and dismiss the writ petition filed by the private respondent.

Pending application(s), if any also stand disposed of accordingly.

****

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

Bhag Chand Sharma ....Petitioner.

Versus

The Hon'ble High Court of H.P. ....Respondent.

CWP No. 4027 of 2015.
Reserved on :25.10.2017.
Decided on:10th November, 2017.

Constitution of India, 1950- Article 14- Civil Writ Petition - equal pay for equal work- Petitioner designated as Registrar (Administration)-cum- Principal Private Secretary to Hon'ble the Chief Justice and worked as such till 21.8.203, when he sought voluntary retirement. The petitioner laid claim to parity of pay vis-à-vis the pay, drawn by other Registrars.

Held entitled to the pay parity, as he was performing duties alike the ones performed by other Registrars and any candidate imposed by the High Court, terming the placement as a mere re-designation held to be unreasonable and unconscionable. (Para-7 and 8)

Cases referred:

Central Inland Water Transport Corporation Ltd. vs. Brojo Nath Ganguly and another, (1986)3 SCC 156

Bhupendera Nath Hazarika and another Vs. State of Assam and others, (2013)2 SCC 516

Petitioner in person.

For the Respondent: Mr. C.N. Singh, Advocate.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge.

The petitioner under Annexure P-1, was designated as Registrar (Administration)-cum- Principal Private Secretary to Hon'ble the Chief Justice, from, his hitherto employment in the Registry of this Court, as Additional Registrar-cum- Principal Private Secretary to Hon'ble the Chief Justice. The conditions of his designation, as Registrar (Administration)-cum- Principal Private Secretary, to Hon'ble the Chief Justice, read as under:

> "(i) This will not be treated as promotion, but only re-designation and he shall draw the pay and allowances admissible to an Additional Registrar only, and;
>
> (ii) He shall have no right to continue to enjoy the designation of Registrar (Administration) and will be re-designated as Additional Registrar as and when any District Judge or Additional District Judge is appointed as fourth Registrar on the establishment of the High Court Registry."

Readings whereof, unfold that the designation of the petitioner, as Registrar (Administration)-cum- Principal Private Secretary, to Hon'ble the Chief Justice, being (a) not reckonable as promotion rather it being merely a simplicitor re-designation and his being only entitled to draw the pay and allowances admissible, to an Additional Registrar; (b) his being entitled to enjoy the apposite re-designation, uptill, the appointment of any District & Sessions Judge/Addl. District & Sessions Judge, as fourth Registrar, on, the Registry of the High Court, whereafter, his being amenable for being re-designated, as Additional Registrar. However, the petitioner upto his seeking voluntary retirement on 21.08.2013, continued to serve in the Registry of this High Court, as Registrar (Administration)-cum- Principal Private Secretary to Hon'ble the Chief Justice.

2. The petitioner under Annexure P-10, made a representation to the Registrar General, of, this Court, wherein, he espoused that given his working as Registrar (Administration)-cum- Principal Private Secretary, to Hon'ble the Chief Justice also his performing duties akin to the one(s) performed by other Registrars drawn from the cadre of District & Sessions Judges, his being hence entitled to parity of pay vis-a-vis the ones drawn by the Registrars, drawn from the cadre of District and Sessions Judges. The aforesaid representation stood under Annexure P-11, hence rejected. The reason as borne in the order rejecting the representation of the petitioner, in representation whereof, he espoused the aforesaid claim, is anvilled upon the factum of his (a) re-designation being conditional (b) besides his accepting all conditions borne in Annexure P-1, whereupon, he stood designated, as Registrar (Administration)-cum- Principal Private Secretary, to Hon'ble the Chief Justice and (c) Acceptance whereof being visible from his joining the duties of the re-designated aforesaid post, (d), thereupon, his being estopped to agitate the aforesaid claim.

3. The petitioner would be entitled to stake a legitimate claim for his being entitled to parity of pay vis-a-vis the pay, drawn by other Registrar(s), drawn from the cadre of District & Sessions Judges/ Addl. District & Sessions Judges, only upon, his initially satiating the conscience of this Court, of, his performing duties alike the one(s) performed by the other Registrar(s), belonging to the cadre of District and Sessions Judges. With Annnexure P-2, revealing, of, (I) the petitioner while serving as Registrar (Administration)-cum- Principal Private Secretary to Hon'ble the Chief Justice,his apparently performing functions akin to the one(s) performed by the other Registrars working in the Registry of the High Court, Registrars whereof stood drawn from the cadre of District & Sessions Judges, therefrom, (ii) the ensuing conclusion is of the petitioner evidently proving his performing functions bearing a close affinity vis-a-vis the duties and functions performed by the other Registrar(s), as, stood, drawn from the cadre of District and Sessions Judges. Fortification vis-a-vis the aforesaid conclusion is garnered, from, the hereinafter extracted relevant portion of Annexure-P-13, Annexure whereof, comprises information supplied to the petitioner under the Right to Information Act, the relevant portion whereof occurring at page 53 of the paper book reads as under:

> "Vide notification dated 26th April, 2010 (Flag 'A'), Hon'ble the Chief Justice in exercise of the powers conferred under Article 229 of the Constitution of India and all other enabling powers in this behalf was pleased to amend Schedule 'A' as under:-
>
> **"Schedule-A**
>
> **OFFICERS DRAWN FROM THE H.P. JUDICIAL SERVICE RULES IN THE CADRE OF DISTRICT JUDGE/ADDL. DISTRICT JUDGE**

Sr. No.	Name of the post	No. of posts	Pay Scale
1.	Registrar General	1	Time Scale/Selection Grade/Super Time Scale in own cadre + Secretariat Allowance
2.	Registrar (Vigilance)	1	-do-
3.	Registrar (Rules)	1	-do-
4.	Registrar (Inspection)	1	-do-

> Note: "Nothwithstanding anything contained in the HP High Court Officers and the Members of the Staff (Recruitment, Conditions of Service, Conduct &Appeal) Rules, 2003 and the Schedule, it will be open to Hon'ble the Chief Justice to appoint one

Registrar from amongst the Additional Registrars, to be the Registrar Incharge of the Administration of the High Court."

(I) the aforesaid "note" occurring in Shedule-A, wherewithin Hon'ble the Chief Justice is enabled to, other then out of four Registrars borrowed from the cadre of District & Sessions Judges/Addl. District & Sessions Judges, also hence appoint, one Registrar from amongst the Additional Registrars, (ii) wherefrom the apt sequitur, is, of the appointment of the petitioner in the establishment of the High Court, as Registrar (Administration)-cum-Principal Private Secretary, being within, the domain of the apposite "Note", (iii) hence, with his manning the aforesaid post, otherwise to be manned by judicial officers, drawn from the cadre of District & Sessions Judges/Addl. District & Sessions Judges, thereupon, a right being egendered in the petitioner to validly claim, of his performing duties akin to the Registrars, belonging tot he cadre of District & Sessions Judges. The rejection, of, the representation of the petitioner is anvilled upon the afore-extracted apposite conditions, being accepted by him, acceptance whereof, is comprised in his subsequent to his appointment made under Annexure P-1, (i) his proceeding to join the duties appertaining to the post of Registrar (Administration)-cum- Principal Private Secretary, to Hon'ble the Chief Justice. Moreover, the rejection of the representation of the petitioner, is hinged upon the factum of his thereupon being estopped to claim the benefit of parity(s) of pay vis-a-vis the pay drawn by Registrar(s) belonging to the cadre of District and Sessions Judges, parity whereof, is harboured upon his performing duties alike the ones performed in the Registry, of this Court by Registrar(s) drawn from the cadre of District & Sessions Judges/ Addl. District & Sessions Judges. In aftermath, validity(ies) thereof are also enjoined to be firmly determined.

4. The test, for determining the contentious issue with respect to the relevant conditions embodied in Annexure P-1, of, the petitioner, upon, his joining the post of Registrar (Administration)-cum- Principal Private Secretary to Hon'ble the Chief Justice, his thereupon accepting them, besides qua his being concomitantly estopped to assail the validity(ies) thereof, hence being unreasonable, given their imposition upon him, being engendered by the superior bargaining power(s), of the employer, is squarely embedded, in a authoritative judicial pronouncement, rendered by the Hon'ble Apex Court in ***Central Inland Water Transport Corporation Ltd. vs. Brojo Nath Ganguly and another, (1986)3 SCC 156***, relevant paragraphs whereof read as under:

> "88. As seen above, apart from judicial decisions, the United States and the United Kingdom have statutorily recognized, at 1 least in certain areas of the law of contracts, that there can i be unreasonableness (or lack of fairness, if one prefers that phrase) in a contract or a clause in a contract where there is inequality of bargaining power between the parties although arising out of circumstances not within their control or as a result of situations not of their creation. Other legal systems also permit judicial review of a contractual transaction entered into in similar circumstances. For example, i section 138(2) of the German Civil Code provides that a, transaction is void "when a person" exploits "the distressed situation, inexperience, lack of judgmental ability, or grave weakness of will of another to obtain the grant or promise of pecuniary advantages . . . which are obviously disproportionate to the performance given in return." The position according to the French law is very much the same.
>
> 89. Should they still continue to cling to outmoded concepts and outworn ideologies? Should we not adjust our thinking caps to match the fashion of the day? Should all jurisprudential development pass us by, leaving us floundering in the sloughs of nineteenth-century theories? Should the strong be permitted to push the weak to the wall? Should they be allowed to ride roughshod over the weak? Should the courts sit back and watch supinely while the strong trample under foot the rights of the weak? We have a Constitution for our country. Our judges are bound by their oath to "uphold the Constitution and the laws". The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality

before the law and the equal protection of the laws. The principle deducible from the above discussions on this part of the case is in consonance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Article 14. This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infra-structural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances."

5. Also the aforesaid view is firmly reiterated in a decision recorded by the Hon'ble Apex Court, in ***Bhupendera Nath Hazarika and another Vs. State of Assam and others, (2013)2 SCC 516,*** relevant paragraph(s) whereof read as under:-

"61. Before parting with the case, we are compelled to reiterate the oft- stated principle that the State is a model employer and it is required to act fairly giving due regard and respect to the rules framed by it. But in the present case, the State has atrophied the rules. Hence, the need for hammering the concept.

62. Almost a quarter century back, this Court in Balram Gupta V. Union of India 1987 Supp. SCC 288 had observed thus (SCC p.236, para 13)

> "13.....As a model employer the Government must conduct itself with high probity and candour with its employees."

In State of Haryana V. Piara Singh (1992)4 SCC 118, the Court had clearly stated:(SCC p.134, para 21)

> "21.....The main concern of the court in such matters is to ensure the rule of law and to see that the Executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16".

63. In State of Karnataka V. Uma Devi (3) (2006) 4 SCC 1 (SCC P.18, para 6) the Constitution Bench, while discussing the role of state in recruitment procedure, stated that if rules have been made under Article 309 of the Constitution, then the Government can make appointments only in accordance with the rules, for the State is meant to be a model employer.

64. In Mehar Chand Polytechnic V. Anu Lamba (2006)7 SCC 161 (SCC p.166, para 16) the Court observed that public employment is a facet of right to equality

> envisaged under Article 16 of the Constitution of India and that the recruitment rules are framed with a view to give equal opportunity to all the citizens of India entitled for being considered for recruitment in the vacant posts.
>
> 65. We have stated the role of the State as a model employer with the fond hope that in future a deliberate disregard is not taken recourse to and deviancy of such magnitude is not adopted to frustrate the claims of the employees. It should always be borne in mind that legitimate aspirations of the employees are not guillotined and a situation is not created where hopes end in despair. Hope for everyone is gloriously precious and a model employer should not convert it to be deceitful and treacherous by playing a game of chess with their seniority. A sense of calm sensibility and concerned sincerity should be reflected in every step. An atmosphere of trust has to prevail and when the employees are absolutely sure that their trust shall not be betrayed and they shall be treated with dignified fairness then only the concept of good governance can be concretized. We say no more."

6. A close reading thereof, unfolds, of the State being enjoined to emulate the role of a model employer, unbereft of, despite its holding a superior bargaining power vis-a-vis the employee, its rather proceeding, to, through executive fiats ingrained with pervasive exploitative tendencies, impose unfettered *carte blanche* condition(s) upon him, fiats whereof are erosive of the trite validatory rubric of good conscience and equity. The State as a model employer would befittingly, be construable to cast itself in the role of an enviable model employer, (i) upon its refraining, from, given its holding a paramount bargaining power, impose upon its employee, exacting conditions of service, conditions whereof openly bespeak of theirs being unconscionable and arbitrary, (ii) elements whereof ingraining, the contract of employment, would surge forth, upon the employer evidently snatching all valid right(s) of the employee(s), predominantly appertaining vis-a-vis his legitimate entitlements qua the emoluments/salary accruable vis-a-vis the posts, whereon, they/he perform duties. Upon application of the aforesaid tests vis-a-vis the conditions aforestated, scribed, below Annexure P-1, hence render (iii) open a conclusion no other than the one, of, thereupon the respondent through its empowered superior bargaining power vis-a-vis the petitioner also by sheer executive fiat, its hence, settling upon him exacting conditions, whereby, he stood deprived of the natural incidents of salary AND of the benefits vis-a-vis the apposite post, whereon, he rendered service(s) in the establishment of the High Court. In aftermath, in the respondent imposing the apposite ill conditions, upon the petitioner, render it to be construable, to its hence not casting itself in the pristine besides enviable role of a model employer. The apt sequitur thereof, is, dehors the petitioner subsequent, to, issuance of Annexure P-1, proceeding to join the duties of the post referred therein, his acceptance, not, being construable to beget any inference (a) of his waiving his rights, to receive pay/emoluments, incidental to the post whereon he rendered employment in the establishment of the High Court, nor the aforesaid condition, obviously operating as an embargo, nor forestalling him to claim the benefits of the emoluments/salary, appertaining to the post whereon, he stood appointed under Annexure P-1.

7. Be that as it may, even if, this Court, upon anvil of the extracted relevant expostulation of law, laid, by the Hon'ble Apex Court, has concluded of the aforesaid conditions, scribed, in Annexure P-1, not operating, as an estoppel against him nor upon his accepting them, his being construable to waive, his legitimate right(s) vis-a-vis all valid claim(s) vis-a-vis pay/salary admissible qua the apposite post. (i) It is also incumbent, for, firming up the aforesaid conclusion, to allude to the judgments rendered by the Hon'ble Apex Court, reported in (2013)4 SCC 152, (1982) 1 SCC 618, (1988) 3 SCC 354, (1986) 1 SCC 637, (1991) 1 SCC 619, (1988)1 SCC 122, (2014) 1 SCC 150 and (2014) 13 SCC 588, wherein it stands expostulated that upon an employee evidently rendering duties, against a post, his being entitled, to pay, appertaining thereto also his being entitled to draw pay, at par, with other co-employees, who render alike function vis-a-vis him. Since, this Court has made the aforesaid conclusion, of, the petitioner performing duties alike the one(s) performed by other Registrars in the Registry of this Court, who

stand drawn, from the cadre of District and Sessions Judge, hence, with his evidently rendering duties alike them, he is obviously entitled to parity of pay scale(s) vis-a-vis them, (i) since the time of his manning the office as Registrar (Administration)-cum-Principal Private Secretary i.e. from 30.11.2010 till his standing voluntarily retired, i.e. on 21.08.2013, (ii) reason being, of, all the aforesaid judgments of the Hon'ble Apex Court, foisting in the petitioner a valid right to stake parity of pay with all co-employees, especially when he alike them also performed duties in the Registry of this Court, as, Registrar (Administration)-cum-Principal Private Secretary, to Hon'ble the Chief Justice.

8. For the foregoing reasons, the instant petition is allowed and the order rejecting the representation of the petitioner is set aside. Consequently, the respondent is directed to accord pay to the petitioner equal vis-a-vis other Registrars working in the establishment of the High Court, who stand drawn from the cadre of District & Sessions Judges/Addl. District and Sessions Judges, from 1.12.2010 to 20.8.2013 and his pension be fixed accordingly. The aforesaid exercise be completed within two months from today, failing which the petitioner shall entitled to interest at the rate of 6% per annum upon the aforesaid benefits from the date of the petition till realisation. All pending applications also stand disposed of.

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

Dalip Thakur ....Petitioner.
Versus
High Court of H.P. ....Respondent.

CWP No. 3200 of 2016.
Reserved on :25.10.2017.
Decided on:10th November, 2017.

Constitution of India, 1950- Article 226- Service- Petitioner seeking selection to the post of Superintendent Grade-I in the Establishment of District and Sessions Judge's Court- rejection of the application- petitioner submitting that Amended Rules of 1996 were not applicable to the petitioner, as he was already working as Superintendent Grade-II, on regular basis at the time of advertisement, which was a feeder post for the Superintendent Grade-I post. In the alternative the petitioner seeking one time relaxation under Rule 7 of Himachal Pradesh Court Act, 1976. **Held** – amended Rules (1996) inter alia provided for a minimum educational qualification for the post of Superintendent, being graduation or 15 years experience in the feeder post- **Further Held-** that the minimum qualification provided under the amended Rule creating a classification was founded on an intelligible differentia holding a close nexus with the salutary purpose of ensuring the aspirant possessing the enhanced educational qualification and acumen, for his proficiently performing, the higher responsibilities of the post of Superintendent in the Establishment of District and Sessions Judge Court. (Para-6)

For the Petitioner: Mr. N.S. Chandel, Advocate.
For the Respondent: Ms. Suita Sharma, Advocate.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge.

The petitioner herein, is an aspirant to the post(s) of Superintendent, Grade-I existing upon the establishments of District and Sessions Judges, posted in Himachal Pradesh.

In pursuance to a circular, issued on 5th July, 2016, for filling up post(s) of Superintendent, Grade-I, in the establishments of District and Sessions Judges, posted in Himachal Pradesh, the petitioner herein made an application, for his being considered for selection besides appointment thereto. However, in pursuance to his making an application, no call letter was served upon petitioner, for eliciting his participation in the apposite viva voce. Subsequent thereto, yet prior to his instituting the instant petition, the petitioner made a representation vis-a-vis the Registrar General, High Court of H.P., for his being considered for selection besides appointment to the post of Superintendent, Grade-I, occurring in the establishment(s) of District and Sessions Judges, posted in Himachal Pradesh. The aforesaid representation, stood, as borne by Annexure-II of 23/24.12.2016, hence rejected. Since, the grounds meted in the rejected representation of the petitioner are parameteria vis-a-vis the grounds meted in the extant writ petition, especially qua thereupon direction(s) being meted to the respondent, for his being considered for selection besides appointment to the post(s) of Superintendent, Grade-I, existing or as may occur in the establishments of District and Sessions Judges, posted in Himachal Pradesh, thereupon, dehors the petitioner not challenging the order rejecting his representation, this Court would yet proceed, to dwell upon the efficacy(ies) of the grounds meted in the writ petition, given theirs bearing congruity vis-a-vis the grounds meted in his rejected representation addressed to the respondent. Before dwelling upon the efficacy of the grounds meted in the writ petition, specifically the one appertaining, to validity besides application vis-a-vis him, of the apposite Rules, of 1996, it is apt to extract the hereinafter relief(s) prayed in the writ petition:-

> "(a) That the amendment of rules of 1996 are not applicable to the petitioner. Even otherwise note below Rule-iii of Himachal Pradesh Court Act, 1996, protects the petitioner as he is already working as Superintendent Grade-II, on regular basis at the time of the advertisement of the post of Superintendent in the office of District and Sessions Judge in the State of Himachal Pradesh by the respondent.
>
> b) That if this Hon'ble Court does not find favour with the submission of prayer (a), one time relaxation under rule -7 of Himachal Pradesh Court Act, 1976 may kindly be granted to the petitioner.
>
> c) That the respondent may kindly be directed to allow the petitioner to participate in the interview to be held from 26.12.2016 to 28.12.2016."

The record bears out the factum of the relief occurring, at clause (c) standing granted vis-a-vis him, by this Court under an order rendered on 26.12.2016 in CMP No. 10654 of 2016, whereby, this Court permitted the petitioner, to participate in the relevant selection process, thereupon, any pronouncement thereon is unnecessary, it being rendered infructuous also a pronouncement vis-a-vis the reliefs occurring at clauses (a) & (b), is merely an academic exercise, for making an endeavour for settling a binding interpretation upon the apposite Rules of 1996.

2. As borne out on a reading of Annexure P-4, the relevant Rule 4, stood amended by a notification of 22nd August, 1983, comprised in substitution(s) thereto, in the hereinafter extracted manner, being effected, vis-a-vis the apposite Rule 4 of the apposite Rules :-

> "The existing rule 4 of the Rules shall be substituted as under:-
>
> (i) The High Court shall maintain a panel of candidates accepted for appointments as Superintendents. This list shall ordinarily contain such number of candidates as can be absorbed within two years.
>
> (ii) The post of Superintendent to the District and Sessions Judge shall be a selection post and shall form a State Cadre.
>
> (iii) The minimum educational qualification for the post of Superintendent will be graduate or 15 years experience in the feeder post. However, preference will be given to those candidates who are law-graduates.
>
> (iv) For the purpose of drawing panel of candidates referred to in sub-rule (I) above, the High Court will call for the recommendations of all the District and

Sessions Judges in Himachal Pradesh. Each District & Sessions Judge will sponsor to the High Court the names of only two candidates working in his Sessions and Civil Division after selecting them on the basis of merit-cum-seniority from amongst the ministerial staff carrying a scale of 570-10180 or its revised scale. Where as District & Sessions Judge is not recommending the names of the Senior Most officials, he shall also send their full particulars along with detailed reasons for not recommending them. The Annual confidential Dossiers and service records of the sponsored candidates as well as those who are senior to them will also be sent to the High Court while making recommendations.

(v) The High Court shall hold a qualifying test which the officials sponsored by the District & Sessions Judges shall be eligible to appear. The High Court may also allow an official who has not been sponsored but is senior to the sponsored candidates of the Division to appear in the test. The syllabus for the qualifying test shall be prescribed by the Hon'ble Chief Justice and his companion Judges. The confidential reports of those candidates who successfully qualify the test will be taken into consideration. The overall merit of the candidates being equal in any case due regard will be given to the seniority and for this purpose, the seniority would be taken into account in the grade of Rs.570-1080 or its revised scale according to length of service in that scale."

The aforesaid amendment, carried, in the year 1983 vis-a-vis Rule 4 of the apposite Rules, enjoined upon the aspirants concerned vis-a-vis the posts of Superintendent(s), existing in the establishments, of District and Sessions Judges, posted in Himachal Pradesh, to (i) at the relevant stage peremptorily hold a graduate degree or (ii) in alternative thereto, they were, enjoined to hold 15 years experience in the feeder category, carrying a pay scale of Rs.570-1080 or its revised scale. Subsequent thereto, as borne by Annexure P-5, of 20th January, 1996, another amendment was effected vis-a-vis sub rules (iii) and (iv) to Rule 4 of the apposite Rules. The hereinafter extracted sub rules (iii) and (v) in supplantation, of the hitherto sub rules (iii) and (v), of Rule 4 of the apposite Rules, were hence, brought in the statute book:-

"(iii) The superintendent Grade-II in the courts subordinate to the High Court with a minimum educational qualification of graduates from a recognized university shall form a feeder category for the post of Superintendents.

Note:- However, this sub rule shall not apply to those candidates who have already been appointed as such on regular basis.

(iv) The selection to the post of Superintendents will be made either on the basis of service record or on the basis of oral and/or written examination as may be prescribed by the High Court."

3. Apparently the extantly prevailing sub rules (III) & (IV), of Rule 4 of the Apposite Rules, hence, abrogate the earlier therewith imperative conditions, (i) of the aspirants to the post of Superintendent, holding, a graduate degree or (ii) in alternative thereto, theirs holding 15 years experience in the feeder category, carrying a pay scale of 570-1080 or its revised scale, (iii) rather nowat the aspirants are compulsorily required, to, at the time contemporaneous vis-a-vis the occurrence of vacancy, hence, hold a graduation degree from a recognized university also the aspirant concerned is obliged to hold thereat the apposite feeder post, of Superintendent Grade-II, in the courts subordinate to the High Court, (iv) also the aforesaid post of Superintendent Grade-II in the courts subordinate, to the High Court, is constituted to be the solitary feeder category, for enabling the aspirants concerned, to aspire for, for selection besides for appointment, to the post of Superintendent in the establishments of District and Sessions Judges, posted in Himachal Pradesh. Nonetheless, a proviso thereto, is comprised in a note appended there underneath, wherein, (v) it is ordained of the mandate of amended sub rule (iii) of Rule 4 of the apposite Rules of 1996 remaining inoperative vis-a-vis those candidate(s), who stand prior thereto appointed on a regular basis, in the feeder category concerned.

4. The learned counsel appearing, for the writ petitioner, contends that the substituted sub rule (iii) of Rule 4 of the apposite Rules of 1996, rules whereof stand borne in Annexure P-5, working hardship vis-a-vis the petitioner given (I) its substituting the earlier therewith apposite sub rule(s) carried in the notification of 1983, wherein, the aspirants were required, to, at the time contemporaneous to the arising of the apposite vacancy(ies), besides were statutorily obliged to possess (a) graduation degree or (b) in the alternative thereto, were, enjoined to hold 15 years experience in the feeder category, holding a pay scale of 570-1080 or its revised scale, whereas, (c) abrogation of the condition alternative, to the primary condition appertaining to the aspirant concerned holding a graduation degree from, a recognized university, has encumbered upon petitioner, who evidently does not hold the peremptory educational qualification, ordained in the substituted sub rule (iii) of Rule 4, of the apposite Rules 1996, as borne in Annexure P-5, with hence an onerous hardship, of his further promotions in the hierarchy of service, being obviously frustrated, (II) he contends that the prescription in Annexure P-5, of the apt relevant cut off date, being recknonable on 20.01.1996, for thereupon the clout of the proviso to sub rule (iii) of Rule 4, of the apposite Rules of 1996, holding sway, whereunder, the primary obligation cast, in the amended sub rule (iii) to Rule 4, of the apposite Rules, upon the aspirant concerned, comprised in his imperatively possessing a graduation degree, is per se arbitrary also it creates an unreasonable classification, (III) besides its being not founded upon any intelligible defferentia nor its holding any nexus with the apposite feeder category of Superintendent(s) Grade-II, being necessarily thereafter being enjoined to hold a graduation degree vis-a-vis the ouster from its play qua the earlier therewith regularly appointed candidate(s) vis-a-vis the post of Superintendent Grade-II, in the courts subordinate to the High Court.

5. The prescriptions, occurring, in the amended sub rule (iii) of Rule 4 of the germane besides apposite Rules, of, (a) the aspirant(s) concerned, subsequent to 1996, upon occurrence of vacancies, of, Superintendent in the establishments of District and Sessions Judges, posted in Himachal Pradesh, being primarily enjoined, to hold a graduation degree from a recognized university, (b) whereas, in the earlier therewith aforesaid apposite Rules, holding operation from 1983 upto 1996, not casting, any peremptory obligation upon the aspirant concerned, to necessarily hold a graduation degree, (c) rather with the aspirant concerned, holding, an alternative thereto statutory condition, comprised in his holding 15 years experience, in the feeder category, holding, a pay scale of 570-1080 or its revised pay scale, also hence rendering him eligible, for his being considered for selection besides appointment to the post of Superintendent in the establishment of District & Sessions Judges, posted in the Himachal Pradesh, cannot be, construed to be carrying (d) any visible trait(s) of arbitrariness, emphatically, when the mandated prescription(s), of the aspirant concerned, being enjoined (e) to primarily hold the aforesaid enhanced educational qualification, is founded besides is imminently rested upon the principle of necessity, of, holding thereof by him, being an indispensable norm, for enabling him, (f) to, upon his being appointed, to a responsible promotional post, of Superintendent in the establishments of District and Sessions Judges, posted in Himachal Pradesh, to hence efficiently discharge all the higher responsibilities of the promotional post. More so, when his primarily holding an enhanced educational qualification would also sharpen his requisite acumen, for his proficiently discharging the higher duties of a Superintendent, in the establishments of District and Sessions Judges, posted in Himachal Pradesh.

6. Be that as it may, the further contention addressed before this Court by the learned counsel, for the petitioner that (I) with the clout, of the note, appended underneath sub rule (iii) of Rule 4 of the apposite Rules of 1996, besides its operating as a proviso thereto, being singularly relaxed vis-a-vis, prior to 20.01.1996, regularly appointed Superintendent Grade-II, in the courts subordinate to the High Court, carrying an obvious concomitant effect, of thereupon, hardship working vis-a-vis Superintendent(s) Grade-II, appointed thereafter AND (II) of the prescription therein, of the cut off date being 20.01.1996, hence creating an unreasonable classification inter se prior thereto regularly appointed Superintendent(s) Grade-II in the courts subordinate to the High Court, vis-a-vis Superintendent(s) Grade-II, appointed subsequent

thereto. (III) Also the classification being arbitrary and also its not being founded upon any intelligible defferentia, holding any nexus vis-a-vis the purpose, of, recruitment besides selection, to the post of Superintendent in the establishments of District and Sessions Judges, posted in Himachal Pradesh, thereupon, the proviso to sub rule (iii) of the apposite Rules of 1996, being permeated with a stain of discriminatoriness, rendering it to be also not applicable vis-a-vis the petitioner, rather his alike the relaxing benefit(s) thereof purveyed vis-a-vis Superintendent Grade-II, appointed on a regular basis prior to 20.01.1996, being entitled to likewise meteings thereof vis-a-vis him. However, the aforesaid submission is also not tenable, the reason for discounting it, is founded upon (a) the engraftment of the relevant aforesaid proviso, AND with its relaxing the rigor of apposite sub rule (iii) of Rule 4 of the apposite Rules of 1996, vis-a-vis candidates regularly, prior thereto, appointed as Superintendent(s) Grade-II, in the courts subordinate to the High Court, being engendered by grave thoughtfulness also by extreme circumspection besides with great wisdom backing it. The salient guiding wisdom behind the aforesaid classification, created, in the apposite afore extracted proviso, is embodied in the superintendent(s) Grade-II, appointed prior to 21.01.1996, against substantive posts also on a regular basis thereon, while, being hence constituted as a feeder category, in the earlier therewith Rule(s), for selection besides appointment, to the apposite post of Superintendent in the establishments, of District and Sessions Judges, posted in Himachal Pradesh, (b) importantly given the earlier therewith rules, prescribing upon the aspirant concerned to hold pay scale(s) alike the one(s) carried, by the aspirants manning the post of Superintendent Grade-II, existing in the courts subordinate to the High Court, (c) being not beset with any hardship, despite theirs being borne in the relevant stream or feeder category vis-a-vis the promotional post, (d) merely on account of theirs, not, holding the imperative peremptory minimal educational qualification of being graduates from a recognized university. With the aforesaid innate wisdom, whereon, the apposite afore extracted proviso to sub rule (iii) to the apposite Rules of 1996, is embedded, thereupon (e) benefits thereof cannot be construed to be extendable nor its amplitude can be made extendable vis-a-vis all subsequent thereto aspirants concerned, who though hold the apposite feeder post(s) in the courts subordinate to the High Court, theirs being alike, prior to 20.01.1996, regularly appointed Superintendents Grade-II, being also meted the relaxing fiat, of the apposite proviso. (f) With the aforesaid innate wisdom backing the incorporation of the proviso vis-a-vis sub rule (iii) of Rule 4 of the apposite Rule of 1996, (g) thereupon, the classification created therein inter se the Superintendent Grade-II, appointed prior thereto on a regular basis in courts subordinate to the High Court and those, AND vis-a-vis those, who stood appointed subsequent thereto, as Superintendent(s) Grade-II, in the courts subordinate to the High Court, obviously, (h) is founded upon an intelligible differentia also it holds a close nexus with the salutary purpose, for its statutory engraftment therein, purpose whereof as aforestated, is to ensure the aspirant possessing the enhanced educational qualification and acumen, for his proficiently performing, the higher responsibilities or working(s) appertaining to the promotional post of Superintendent, in the establishments of District and Sessions Judges, posted in Himachal Pradesh. (i) The further reason for making the aforesaid conclusion, is founded upon the factum of since 1996 thereafter upto the occurrence of the relevant vacancy(ies), the aspirant(s) concerned, though being enabled, to acquire the primary compulsory educational qualification, yet despite, the existence(s) of relevant Study Rules or despite prevalence, of correspondence courses, upon availments whereof, the aspirants concerned, may overcome the shortcomings in his/their educational qualification. (j) Nonetheless, the apposite failures of the aspirants concerned, cannot, empower them to claim benefits of the relaxing proviso of sub rule (iii) of the apposite Rules. (k) Conspicuously when the Superintendent(s) Grade-II, who stood appointed in the aforesaid capacity on a regular basis prior to 1996, given the immediacy of promulgation, of the amended, Rules of 1996, hence, not holding any opportunity, to enhance their educational qualification(s) also when hence any prompt implementation upon them of the amended rules, would work hardship vis-a-vis their promotional prospects, (L) whereas the subsequent thereto regularly appointed Superintendent(s) Grade-II, despite holding an opportunity to enhance their educational qualification, yet theirs failing, failure whereof is not amenable for any condonation.

7. The learned counsel appearing for the petitioner has further placed reliance upon a common judgment of this Court, rendered, in CWP Nos. 1712 of 1993, titled as Mohan Dass versus District & Sessions Judge & Ors and in CWP No. 2053 of 1995, titled as Smt. Savita Sharma versus District and Sessions Judge & Ors., to contend that the relaxation purportedly meted vis-a-vis the petitioners therein qua the enjoined statutory necessity, of theirs possessing the apposite qualification(s), thereupon, at par therewith, the petitioner be accorded an alike relaxation vis-a-vis the rigor of sub rule (iii) to Rule 4 of the apposite Rules of 1996, especially for want of his, not possessing the primarily enjoined educational qualification, of his holding a graduation degree from a recognized university. However, the aforesaid contention is also rudderless, as, in the verdict pronounced in the aforesaid writ petitions, this Court was not seized with the interpretation, of the aforesaid Rules nor was seized with the apposite herewith espoused relaxation(s) being meted vis-a-vis the petitioner in respect of the rigor of sub rule (3) of Rule 4 being relaxed, by meteing vis-a-vis him, the benefit of the proviso appended therewith.

8. Lastly, the learned counsel appearing for the petitioner has contended that the direction(s) be rendered upon the respondent, to relax the rigor of sub rule (iii), to Rule 4 of the apposite Rules of 1996, yet the aforesaid direction, cannot, be also pronounced, as no relaxing discretion(s) stand engrafted in the relevant Rules, also when the sequitur whereof, would be of occurrence of conflict with the peremptory mandate of sub rule (iii) of Rule 4 of the apposite Rules of 1996, conflict therewith is obviously to be avoided.

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

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

Durga Devi .....Appellant/Plaintiff.
Versus
Nihal Dass & another .....Respondents/Defendants.

RSA No. 370 of 2005.
Reserved on : 01.11.2017.
Decided on:10th November, 2017.

Code of Civil Procedure, 1908- Order 2 Rule 2- Civil Suit filed seeking declaration as exclusive owner of the suit land, with the consequential relief of permanent prohibitory injunction- Plaintiff seeking intestate succession being the sole heir of the deceased Karmu- defendant claiming ownership and possession on the basis of Will dated 27.5.1985- Suit land being a part of the land of the deceased Karmu qua which decree had been obtained by the plaintiff in a previous suit - As per the plaintiff, the Halqa Patwari without any authority of law had sanctioned mutation in favour of defendant on 25.8.1985 on the basis of the aforesaid forged Will, which was also under challenge in the earlier suit- the Learned Trial Court and the 1st Appellate Court had dismissed the suit of the plaintiff – In the Second Appeal the judgments of both the learned Courts below set aside- Suit of the plaintiff decreed to the effect that the plaintiff was owner in possession of the suit land the revenue entry showing defendant as owner in possession were wrong and illegal- **Held**- that the act of omission of the plaintiff to reflect the Khasra number in the earlier suit has to be an intentional omission, a mere omission is no bar in a subsequent suit on the same cause- the omission to sue has to be an intentional omission and in the knowledge of plaintiff- rigor of Order 2 Rule 2 CPC would be applicable only in case of intentional omission and when the fact is in the knowledge of the plaintiff. (Para-12)

For the Appellant: Mr. Vipul Sharda, Advocate vice Mr. Sunil Mohan Goel, Advocate.
For Respondent No.1: Mr. K.S. Kanwar, Advocate.
Respondent No.2 already proceeded against ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiff's suit for rendition of a declaratory decree in respect of hers being entitled to be declared as exclusive owner of the suit property, with, consequential relief of permanent prohibitory injunction being rendered qua thereto, was, under concurrent pronouncements recorded thereon by both the learned Courts below, hence, dismissed.

2. Briefly stated the facts of the case are that the plaintiff filed a suit claiming therein relief of declaration to the effect that she is owner in possession of land comprised in khata No.1021/2, Khatauni No.1787, khasra No.2321, measuring 1-14-0 bighas as described in copy of jamabandi for the year 1991-92, situated in phati and kothi Naggar, Tehsil and District Kullu, H.P. and as such collusive revenue entries showing defendant No.1 as owner in possession of the suit land are wrong, illegal and not binding upon the plaintiff with consequential relief of injunction restraining the defendant from claiming any right, title or interest over the suit land. It is averred that one Karmu son of Shri Moti resident of village Kutbai (Naggar), husband of plaintiff was owner in possession of the suit land. Shri Karmu died on 24.6.1985. The plaintiff being his widow is the sole heir of deceased Karmu and as such has succeeded to the suit land on the basis of intestate succession, hence, she is owner in possession of the suit land. The defendants on the basis of some forged and fictitious will dated 27.05.1985 set up by him in connivance with the revenue officials, got mutation numbers 4152 and 4153 dated 25.8.1985 of phati Nakthan and Naggar attested and sanctioned in their names. However, the suit land was not included in the aforesaid, mutation and the mutation in respect of the suit land was not attested and sanctioned in the name of the defendant on the basis of the alleged will set up by them. It is further alleged that the plaintiff had filed a civil suit No.186/85 wherein he had claimed herself as owner in possession of the property and estate of deceased Karmu and had also challenged the aforesaid mutations. The aforesaid civil suit was dismissed by the learned Sub Judge 1st Class, Kullu on 24.09.1987. However, in the civil appeal No.306/87-76/88, the said judgment and decree passed by the learned Sub Judge 1st Class, Kullu was set aside by the learned District Judge, Mandi, Kullu and Lahul Spiti vide judgment and decree dated 10.9.1990 and she was declared owner in possession of the suit property in the said civil suit and the will set up by the defendants was rejected and mutations were declared null and void. In Regular second appeal No.483 of 1990, the judgment and decree passed by the learned District Judge, Mandi, Kullu and L& S was affirmed and maintained by the High Court on 20.8.1991. It is further averred that in the month of February 2001, the plaintiff obtained parcha jamabandi of suit land in order to raise crop loan from the bank and on obtaining such parcha jambandi, she was surprised to know that Patwari Halqa without any authority of law incorporated red entries in the remarks column showing therein that mutation No.4192 had been attested and sanctioned in respect of the suit land in the name of defendants and the said wrong revenue entries were carried out in subsequent jamabandies wrongly. The plaintiff made further inquiries and obtained the relevant documents and came to know that at the time when the previous suit was filed by the plaintiff, the suit land was not included in the said suit because no mutation with respect to the suit land was attested in the name of defendants and further that Patwari Halqua had not issued parcha jamabandi of the suit land although the same was demanded by the plaintiff of the entire property left by Karmu. In the said suit the defendants did not raise any objection as the suit land was not included in the same. The plaintiff came to know about the aforesaid wrong and collusive revenue entries in the first week of August, 2001 and asked the defendant to get the entries corrected but without any result and they started causing unlawful interference in the ownership and possession of the plaintiff.

3. Defendant No.1 contested the suit and filed written statement, whereas, defendant No.2 has not contested the suit and he was proceeded against ex-parte. Defendant No.1 in his written statement taken preliminary objections, inter alia locus standi, maintainability, limitation, valuation and the suit filed by the plaintiff is barred by the provisions contained in Order 2, Rule 2 and Section 11 of the CPC. On merits, it is admitted that Karmu died on 24.6.1985, but rest of the claim set up by the plaintiff has been termed as wrong and incorrect. It has been pleaded that on the death of Karmu the suit land came in the possession of defendant No.1 on the basis of Will dated 27.3.1985 which was duly executed by Karmu deceased on the basis of which mutations of inheritance were sanctioned. The suit land has been correctly entered in the ownership and possession of defendant No.1. The suit land was not the subject matter of Civil suit No.189/85 and subsequent Civil Appel No.306/87-76/88 and RSA No. 483/90 of which the plaintiff had full knowledge and notice but the plaintiff intentionally omitted to sue in respect of the suit land in the said civil suit. Hence, the matter was directly and substantially in issue in the previous suit, which is directly and substantially in issue in the present suit, hence, the suit is barred under the provisions of Order 2, Rule 2 and Section 11 of the CPC.

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 the owner in possession of the suit land, as alleged? OPP.
2. Whether the plaintiff is entitled to on the injunction as prayed for? OPP.
3. Whether revenue entries are wrong and illegal, as alleged? OPP
4. Whether the plaintiff has locus standi to sue? OPP.
5. Whether the suit is not maintainable in the present form? OPD.
6. Whether the suit is time barred? OPD.
7. Whether the suit is hit by Order 2, Rule 2 and Section 11, CPC as alleged, if so its effect? OPD.
8. Whether the suit has not been properly valued for the purposes of court fee and jurisdiction? OPD.
9. Whether late Karmu executed a valid Will dated 27.03.1985 in favour of the defendants, as alleged? If so its effect?OPD.
10. Whether the plaintiff has a cause of action? OPP.
11. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff/appellant herein. In an appeal, preferred therefrom by the plaintiff/appellant 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 plaintiff/appellant 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 17.07.2006, this Court, admitted the appeal instituted by the plaintiff/appellant against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether a suit can be said to be barred by Section 11 of Civil Procedure Code when the suit property that is the subject matter of the case was not involved earlier in any case through the parties to the case might have been involved earlier in litigation qua some other property?

b) Whether the Courts below have erred in coming to the conclusion that the suit filed was barred by provisions of Order 2, Rule 2 of the Civil Procedure Code when there is nothing on record to suggest that the plaintiff had

willfully or otherwise omitted the subject matter of the present case from the earlier suit as the plaintiff was not aware of the revenue entires which were challenged in subsequent suit?

c) Whether the learned Courts below have erred in not appreciating that Order 2, Rule 2 of the CPC does not require that when several causes of action arises from one transaction the plaintiff should sue for all of them in one suit?

d) Whether the learned Courts below have totally misread and mis appreciated the facts of the case and evidence on record?

Substantial questions of Law No.1 to 4.

7. Uncontrovertedly, the plaintiff is the widow of deceased Karmu. Uncontestedly, during his life time, the aforesaid Karmu, was, the exclusive owner in possession of the suit land, borne in the extant suit also the extant suit land is partially similar vis-a-vis the one borne in the previous suit bearing Civil Suit No. 180/1985 besides the parties at contest hereat are analogous vis-a-vis the previously litigating parties. However, in the earlier suit, bearing C.S. No. 180 of 1985, the suit khasra numbers, in respect whereof the apposite relief of declaration, is now sought by the plaintiff, remained omitted to be included therein. In the previously instituted suit, wherein, the parties at contest hereat were analogous vis-a-vis the litigants therein, the plaintiff espoused the hereinafter extracted reliefs:-

"The plaintiff be declared as owner in possession of the land:

(A) (i) ½ share of land measuring 3-11-0 bighas, comprised under khasra Nos. 707, 813, khata Khatauni No. 661 min/1437, incorporated in the jamabandi for the year 1970-71of phati Nathan, Kothi Naggar, Tehsil and District Kullu

(ii) full share of land measuring 1-4-0 bighas, comprised under khasra No.709, khata khatauni No.661 in/1438, incorporated in the jamabandi for the year 1970-71 of phati Nathan, Kothi Naggar,

(iii) ½ share of land measuring 2-6-0 bighas, comprised under khasra No.711 and 710, khata khatauni NO.661 min/1439, incorporated in the jamabandi for the year 1970-71 of phati Nathan, kothi Naggar, Tehsil and District Kullu,

(iv) owner in possession of three storeyed slate roofed house, having 3 rooms along with verandahs in its surrounding three sides measuring 16 x 16 hath, situated on phati abadi, surrounded from North House of Pushpa, East orchard & road, west Sharshi of Pushpa, South Khal of Plaintiff, in phati and kothi Naggar, Teshil and District Kullu

(v) ½ share of khal measuring 19x 19 hath, situated in Phati Abadi, surrounded from North-House of plaintiff, East Orchard & Road, west-Sharhi of plaintiff and South-path, in Phati and Kothi Naggar, Tehsil and District Kullu, H.P.

(vi) full share of land measuring 0-4 biswas, comprised under khasra No.2329 and 2331, khata khatauni No.812 min/1589, incorporated in the jamabandi for the year 1976-77 of phati Naggar Kothi Naggar, Tehsil and District Kullu

B. Tenant in possession as Pujari of Devta Takar Nar Singh of Naggar of land;-

I) ½ share of land measuring 3-5-0 bighas, comprised under khasra No.2323, khata khatauni No.812 min/1584, incorporated in the jamabandi for the year 1976-77 of phatai and Kohi Naggar, Tehsil and District Kullu.

ii) ½ share of land measuring 19-19-0 bighas, out of total land measuring 20-5-0 bighas, comprised under khata Khatauni No.812min/1585, comprised under khasra No.1904, 2326, 2425, 2424, 2426, 1905, 2306, 2307, 2319, 2322, 2325, 2328, 2332 and 2300, incorporated in the jamabandi for the year 1976-77 of Phati and Kothi Naggar, Tehsil and District Kullu, H.P. (to be called hereinafter as suit land), being inherited by the plaintiff from her husband Shri Karmu

> deceased as his widow and that the plaintiff is not bound by the mutation Nos. 4192 and 4193, attested by the A.C. 2nd Grade, Kullu on 25.8.1985, of Phati Naggar, with respect to the property situated in Phati Naggar, on the basis of alleged Will purported to have been executed by Shri Karmu deceased on 27.5.1985, in favour of defendants with consequential relief of injunction restraining the defendants from causing any sort of interference with the same."

The defendants therein propounded, the Will of aforesaid Karmu. However, under a decision recorded upon Civil Suit No. 180 of 1985, verdict whereof is borne in Ex.D-5 & Ex. D-6, the learned trial Court hence dismissed the aforesaid suit. Nonetheless, the learned First Appellate Court allowed Civil Appeal No. 306 of 1987/76 of 1988 preferred before it by the aggrieved plaintiff AND hence, under Ex. D-7, decreed the plaintiff's suit, whereby, the Will of deceased Karmu as propounded by the defendants, was invalidated. The verdict borne in Ex. D-7, stood, affirmed by this Court, under, its verdict recorded upon RSA No.483 of 1990. Consequently, the verdict rendered in the previous suit has attained conclusive binding effect, predominantly, with respect to the Will of deceased Karmu, as propounded by the defendants being declared to be a fictitious document.

8. Both the learned Courts below declined vis-a-vis the plaintiff, the apposite declaratory relief, with respect to the extant suit khasra numbers, on anvil, of theirs attracting the mandate of Order 2, Rule 2, of the CPC, provisions whereof stand extracted hereinafter:-

> **"2. Suit to include the whole claim.-** (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.
>
> (2) Relinquishment of part of claim—Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.
>
> (3) Omission to sue for one of several reliefs—A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted."

Attraction(s) whereof, occurred, (i) upon anvil of, conclusive verdicts being pronounced by Courts of law, in the earlier suit inter se analogous parties thereat vis-a-vis contesting parties hereat, (ii) besides on anchor of the plaintiff not including in the previous suit, the extant suit khasra numbers, as now stand included in the extant suit, (iii) whereas, hers being statutorily enjoined to also include therein the extant suit khasra numbers , (iv) besides with hers not seeking leave of the court, to subsequently sue in respect of the extant suit khasra numbers, thereupon, both the learned Courts below concluded, of the plaintiff (a) intentionally relinquishing, for espousal, in the earlier suit, any relief vis-a-vis the extant suit khasra numbers; (b) her omission to include the extant suit khasra numbers in the previous suit, now estopping her, to, in respect thereto hence claim the apposite declaratory decree.

9. Before proceeding to make any pronouncement upon the validity(ies) of attraction vis-a-vis the extant suit,, the mandate of the provisions borne in Order 2, Rule 2 of the CPC, it is imperative to allude, to the apposite explicatory averments borne in paragraphs No.4,5 and 6 of the plaint, whereupon the plaintiff, stood hence precluded to, in the earlier suit, include therein the extant suit khasra numbers, paragraphs whereof read as under:-

> "4. That now in April, 2001, the plaintiff obtained the parcha jamabandi of the suit land in order to raise the crop loan from the bank and when she obtained the copy of the jambandi of the suit land, she was surprised that the patwari halqua without any authority of law, had given the red entries in the remarks column of the jamabandi, showing therein that the mutation NO.4192, has been attested and sanctioned and then names of the defendants with respect to the

suit land also, and on the basis of such wrong red entries the names of the defendants were carried out in the subsequent jamabandies and subsequently the name of the defendant No.1 was wrongly carried out in the subsequent jamabandi. The plaintiff made further enquiry and obtained the relevant papers and documents and came to know that at the time when the previous suit was filed by the plaintiff, the suit land was not included in the previous suit, as because no mutation with respect to the suit land was attested in the names of the defendants, and further that the patwari halqua had not issued the parcha jamabandi of the suit land, though the parcha jamabandies were demanded with respect to the entire property left by Shri Karmu husband of the plaintiff. Further there was no objection on the part of the defendants that the suit land is not included in the aforesaid civil suit.

5. That when the plaintiff came to know about the aforesaid wrong and collusive revenue entries, she requested the defendants to get the wrong entries correct, but the defendants instead admitting the claim of the plaintiff since the fist week of August, 20-01, started causing unlawful interference in the ownership and possession of the plaintiff concerning the suit land and threatening to dispossess the plaintiff therefrom, for which the defendants have got no right.

6. That mutation No.4192, there was no reference of the suit land and the suit land was never mutated by the revenue officer in the name of the defendants and moreover in the aforesaid civil appeals decided by the learned District Judge, as well as by the Hon'ble High Court of Himachal Pradesh, the aforesaid courts have rejected the Will set up by the defendants and have held the plaintiff as the sole heir of the deceased Shri Karmu and set aside the mutation No.4192, and as such the Patwari halqua had wrongly carried entries of ownership and possession in the name of the defendants and then in the name of the defendant No.1, which entries are collusive, wrong, illegal, against law and facts and as such the plaintiff is not bound by the same."

A circumspect reading of the apposite afore extracted averments, reveal, (i) of the plaintiff being precluded to in the earlier suit, hence include the extant suit khasra numbers, exclusion whereof springing from (ii) no mutation in respect of the extant suit khasra numbers being attested by the Revenue Officer vis-a-vis the defendants AND vis-a-vis the extant suit khasra numbers; (iii)) the Patwari halqua, not, issuing revenue records apposite to the extant suit khasra number(s), despite, hers making demand(s) thereof, upon the Patwari and (c) the defendants in their written statement instituted to the previous suit, not, making any espousal of theirs holding any right vis-a-vis the extant suit khasra numbers. Testifications were rendered by the plaintiff in proof of the aforesaid averments cast in the extant suit. The defendant(s) for succoring their contentions reared in their written statement (a) of the plaintiff thereat, holding, the apposite knowledge in respect of the extant suit khasra number, knowledge in respect whereof, held, by the plaintiff, arising from theirs holding possession of the suit khasra numbers, (b) did not adduce any affirmative evidence thereon, except their counsel putting suggestions to the plaintiff, of hers not holding possession of the suit khasra numbers, rather theirs holding possession thereof, suggestion whereof stood denied by her; (c) apart therefrom, the defendants for succoring the aforesaid contentions reared by them, in their written statement, did not adduce, any affirmative evidence thereon, rather their counsel after tendering certified copies, of, the previous conclusive verdicts recorded upon the previous suit, hence closed their evidence.

10. The aforesaid extracted averments, cast, in the plaint and omission(s) of the defendants, in adducing cogent evidence, in display of theirs holding possession, of the extant suit khasra numbers, does gain, the hereinafter inferences (a) of the plaintiff holding possession of the suit khasra numbers; (b) hers proving of the defendant(s) in the first week of August, 2001, hence making unlawful interference(s) besides invasions, upon the suit khasra number(s), for unsettling her possession vis-a-vis the extant suit khasra numbers.

11. Be that as it may, with all the apposite explication(s) meted by the plaintiff in the extant suit being hence proven, whereupon she stood precluded, to in the earlier suit, hence, include the extant suit khasra number(s), (i) thereupon, it is to be determined, upon an incisive reading of the apposite provisions, occurring in Order 2, Rule 2, of, the CPC, qua whether attraction of mandate(s) thereof vis-a-vis the extant suit, being valid or not. (ii) Both the learned Courts below, *per se ipso facto,* on anvil of inter se analogity of contesting parties in the previous suit vis-a-vis the contesting parties hereat also upon anchor of the plaintiff, excluding, the extant suit khasra numbers, in her previous suit, (iii) made a conclusion of hers, being in respect thereof hence precluded, to institute the extant suit. (iv) However, the aforesaid conclusion is drawn, on a gross mis-appraisal, of the mandate borne in the provisions of Order 2, Rule 2, of the CPC besides spurs from a gross ignorance, of the apposite proven aforesaid apposite explications purveyed in the extant suit, by the plaintiff, explication whereof rather attract (v) the innate implied principles, whereupon, the rigor of the mandate of provisions of Order 2, Rule 2 of the CPC, stands relaxed.

12. The omission of the plaintiff, to, in the earlier suit, sue in respect of the extant suit khasra numbers, whereupon, she is concluded to hence in respect(s) thereof, stand precluded, to institute the extant suit, ought to be a proven intentional omission. Even though, the apt hereinafter coinage occurring in the opening line of, sub rule 2 of Order 2, Rule 2 of the CPC, of, "plaintiff omits to sue in respect of", does not, make any open candid bespeaking, of the apposite omission, of the plaintiff, necessitating proof of its hence intentionally spurring, yet the apposite omission(s) of the plaintiff are enjoined to be evidently proven to be intentional, (ii) given the subsequent thereto, coinage, borne therein "intentionally relinquishes, any portion of his claim" warranting its being read not in isolation from earlier thereto portion of sub rule 2 to Order 2, Rule 2 of the CPC. (iii) In sequel upon a cumulative reading, of, the coinage *"where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim"*, does beget a conclusion of with the word "intentional" occurring prior to "relinquishes" being also intended by the legislature, to also being transposed into earlier thereto coinage "omits to sue in respect of". (iv) Unless the aforesaid harmonious reading, is purveyed, to the aforesaid coinage(s) existing in sub rule 2 of Order 2, Rule 2 of the CPC, thereupon, it would sequel, a harsh onerous interpretation being purveyed thereto, (v) thereupon, despite, the plaintiff not evidently holding knowledge in respect of her entire claim, the exacting rigor(s) thereof being encumbered upon her, whereupon, gross injustice would accrue vis-a-vis the plaintiff. Since, with evidently proven, tangible explication(s) standing purveyed by the plaintiff in respect of her omission(s) to, in th earlier suit, hence claim relief in respect of the extant suit khasra numbers, (vi) thereupon, when her omission(s) are also obviously not ingrained, with any element of hers holding knowledge(s) in respect thereof, (vii) concomitantly with hers hence, not, intentionally making the relevant omission(s), thereupon, it was inapt for the learned Courts below, to apply the rigor of the mandate enshrined in the provisions of Order 2, Rule 2 of the CPC, (viii) especially when the area of the suit khasra numbers is minimal also when the defendants are unable to, for the aforesaid reason(s) unflinchingly, prove qua theirs holding possession, of the suit khasra numbers, rather with the plaintiff, proving of hers holding possession of the suit khasra number and hers also proving of the defendants making unlawful interference upon them, (ix) predominantly, also when all the aforesaid fact(s) were camouflaged by the defendant(s) in their written statement, instituted to the previous suit. (x) Paramountly also for disabling, the defendants, from making any untenable displacements of the vigour of conclusive previous renditions pronounced by Courts of law, whereupon, their espousal, for, vindicating their claim(s) with respect to the property of, one, Karmu, on anvil of theirs holding his testamentary disposition, stood hence invalidated. (xi) Thereupon, any declining of relief vis-a-vis-a-vis the plaintiff by unlawfully attracting vis-a-vis her extant suit, the mandate of Order 2, Rule 2 of the CPC, would, rather unbeffitingly perpetuate gross injustice upon her. Accordingly, all the substantial questions of law are answered in favour of the plaintiff/appellant and against the defendants/respondents.

13. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as well as by the learned trial Court are not based upon a proper

and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court have excluded germane and apposite material from consideration.

14. In view of the above discussion, the instant appeal is allowed and the impugned judgments and decrees rendered by both the learned Courts below are set aside. Consequently, the suit of the plaintiff is decreed to the effect that she is owner in possession of land comprised in khata No.1021/2, Khatauni No.1787, khasra No.2321, measuring 1-14-0 bighas as described in copy of jamabandi for the year 1991-92, situated in phati and kothi Naggar, Tehsil and District Kullu, H.P. and the revenue entries showing defendant No.1 as owner in possession of the suit land are wrong, illegal and not binding upon the plaintiff. Further, the defendants are restrained from interfering or claiming any right, title or interest over the suit land. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back.

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

Lachhman ....Appellant/Plaintiff.
Versus
Keshav & another .....Respondents/Defendants.

RSA No. 470 of 2004.
Reserved on : 01.11.2017.
Decided on: 10th November, 2017.

Code of Civil Procedure, 1908- Limitation Act, 1963- Article 58- Regular Second Appeal- Plaintiff filed a suit for declaration that he is exclusive owner of the suit land and in the alternative for being declared in exclusive possession thereof- plaintiff claiming to be the sole heir of his father, Shri Kirpa Ram- mutation of inheritance however reflected in the name of the plaintiff and Maya and Bheema- defendants contested the suit and averred that Kirpa Ram died in 1962- plaintiff alone was not the sole heir- in fact, Roshani Devi, defendant No.3 had married Kirpa Ram and two daughters, namely, Maya and Bheema were born out of the wedlock- mutation was thus rightly sanctioned jointly in favour of the legal heirs of the deceased Kirpa Ram- both the learned Courts below held against the plaintiff- In Regular Second Appeal held that cause of action of the plaintiff did not arise in the year 1998 when the defendants allegedly started interfering in the suit land- the revenue entries from the year 1962 to 1998 were known to the plaintiff and at the best as per Article 58 of the Limitation Act- he could have challenged the mutation within three years of his attaining majority in the year 1970- suit thus held barred by limitation too. (Para-9)

For the Appellant: Mr. Manohar Lal Sharma, Advocate.
For the Respondents: Mr. G.D. Verma, Senior Advocte with Mr. B.C. Verma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiff's suit for rendition of a declaratory decree in respect of his being entitled for being declared to be exclusive owner of the suit property or in the alternative his being declared to be in exclusive possession thereof, stood, under concurrent pronouncements recorded thereon by both the learned Courts below, hence, dismissed.

2. Briefly stated the facts of the case are that the plaintiff is owner in possession of the suit land, which he had inherited from his father Sh. Kirpa Ram, who died in the year 1962, leaving behind the plaintiff as sole legal heir. It is claimed that Smt. Roshani Devi, defendant No.3 was legally wedded wife of late Sh. Jaunsar, who was the real brother of his father Kirpa Ram. Consequently, the defendants, who are son, daughter and widow of his uncle Jaunsar, have no right, title or interest in the suit property, which was owned by his father kirpa Ram. It is averred that Roshni Devi-defendant No.3, from the loin of her husband Jaunsar, gave birth to three daughters, namely, Manglan Devi, Maya and Bheema and two sons Keshav and Narinder, who all except Keshav, Manglan Devi and Narinder, jointly inherited the property of Jaunsar. Consequently, it is claimed that mutation of inheritance of property of Kirpa Ram was wrongly sanctioned in favour of the defendants along with the plaintiff in equal shares. Plaintiff was minor at the time of sanctioning of the mutation and he had no knowledge of wrong mutation of his father Kirpa Ram. Now, the defendants, on the basis of wrong mutation, started unlawful interference over the suit land owned and possessed by the plaintiff and are bent upon to take forcible possession of it, without any right, title or interest.

3. The defendants contested the suit and filed written statement, wherein, it is averred that Kirpa Ram died in the year 1962 and plaintiff alone was not the sole legal heir of Kirpa Ram, at the time of his death. It is averred that Roshni Devi, defendant No.3 was married to Jaunsar and two daughters Maya and Bheema were born out of the wedlock. After death of his brother Jaunsar on 25.1.1958, Kirpa Ram solemnised customary marriage of "Jhanjara" with Roshni Devi. Defendants No.1 and 2 were born from the wedlock of Roshni Devi and Kirpa Ram. Thus, it is averred that they have, as such, rightly, succeeded to the property of Kirpa Ram along with the plaintiff. The mutation was rightly sanctioned, which was in the knowledge of the plaintiff. Plaintiff is now estopped to challenge the same. The parties are in peaceful possession as per their share in the suit land. Further, it is claimed that the suit is hopelessly time barred, as filed beyond the period of three years from the date of attaining age of majority. Objections qua act and conduct, valuation, jurisdiction, cause of action, non joinder of necessary parties and maintainability were also taken.

4. The plaintiff/appellant herein filed replication to the written statement of the defendants/respondents, wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the plaintiff is sole legal heir of deceased Kirpa Ram and entitled to succeed his property exclusively, as alleged?OPP.

2. If issue No.1 is proved, whether the plaintiff is the sole owner in possession of suit land, as alleged? OPP

3. Whether the mutation of suit land sanctioned in favour of the defendants is wrong, illegal, null and void and not binding upon the rights of plaintiffs, as alleged? OPP.

4. Whether the defendants makes unlawful interference in the ownership and possession of plaintiff over suit land, as alleged? OPP.

5. Whether the suit is not maintainable in the present form, as alleged? OPD

6. Whether the suit is time barred, as alleged?OPD.

7. Whether the plaintiff is estopped to file the present suit by his act and conduct, as alleged?OPD.

8. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff/appellant herein. In an appeal, preferred therefrom

by the plaintiff/appellant before the learned First Appellate Court, the latter Court dismissed the appeal and affirmed the findings recorded by the learned trial Court.

7. Now the plaintiff/appellant herein, has instituted the instant Regular Second Appeal before this Court wherein it assails the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission on 15.03.2005, this Court, admitted the appeal instituted by the plaintiff/appellant against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial question of law:-

a) Whether the two courts below were justified in holding the suit as time barred when the cause of action arose in 1998 and the suit brought in the year 1999?

Substantial question of Law No.1.

8. The predecessor-in-interest of the parties at contest, one Kirpa Ram died in the year 1962. During his life time AND after demise of his legally wedded wife, he contracted a customary marriage with his brother's widow, one, Smt. Roshani Devi. In pursuance thereto, upon occurrence of demise of Kirpa Ram in the year 1962, reflections in pedigree table, borne in Ex.P-2, occurred, with display(s) therein, of, defendant No.3 being the widow of Kirpa Ram besides, of, co-defendants No. 1 and 2, being respectively the son and daughter of deceased Kirpa Ram. Earlier thereto, on demise of Kirpa Ram, mutation qua his estate was attested, wherein, rightsin equal shares, were conferred vis-a-vis the plaintiff and the defendants. Since, this Court is enjoined to make a pronouncement, only upon, the substantial question of law, whereon, the instant appeal stands admitted, thereupon, validity(ies) of reflections occurring in the apposite order, of mutation, comprised in Ex.P-5, as also, the reflections occurring in the pedigree table borne in Ex. P-2, nor the validity(ies) of the customary marriage contracted by deceased Kirpa Ram with the widow of his brother Jaunsar, namely, one Roshani Devi, is not enjoined to be either dwelt upon and nor any adjudication is required to be pronounced thereon. Moreover, the suit property, in pursuance to the apposite order of mutation, comprised in Ex.P-5, stands reflected in the jamabandis apposite, to the suit land to be jointly held by the parties at contest. (i) Reflections occurring therein when hence enjoy a rebuttable presumption of truth, (ii) whereas, cogent evidence, for displacing the presumption of truth enjoyed by the revenue entries apposite, to the suit property, remaining unadduced, (iii) thereupon, conclusivity is to be imputed to all the reflections borne therein, whereunder, the suit property is reflected to be jointly owned by the parties at contest. The further sequel thereof is of the claim of the plaintiff of his holding exclusive ownership and possession thereof, also getting concomitantly scuttled.

9. Be that as it may, the apposite order, of mutation stood attested in the year 1962, whereat, the plaintiff, who claims reversal thereof, was a minor. (i) However, upon his attaining majority in the year 1970, he yet thereat did not within three years commencing therefrom, hence assail the aforesaid order(s), by his instituting an apposite civil suit, in the civil court concerned, (ii) though, his being imperatively enjoined, by the mandate of Article 58 of the Limitation Act, to, within three years from the date of accrual of cause of action vis-a-vis him, hence, institute a suit, seeking therein a declaratory decree, for setting aside the apposite order of mutation. Even if, the rule embodied in Article 58 of the Limitation Act, (iii) for a suit seeking, a declaratory decree for setting aside the apposite order of mutation AND for setting aside the relevant revenue entries, whereby, the right of the aggrieved vis-a-vis the suit land stood hence infringed, being imperatively brought within three years, since the making of the apposite revenue entries, is not a rule of inflexible rigor,(iv) nor accrual(s) thereat of cause(s) of action, cannot, also be an inflexible rule, for an apposite suit being within three years therefrom, being mandatorily instituted, (v) rather with evidence bespeaking, of absence of knowledge in the aggrieved concerned, with respect to their relevant makings, besides accruals, imminently relaxing the rigor of the rule, (vi) besides obviously with acquisition of knowledge(s) thereof, arising, only from proven overt act(s) of interference(s) being made by the offending litigants concerned, thereupon, empowering the aggrieved, to also, within three years therefrom, impugn

the relevant orders, of mutation also to impugn the occurrence of relevant entries in the revenue record(s) concerned.

10. The learned counsel appearing for the plaintiff contends, of, with the interference(s) upon the suit land, being made by the co-defendants in the year 1998, thereupon, his being awakened vis-a-vis the apposite order, wherefrom, he contends (i) that the mandate of the apposite Article 58 of the Limitation Act, whereby, he stands validly empowered, to, upon his being being firmly consciously enlivened qua accrual of cause(s) of action, awakenings whereof stand engendered by evident alleged overt invasion(s) made upon the suit land, by the co-defendants, invasion whereof were evidently made in the year 1998, to hence within three years thereafter, institute the apposite suit. However, the aforesaid submission, is seeped in an entrenched illusion, comprised in the factum, (ii) of the revenue entries occurring in the relevant revenue records, since the year 1962 upto 1998, making a visible display of the suit property being reflected to be jointly owned and possessed by the parties at contest,(iii) entries whereof, for reasons aforestated, acquire conclusivity besides when the plaintiff, does not, challenge the disaffirmative findings recorded on the pertinent issue, appertaining to his exclusively possessing the suit land, (iv) thereupon, with his acquiescing, of his jointly holding the suit property with the co-defendants, (v) thereupon his failure, to since the making of the revenue entries, hence, assail them within three years therefrom, cannot, enable him to merely, upon purported interferences being made by the co-defendants upon the suit land in the year 1998, hence, espouse of his thereat becoming awakened in respect thereto, (vi) imminently, when since the making of the entries upto the date of the institution of the suit, his acquiescing qua his jointly enjoying the suit property vis-a-vis them. Moreover, with yet the joint suit property being undismembered, thereupon when the litigating parties, hence, hold thereon unity of title besides community of possession, (vii) thereupon, the effect, if any, of interference(s) by the co-defendants, upon jointly held suit property, is rendered insignificant, in hence construing, of, assumingly upon the aforesaid interference(s) hence constituting any cause of action, for the plaintiff belatedly instituting a suit for setting aside, the apposite order of mutation borne in Ex.P-5.

11. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as well as by the learned trial Court are based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court have not excluded germane and apposite material from consideration. Substantial questions of law is answered in favour of the respondents/defendants and against the plaintiff/ appellant.

12. In view of the above discussion, there is no merit in the instant appeal, which is accordingly dismissed. The impugned judgments and decrees are maintained and affirmed. All pending applications also stand disposed of. No order as to costs. Records be sent back.

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

Oriental Insurance Company .....Petitioner.

Versus

Santosh Devi & others .....Respondents.

CMPMO No. 464 of 2011.
Reserved on : 24th October, 2017.
Date of Decision: 10th November, 2017.

Constitution of India, 1950- Article 227- Code of Civil Procedure, 1908- Order 6 Rule 17- Section 41 of the Workmen's Compensation Act, 1923- The adoptive parents of the deceased moving an application under Order 6 Rule 17 CPC seeking amendment in a claim filed under

Workmen's Compensation Act- Application allowed by the Learned Commissioner- Insurance Company disputing the maintainability of the application by way of a petition under Article 227- **Held**- that the application under Order 6 Rule 17 CPC can be considered by the Commissioner, otherwise, than in accordance with the provision of Section 41 of the W.C. Act, if he is satisfied that the interests of the parties will not thereby be prejudiced- particularly keeping in view the requirement of Section 41(1)(b)- petition filed by the Insurance Company dismissed.

(Para-4 and 5)

For the Petitioners: Mr. G.C. Gupta, Senior Advocate with Ms. Meera Devi, Advocate.

For Respondents No.1 to 6: Mr. Karan Singh Kanwar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Claimants No. 1 to 4, namely, Smt Santosh Devi, Master Naveen Thakur, Master Shubham Thakur and Master Mohit Thakur, were, in the initially instituted claim petition before the learned Commissioner, therein described to be respectively the widow and the minor sons of deceased employee Inder Singh, who therein was described to be begotten from the loins of one Surat Singh. Co-claimant No.5 was described to be the widow of one Surat Singh, son of Uday Singh, whereas, co-claimant No.6 was described therein to be the father of the deceased employee.

2. The aforesaid deceased Inder Singh, during the course of his holding employment under respondent No.1, suffered his demise, in an accident involving the ill fated vehicle, whereon, he stood engaged as a driver. Obviously, his demise occurred, during the course of his performing, employment under respondent No.1. Consequently, upon demise of deceased employee Inder Singh hence occurring, during the course of his performing employment under respondent No.1. (i) Thereupon, the claimants, instituted a claim petition, before the learned Commissioner concerned, wherein, they claimed compensation against the respondent(s) impleaded therein, on anvil of theirs being jointly and severally liable, for liquidating the compensation amount(s), as may, come to be determined by the Commissioner concerned. However, (ii) after adduction of evidence by the contesting parties upon the relevant issues, an application cast under the provisions of Order 6, Rule 17 of the Code of Civil Procedure (hereinafter referred to as the CPC), (iii) was instituted, before the Commissioner concerned, wherein, its leave was sought for incorporating in the claim petition, the hereinafter extracted averments:-

> "1(A) That the deceased late Sh. Inder Singh was natural son of Sh. Heera Singh, son of Sh. Uday Ram, who was given in adoption by Sh. Heera Singh to his brother Sh. Surat Singh and his wife Smt. Jalmo Devi (the petitioners No.5 and 6, who were issueless), as such, the deceased Inder Singh was an adopted son of the petitioners No.5 and 6, to this effect Adoption deed was executed and registered on 03.04.1991 in the Office of Sub Registrar (Tehsildar), Tehsil Renuka ji at Sangrah, District Sirmour, H.P."

It was averred in the aforesaid application, that, the necessity of its institution being a sequel to (i) reflections occurring in the driving licence of deceased employee Inder Singh, qua his being fathered by Heera Singh, whereas, in the initially instituted claim petition, the name of the father, of, deceased Inder Singh being displayed as one Surat Singh. The application was contested by the Insurance Company, by its filing a detailed reply thereto. It was vigorously contended in the reply filed, to the application by the counsel for the Insurance Company, of the application being not maintainable, it being instituted belatedly also despite the aforesaid factum being within the knowledge, of the petitioner at the stage of theirs instituting the claim petition, (ii) thereupon, their omission to disclose the facts, as sought to, with the leave of the Court, hence, introduced in

the claim petition, attracting the rigor of the mandate of the proviso, to Order 6 Rule 17 of the CPC, provisions whereof stand extracted hereinafter:-

> "**17. Amendment of Pleadings.-** the Court may at any stage at the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:
>
> Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

In the aforesaid proviso to Order 6, Rule 17 of the CPC, it is mandated that where "in spite of due diligence", the fact(s) in respect of whose incorporation, the leave of the Court, is sought, were yet thereat undiscoverable, thereupon, alone the apposite leave, for their incorporation being meted vis-a-vis the applicant concerned, (iii) whereas, with visible display(s) occurring in the application, of deceased employee Inder Singh, being given in adoption by his natural father, Heera Singh, vis-a-vis, his brother Surat Singh, thereupon, with the aforesaid reflections, being hence initially within the knowledge of the claimants, hence, warranted their inclusion in the initially instituted claim petition, (iii) whereas, the learned Commissioner, upon, considering the rival contentions of the parties at contest, allowing the application, has hence committed an illegality. The Insurance Company/petitioner herein, is aggrieved therefrom, hence, it has instituted the instant petition before this Court.

3. The learned Senior Counsel appearing for the petitioner herein, contended, of the application, cast under the provisions of Order 6, Rule 17 of the CPC, before the learned Commissioner, being, neither institutable nor maintainable before him, (i) given Rule 41 of the Workmen's Compensation Rules, 1924, provisions whereof stand extracted hereinafter:-

> "**41. Certain provisions of Code of Civil Procedure, 1908 to apply**.-- Save as otherwise expressly provided in the Act or these rules the following provisions of the first Schedule to the Code of Civil Procedure, 1908, namely, those contained in Order V, Rule 9 to 13 and 15 to 30; Order IX; Order XII, Rules 3 to 10; Order XVI, Rules 2 to 21; Order XVII, and Order XXIII, Rules 1 and 2, shall apply to proceedings before Commissioners, in so far as they may be applicable thereto:
>
> Provided that: -
>
> (a) for the purpose of facilitating the application of the said provisions the Commissioner may construct them with such alternations not affecting the substance as may be necessary or proper to adapt them to the matter before him;
>
> (b) the commissioner may, for sufficient reasons, proceed otherwise than in accordance with the said provision, if he is satisfied that the interests of the parties will not thereby be prejudiced."

moreso, substantive provisions thereof expressly, (i) excepting the apposite provisions of the CPC specifically engrafted therein, hence, excluding other provisions thereof, vis-a-vis proceedings launched under the Workmen's Compensation Act, 1923 (hereinafter referred to as the Act), AND also their diktat and vigor, (ii) where amongst, the unincluded provisions therein, of, the Code of Civil Procedure, are the one(s) borne in Order 6, Rule 17 CPC, (iii) thereupon, with express inclusion therein, of, the enumerated therein provisions of the Code of Civil Procedure, excepting the bones borne in Order 6, Rule 17 of the CPC, (iv) render(s) the provisions of Order 6, Rule 17 of the CPC, being construable, to, theirs being statutorily excluded from the ambit of apposite Rule 41, thereupon, the Commissioner holding, no, jurisdiction to pronounce the orders, impugned before this Court, (v) especially when they stood rendered, upon, an application cast under the provisions of Order 6, Rule 17 of the CPC, application whereof, was reiteratedly, not maintainable before him.

4. The aforesaid submission addressed by the learned Senior Counsel appearing, for the petitioner/Insurance Company, has immense vigour, thereupon, inevitable corollary thereof, is (a) of the further submission addressed by him, before this Court, of, the mandate of the proviso occurring below Order 6, Rule 17 of the CPC, for reasons aforestated, remaining unaccomplished, thereupon, the affirmative impugned pronouncement, made, by the learned Commissioner upon Misc. Appl. No. 310/6 of 2011 on 9.11.2011, warranting interference, also not acquiring any formidable weight; (b) given for attracting clout thereof, it was imperative for the petitioner, for hence, excluding vis-a-vis claimants, the rigor of the mandate of proviso to Order 6, Rule, 17, CPC, to unveil emanation(s), from the substantive provision, of, apposite Rule 41 of the Workmen's Compensation Rules, of occurrence of inclusion therein, of, the provisions of Order 6, Rule 17 of the CPC, (b) whereas, contrarily with the apposite Rule, of the Workmen's Compensation Rules, rather for reasons aforestated. hence excluding, from its domain, the provisions of Order 6, Rule 17 CPC, also renders unattractable both the substantive provisions of 6, Rule 17 AND also the mandate of the proviso appended there underneath. Even if, this Court, forms the aforesaid inference, yet before recording any clinching pronouncement with respect to the validity or invalidity of the impugned pronouncement recorded by the learned Commissioner, it is also imperative to bear in mind clause (b) of the proviso appended underneath, the apposite Rule 41 of the Workmen's Compensation Rule, clause whereof reads as under:

> "(b) the commissioner may, for sufficient reasons, proceed otherwise than in accordance with the said provision, if he is satisfied that the interests of the parties will not thereby be prejudiced."

5. The aforesaid clause, of, the apposite proviso, occurring underneath Rule 41, of, the Workmen's Compensation Rules, enables the Commissioner concerned, to, for sufficient reasons, proceed otherwise than in accordance with the substantive provisions occurring in Rule 41, of the Apposite Rules, 'only' upon his being satisfied that the interest of the parties will not thereby be prejudiced. Upon deep delvings into the innate nuance of the apposite clause, of the apposite proviso appended underneath Rule 41, of the apposite Rules, for hence uncovering its intrinsic spirit, it stands disinterred (i) that the words "proceed otherwise than in accordance with the said provision" being amenable, to, a construction of (i) theirs being carved as an exception vis-a-vis the mandate of the substantive provisions occurring in Rule 41 of the apposite Rules, (ii) thereupon, the effect of the substantive provisions of Rule 41, of, the apposite Rules, not including therein, the provisions borne in Order 6, Rule 17, CPC, non inclusion thereof, not restricting the Commissioner concerned, to upon his being satisfied that the interest of the parties will not thereby be prejudiced, hence, proceed to render a verdict (iii) without *stricto senu*, meteing reverence to the provisions of Order 6, Rule 17 of the CPC, rather for recorded sufficient reasons, only for safeguarding the interest(s) of justice, (iv) besides for ensuring that unless a valid judicious pronouncement, is made upon the apposite application preferred before him, hence, grave prejudice would accrue to the parties at contest. (iii) Reiteratedly, dehors non inclusion of Order 6, Rule 17 of the CPC in the substantive provision(s), of, the Rule 41, of the apposite Rules, to without making any strict compliance with the rigors of the provisions borne in Order 6, Rule 17 of the CPC, record an appropriate judicious pronouncement(s) upon the relevant application, cast before him. Consequently, even if, the claimants inappropriately nomenclatured, their apposite application preferred before the learned Commissioner, to be, one under the mandate of Order 6, Rule 17 of the CPC, yet any misdenomination therein of the apposite provisions, cannot, for aforesaid reasons, per se, render construable the orders recorded thereon, to be infirm, nor per se thereupon, the apposite application is rendered not maintainable.

6. Be that as it may, the aforesaid determination would not per se obtain any formidability, unless, all the ingredients stipulated in clause (b) of the proviso occurring underneath Rule 41 of the apposite Rules, comprised in (a) there being sufficient reasons; (b) in his making the pronouncement; (c) his ensuring justice being done and (d) the interest of the parties to lis, hence, being precluded, to beget any prejudice, beget evident satition. For determining whether deference, was, meted vis-a-vis the ingredients borne in clause (b) of the

proviso occurring underneath Rule 41 of the apposite Rules, “dehors”, the Commissioner making the pronouncement, within the purported domain of the provisions borne in Order 6, Rule 17 of the CPC, the imperative factum of (i) the apposite post postmortem report, carrying, the parentage of the deceased, as one Surat Ram; (ii) the apposite abstract(s) of the Parivar Register, displaying, of adoption of the deceased employee, being made by the brother of his putative father, (iii) whereupon, with identity of the deceased employee being prima facie established, (iv) whereas, the Insurance Company not adducing any evidence or material personificatory, of the deceased employee's identity, not, bearing any affinity with all the reflections, occurring, in the postmortem report or in the apposite abstracts, of the pariwar register, especially qua his adoptive father, being not Surat Ram, (v) whereas, the aforesaid factum being also displayed in the memo of parties occurring in the earlier instituted claim petition, corollary whereof, is of (vi) unless the aforesaid clarificatory factum was permitted to be incorporated in the claim petition, thereupon, contradictory thereto, reflections occurring in the driving licence of deceased employee Inder Singh, especially his being reflected therein to be fathered by his putative father, Heera Singh, would sequel befallment, of grave injustice besides imperative prejudice, upon the claimants, comprised in theirs being deprived to upon his demise, hence canvass a claim for compensation vis-a-vis them. Fakeness, if any, of the driving licence, spurring from the reflections occurring therein, specifically with respect to his being fathered by his putative father, may not, subject to an appropriate appraisal being meted thereto vis-a-vis verdict(s) of the Hon'ble Apex Court, wherein, it is expostulated, that, meteing(s) of satiation vis-a-vis the mandate of Section 3 of the Act, being a sine qua non for awarding of compensation, upon an application preferred within its domain, (vii) In aftermath, the factum of the deceased employee, not, at the time contemporaneous to the ill fated mishap involving the vehicle whereon he was engaged as driver, hence, not purportedly possessing any valid driving licence to drive it, may not be a relevant factum for resting the fate of the apposite application.

7. For all the foregoing reasons, the instant petition is dismissed and the impugned order is maintained and affirmed. However, the insurance company is at liberty, to yet delink the identity of the deceased vis-a-vis the one reflected in the memo of parties, by adducing cogent evidence. No order as to costs. All pending applications also stand disposed of.

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

Tilak Raj ....Petitioner.

Versus

High Court of Himachal Pradesh & another. ....Respondents.

CWP No. 6114 of 2011.
Reserved on :25.10.2017.
Decided on:10th November, 2017.

Constitution of India, 1950- Article 226- Reinstatement of Service- Petitioner removed from the service in pursuance to an FIR lodged for having allegedly committed offences punishable under Sections 376 and 506 of I.P.C. Show cause notice issued to the petitioner under Rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 for initiating disciplinary action, for having committed offences punishable under Sections 376 and 506 of I.P.C – during the course of disciplinary proceedings the petitioner went missing, who was also declared a proclaimed offender by the Court after charge having been laid against him under Sections 376 and 506 of I.P.C. - Disciplinary Authority resorted to the provision of Rule 19 of CCS Rules - Disciplinary Authority proceeded to impose a major penalty, ordering the removal of the petitioner from the service- petitioner having surrendered before the Trial Court on 20.2.2008

came to be acquitted- petitioner thereupon seeking reinstatement- The claim for reinstatement in service dismissed- Holding that the honourable acquittal of the petitioner did not absolve him of the other imputations of misconduct i.e. remaining evidently willfully absent from the duty w.e.f. 28.12.2004 till 12.12.2005, whereupon, he was ordered to be removed from the service- further held that the petitioner even after surrendering before the Learned Additional District Judge on 22.2.2008 not applying for extension of leave nor explaining his willful absence- no evidence led showing that the petitioner was suffering from mental depression- petition dismissed. (Para-5)

For the Petitioner: Mr. B.C. Negi, Senior Advocate with Mr. Pranay Pratap Singh, Advocate.
For the Respondent: Mr. Romesh Verma, Advocate.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge

Through the instant writ petition, the petitioner prays for quashing of Annexure P-12, and of Annexure P-14, whereunder, the petitioner's espousal for restoration in service claimed under Annexure P-11, was declined respectively, by the District and Sessions Judge, Bilaspur and thereafter in an appeal, borne in Annexure P-13, carried therefrom before the High Court, the latter proceeded to affirm the rendition occurring in Annexure P-12.

2. Annexure P-8, unfolds, the apt imputation(s) of misconduct vis-a-vis the delinquent/petitioner herein. The apt imputations of misconduct, embodied therein read as under:

> " 1. Whereas you are appointed as Chowkidar on temporary basis and posted as such in the Court of Civil Judge (Sr. Division)-cum-Addl. Chief Judicial Magistrate, Ghumarwin, under this office, office order No. DSJ/BLP/EC/2001-25, dated 10th April, 2001 and you were working as such in the said court w.e.f. 19th April, 2001. On 3.11.2002 at abut 11 a.m., while you were working as Chowkidar in the Court of Civil Judge (Sr. Division)-cum-All. Chief Judicial Magistrate, Ghumarwin had committed rape on one Miss Anurag d/o Sh. Surtia Ram, Caste Brahamn, village Gehra, Tehsil Ghumarwin, District Bilaspu and for which case FI.R. No.211/2002 of offence under Sections 376, 506 IPC was registered against you in police station, Ghumarwin. The above act amounts to an offence of moral turpitude on your part, which is highly unbecoming of a public servant.
>
> 2. And whereas you had proceeded on compensatory leave and casual leave w.e.f. 20th December, 2004 to 27th December, 2004 and you were due to report for your official duty on 28th December, 2004. You had neither reported for duties on 28.12.2004, nor you had submitted any application for leave. You are wilfully absent from your duties w.e.f. 28th December, 2004 onwards, which is also highly unbecoming of your part being public servant and is vilation of sub rule (1) (iii) of Rule 3 under Central Civil Services (Conduct) Rules, 1964.
>
> c) That the respondent may kindly be directed to allow the petitioner to participate in the interview to be held from 26.12.2016 to 28.12.2016."

3. In pursuance to FIR No.211/2002 being loged against the petitioner for his committing offences punishable under Sections 376 and 506 of the IPC, he was arrested on 3.11.2002, whereafter he was placed under suspension w.e.f. 3.11.2002. However, on his being released on bail, he reported for duty on 22.5.2003. Under an order recorded on 27.09.2003, the suspension visited vis-a-vis the petitioner/delinquent, was hence revoked. The delinquent/petitioner was sanctioned compensatory casual leave w.e.f. 20.12.2004 to 27.12.2004 and was enjoined to report for duty on 28.12.2004 at 9.45 a.m. However, the petitioner did not report for duties, on 28.12.2004 nor he submitted any application for meteing(s), of, extension of

leave. In sequel, it was also imputed vis-a-vis the petitioner qua his remaining willfully absent from duty w.e.f. 28.12.2004. Consequently, an apposite approval was meted by the learned District and Sessions Judge, Bilaspur, for, a notice being issued upon him, for his purveying the reason(s) for precluding the disciplinary authority, from, under Rule 14 of the Central Civil Services (Calssification, Control and Appeal) Rules, 1965, hence initiating action against him. The bailiff of the Court of Civil Judge(Sr. Division)-cum-ACJM, Ghumarwin, made, a visit vis-a-vis the abode of the delinquent/petitioner, whereupon, upon a communication, made, in writing by the father of the delinquent/petitioner, he made a report of his missing therefrom. Thereafter, the disciplinary authority, hence, adopted the statutory mechanism contemplated in sub rule (9)(2) appended below Rule 19 of the Central Civil Services (Control, Classification and Appeal) Rules, 1965, provisions whereof are extracted hereinafter:-

> " 2. After careful consideration, it has been decided that in such cases the competent disciplinary authorities may take the following actions;-
>
> (a) A certificate should be obtained from the local police authorities to the effect that the whereabouts of the officials concerned are not known. This certificate would be placed on record in the concerned file.
>
> (b) A brief statement of allegations and charges should be prepared and kept on the file.
>
> (c) The disciplinary authority should himself record on the file the fact that the whereabouts of the officials concerned are not known and that the police authorities have also certified to that effect and therefore, it is not reasonably practicable to hold the inquiry contemplated under Rule 14 of the C.C.S (C.C.A) Rules, 1965. The disciplinary authority can then take recourse to rule 19 (ii) of C.C.S. (C.C.A.) Rules, 1965 wherein enquiry has to be dispensed with. Reasons for not holding enquiry should then be recorded in writing and the disciplinary authority should issue orders imposing such penalty as it deems fit. The allegations and charges have to be briefly discussed in the punishment order. Normally, in such cases the punishment that could be meted out would be either removal or dismissal from service."

4. In compliance with the provisions occurring therein, a copy of the order rendered by the learned Additional Sessions Judge, whereby, the delinquent/petitioner was declared a proclaimed offender AND a copy of notice issued vis-a-vis the delinquent/petitioner under Section 82 of the Cr.P.C. as also, a copy of police report filed before the trial Court under the provisions of Section 173 of the Cr.P.C., was ordered to be procured. The aforesaid material, for hence satiation thereto being begotten, was purveyed, by the learned trial Court, to the disciplinary authority. Also, with its being unveiled therein, of, the learned Additional Sessions Judge concerned being seized with a report instituted under the provisions of Section 173 of the Cr.P.C., by the Investigating Officer concerned, with echoings therein of the delinquent/petitioner committing offences under Sections 376 and 506 of the IPC, hence, amended imputation(s) of misconduct, embodying the aforesaid misconduct, was ordered to be framed against the delinquent/petitioner. An amended show cause notice, embodying therein, the aforesaid imputation(s) of misconduct vis-a-vis him, was ordered to be served upon the delinquent/petitioner. The aforesaid amended imputations of misconduct ordered to be served upon the delinquent/petitioner, yet, given the absence of the delinquent, from his abode, it, as ordered, was hence, affixed, by the process server concerned, on the outer door of the abode/premises of the petitioner. Since, in pursuance thereto, the delinquent/petitioner did not appear before the Inquiry Officer concerned, thereupon, it was concluded, of, his being amenable for being charge sheeted for his committing the aforesaid misconduct(s). Copy of the charge sheet, could not be personally served upon the delinquent, thereupon, it was affixed by the process server concerned, upon, the outer door of his premises. Given, the delinquent absconding and his being declared, a proclaimed offender, under valid orders in respect thereof, being pronounced by the learned Additional District Judge, Ghumarwin, (i) thereupon, on anvil of the provisions,

vested, in the disciplinary authority concerned by Rule 19 (ii) (9) of Central Civil Services (Classification, Control and Appeal) Rules, 1965, (ii) whereupon it stood empowered to dispense with the holding of a regular enquiry upon evident satiation(s) thereof vis-a-vis the delinquent, (iii) thereupon, with obviously satiation thereof being meted, constrained the disciplinary authority concerned, to, hence make a valid ex-parte conclusion, of the imputations of misconduct vis-a-vis the delinquent, comprised in his remaining absent from duty w.e.f. 28.12.2004 till 22.12.2005 being proven, (iv) whereupon it proceeded to impose upon him a major penalty, of his being ordered to be removed from service.

5. However, subsequent thereto, the delinquent surrendered on 20.02.2008, before the trial Court concerned. On his surrendering before the learned trial Court, he was charged for his committing an offence punishable under Sections 376 and 506 of the IPC. On conclusion of the trial of the case, the learned Additional Sessions Judge, Ghumarwin, pronounced an order of acquittal upon the delinquent/petitioner. Uncontrovertedly, the aforesaid order of acquittal pronounced upon the petitioner/delinquent by the learned Additional Sessions Judge, Ghumarwin, led him to address an application comprised in Annexure P-11, to the District & Sessions Judge, Bilaspur, whereunder he sought relief of his being ordered to be reinstated in service. The aforesaid application was rejected under Annexure P-12 and the aforestated rejection order was also, under Annexure P-14, hence affirmed by the High Court. The order of acquittal pronounced upon the delinquent/petitioner by the learned Additional Sessions Judge, Ghumarwin, does, on its close reading, unveil, of it being founded upon the prosecutrix turning hostile, thereupon, the ensuing sequel, is of the petitioner/accused/delinquent being beset with a humiliation, of, his may be, being maliciously prosecuted. Moreover, (I) the order of the acquittal pronounced upon the accused/delinquent/petitioner, being founded, upon reasons not tantamounting, of theirs being construed, to be of hence the learned Additional Sessions Judge concerned, upon his traversing through the apposite evidence vis-a-vis the charge, existing on record, concluding of it being infirm and inconsistent, (ii) thereupon, it affording vis-a-vis the accused/petitioner/delinquent, the benefit of doubt, (iii) rather it appears, of, with the prosecutrix reneging from her previous statement recorded in writing, hence, prevailing upon the learned Additional Sessions Judge concerned, to pronounce an order of acquittal, upon, the accused/petitioner/delinquent, (vi) thereupon, it can be befittingly concluded that the acquittal of the delinquent/petitioner being construable to be an honourable acquittal. However, yet on the basis of his honourable acquittal aforesaid, the petitioner/delinquent, cannot make any valid espousal vis-a-vis his being reinstated in service, for the reasons, (i) though one of the imputations of misconduct vis-a-vis the accused, is comprised in his committing offences punishable under Sections 376 and 506 of the IPC, yet dehors the aforesaid infirmity ingraining one of the imputations of misconduct, encumbered upon the petitioner/delinquent, would not, per se render also likewise infirm, the other imputations of misconduct entailed upon the delinquent, comprised in his remaining evidently willfully absent from duty w.e.f. 28.12.2004 till 22.12.2005, whereupon, he was ordered to be removed from service. The reason as purveyed in Annexure P-12, vis-a-vis the aforesaid imputations of misconduct, being formidably proven, does evidently, personify of the petitioner, not, attending his duties on 28.12.2004, rather upto his surrendering before the learned Additional District Judge on 20.02.2008, his neither applying for extension of leave before the authority concerned, contrarily, rather his being declared a proclaimed offender. He concerts to validate his absence from duty w.e.f. 28.12.2004 upto 20.02.2008, whereat he surrendered before the Addl. Sessions Judge, Ghumarwin, on anvil (a) of his suffering from mental depression. The aforesaid ground reared in Annexure P-11, for his hence proceeding, to remain absent from duties, appears to be an afterthought besides a clever stratagem, given his not appending therewith, any apposite medical certificate issued by the competent doctor and (b) his neither at the time contemporaneous to the expiry of the leave sanctioned vis-a-vis him, nor his in the interregnum, since expiry thereto upto 20.02.2008, whereat he surrendered before the trial Court concerned, purveying any application, wherewith, an apposite medical certificate, stood appended, personificatory of his being beset with a mental ailment or depression, thereupon, his being precluding to attend his duties.

6. Reinforcingly, the absence of the aforesaid material, galvanizes, a clinching conclusion of (i) the prolonged period of absence, of the delinquent, from, his duties w.e.f. 28.12.2004 uptill 20.02.2008, whereat he surrendered before the learned trial Court , remaining unexplained also thereupon, the inordinate prolonged duration thereof, (ii)not warranting any meteing(s) of leniency vis-a-vis the delinquent besides its duration being not amenable, of, its being extenuated on any ground whatsoever (iii) rather the imposition of penalty of removal, of the petitioner/delinquent, from service, being construable to be validly imposed upon him, dehors making of the afore conclusion by this Court, of, the order of acquittal pronounced upon the delinquent/petitioner, being construable to be his honourable acquittal vis-a-vis the charges framed against him.

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

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

Nokh Ram .... Petitioner

Versus

Union of India and others .... Respondents

CWP No. 9592 of 2011.
Reserved on : 30.10.2017.
Date of decision: 13.11.2017.

Constitution of India, 1950- Article 226- Civil Writ Petition- Reduction in pay scale on the basis of audit objection raised qua irregular grant of ACP to the petitioner. Petitioner challenging his re-fixation on a lower scale as a consequence thereto- Central Administrative Tribunal upholding the action of the respondent as the petitioner had already earned a promotion during the said inter regum**- Held**- that since the petitioner was found to have gained one promotion and as such, petitioner was rightly held not entitled to the financial upgradation. In the facts and circumstances of the case, petitioner could have gained the second financial upgradation under the assured career progression scheme on completion of 24 years of service from the date of his appointment as a Reference Assistant on regular basis. Since the petitioner had not put the requisite 24 years, Petitioner held not entitled to the upgradation under the ACP Scheme. Consequently, the finding of the Tribunal upheld- petition dismissed. (Para-10)

For the petitioner: Ms. Ranjana Parmar, Sr. Advocate with Ms. Rashmi Parmar, Advocate.

For the respondents : Mr. Ashok Sharma, ASGI with Ms. Srishti Verma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this writ petition, the petitioner has challenged the order passed by learned Central Administrative Tribunal, Chandigarh Bench in OA No. 984-HP of 2010, dated 3.8.2011, vide which learned Tribunal has dismissed the original application filed by the present petitioner.

2. Brief facts necessary for adjudication of the present petition are that an original application i.e. OA No. 984-HP of 2010 was preferred by the present petitioner before the learned

Tribunal wherein the petitioner had *inter alia* prayed for quashing of order Annexure A-1 appended with the original application dated 22.12.2006, vide which, pay scale of Rs. 6500-10,500 granted to him was reduced to Rs. 5500-9000. Reliefs prayed by the petitioner in the original application are quoted herein below.

> *"i) That the impugned order Annexure A-1 may kindly be quashed and set aside and the respondents may kindly be directed to re-fix the pay of the applicant forthwith alongwith all consequential benefits.*
>
> *Or*
>
> *ii) In the alternative the respondents may kindly be directed to release the First Assured Career Progression under the relevant Scheme to the applicant, which has fallen due to him in the year 2000 with all consequential benefits.*
>
> *iii) That the respondents may be directed to produce the entire record pertaining to this case before this Hon'ble Tribunal.*
>
> *iv) That the present original application may very kindly be allowed with costs.*
>
> *v) That any other and further reliefs which this Hon'ble Tribunal deems just and fit in the facts and circumstances of the case may also be granted in favour of the applicant and against the respondents."*

3. The following facts are not in dispute. Petitioner initially joined the service of the respondents as a Mali on temporary basis on 01.03.1973 and thereafter, he was appointed as a Peon in July 1975, again on temporary basis under a specific scheme called the Source Book Scheme. Petitioner thereafter was appointed on ad-hoc basis as an LDC on 31.07.1985 on a pay scale of Rs. 260-400. In the year 1986, the respondent-Institute invited applications for the post of Library Assistant and Reference Assistant (Sanskrit) and Reference Assistant (Arabic). Petitioner applied for the post of Library Assistant. He was offered the post of Reference Assistant on ad-hoc basis in the pay scale of Rs. 1400-2300. The ad-hoc appointment of the petitioner as such was without specifying the particular language in which he so stood appointed as Reference Assistant which as per the respondent- Institute was done as the petitioner was not possessing essential qualification for being appointed as Reference Assistant as he did not possess the requisite degree either in Sanskrit or Arabic language. Petitioner served as Reference Assistant on ad-hoc basis without his services being so regularized till 01.12.1993. Thereafter he was promoted to the post of Professional Assistant w.e.f. 01.12.1993 in the pay scale of Rs. 1640-2900 and under FR 22(c), his pay was fixed Rs.1760 w.e.f. 02.12.1993. Thereafter vide office memorandum dated 24th December, 2002, the service of the petitioner was deemed to be treated regularized as Reference Assistant w.e.f. 30.04.1987 in the pay scale of Rs. 1400-2300 revised to Rs. 4500-7000, further revised to Rs. 5000-8000 w.e.f. 01.07.1990. Vide same office memorandum, the services of the petitioner were further ordered to be regularized as Professional Assistant w.e.f. 10.10.1992 in the pay scale of Rs. 1640-2900, revised to Rs. 5500-9000 w.e.f. 01.01.1996. He was also given the first upgradation under the Assured Career Progression Scheme (ACP) in the pay scale of Rs. 6500-10500 w.e.f. 19.10.2000 vide office memorandum dated 24.12.2002.

4. The records demonstrate that an audit objection was raised qua irregular grant of ACP to the petitioner, as is evident from Office Memorandum dated 29th August, 2006 (appended with the original application as Annexure A-6). It was mentioned in the said objection that as per Assured Career Progression Scheme for the Central Government Employees introduced vide Government of India Memorandum No. 35034/1/97-Estt. (d) 9.8.99, if an employee already had got one regular promotion after direct recruitment, he shall qualify for the second financial upgradation only on completion of 24 years of regular service under ACP Scheme. It was further mentioned in the said audit objection as under:-

> *"During test check of records it was noticed that Sh. Nokh Ram Professional Assistant had already got one promotion from Library Assistant i.e. from 1400-3200 to 1610-2900 on 2.12.1993 as per information supplied by the Dy. Secretary*

(Admn.) Sh. Nokh Ram was entitled to be treated as direct recruit from 30.04.1987 (the entire in the service book have been taken w.e.f. 12.12.86 which needs to also be corrected. Obviously the official was not entitled for the second financial upgradation w.e.f. 1.12.2000. This has resulted in overpayment of Rs. 19210 as detailed below.

Period	Due	Drawn	Dif BP	Dif DA	Total
	5500-175-9000	6500-200-10500			
2.12.2000-21.12.2000	6725	7100	362	148	510
1.1.2001-30.6.2001	6725	7100	375	161	536
1.7.2001-30.11.2001	6725	7100	375	169	544
1.12.2001-31.12.2001	6900	7300	400	180	580
1.1.2002-30.6.2002	6900	7300	400	196	596
1.7.2002-30.11.2002	6900	7300	400	208	608
1.12.2002-31.12.2002	7100	7500	400	208	608
1.1.03-31.3.03	7100(subject to charge of DA w.e.f. 1.7.03)	7500	400	220	620

Month	*Total and overpayment*
30 days	*510*
6 months	*3216*
5 months	*2720*
1 month	*580*
6 months	*3576*
5 months	*3040*
1 months	*608*
8 months	*4960*
Total	*19260*

In reply to audit memo No. 17 it was stated by the institute that according to letter OM No. 35034/1/97-Estt. (D) (Vol-iv) dated 10.02.2000 the official was entitled for personal up gradation. The reply of the institute was not tenable as the

official was entitled of the second financial up gradation if he was not direct recruit on the post of reference Assistant/Library Assistant only on completion of 21 years of regular service as direct and as such recovery as stated above may be recovered under intimation to audit."

5. A Special Committee of Controller of Accounts and Director of Finance was constituted by the department of Higher Education, Ministry of Human Resource Development, Government of India, which agreed with the observations of the audit. This led to issuance of Annexure A-1, dated 22.12.2006, which was impugned by way of original application before the learned Tribunal by the present petitioner. Learned Tribunal while dismissing the original application so filed by the present petitioner *inter alia* held as under:-

> *"It may be pointed out here that the ACP Scheme was introduced on recommendations of the 5th CPC to deal with the problem of stagnation as a measure of safety net. The ACP scheme envisages grant of two financial step-ups on completion of 12 and 24 years of service to an employee, who has no promotional avenues or has not earned any promotion. Condition No. 5.1 of the scheme provides that "**Two financial upgradations under the ACP scheme in the entire Government service career of any employee shall be counted against regular promotions** (including in situ promotion and fast-track promotion availed through limited departmental competitive examination) availed from the grade in which an employee was appointed as a direct recruit. This shall mean that two financial upgradations under the ACP Scheme shall be available only if no regular promotions during the prescribed periods (12 and 24 years) have been availed by an employee. If an employee has already got one regular promotion he shall qualify for the second financial upgradation only on completion of 24 years of regular service under the ACP scheme. In case two prior promotions on regular basis have already been received by an employee, no benefit under the ACP Scheme shall accrue to him."*
>
> *The question would arise whether the applicant has already earned two promotions since he joined service as a temporary Mali and reached to the post of Professional Assistant while remaining in the same department and if not, whether he was entitled to the benefit of the ACP Scheme. No doubt, he joined as a Mali, but was subsequently appointed as a Peon (Group 'D'). Thereafter, he was appointed as an LDC. This could surely be a promotion for him from a Group D to Group C post. Further, he is shown to have been promoted as Reference Assistant in the Service Book, which post was upgraded as Professional Assistant on 2.12.93. So, According to us, applicant had already earned more than two promotions and no benefit of ACP could be given to him. The impugned order Annexure A-1 has, therefore, rightly been passed and calls for no interference at the hands of this court."*

6. Mrs. Ranjana Parmar, learned Senior Counsel appearing for the petitioner has argued that order passed by the learned Tribunal is not sustainable in the eyes of law, as not only the said Tribunal erred on facts in coming to the conclusion that the petitioner during his course of employment with the respondent-institute had gained two promotions, but also erred in not appreciating that the right of the petitioner to receive benefits under Assured Career Progression Scheme was to be construed from his joining the office as Reference Assistant at the first instance and further taking into consideration the fact that his subsequent promotion to the post of Professional Assistant was no promotion in the eyes of law as the pay scale of both the said posts stood merged in a single pay scale. No other point was urged.

7. On the other hand, Mr. Ashok Sharma, learned Assistant Solicitor General of India while defending the order passed by the learned Tribunal argued that the order which was passed by the respondent-Institution while revising the pay scale of the petitioner was a valid order as the same was done by the respondent-institution on the basis of report of a Special

Committee which was constituted by the Ministry of Human Resource Development, Department of Higher Education, Government of India, to examine cases of audit objections on account of wrong implementation of Assured Career Progression Scheme in Indian Institute of Advanced Studies, Shimla. In the course of his contention he also referred to the said report which is on record alongwith the reply filed by the respondents to the original application.

8. We have heard learned counsel for the parties and also gone through the records of the case as well as the order passed the learned Tribunal.

9. A perusal of the records of the case demonstrates that Ministry of Human Resource Development, Department of Higher Education, Government of India had constituted a Special Committee of Controller of Accounts and Director (Fin.) to examine the cases of audit objections on account of wrong implementation of ACP in the office of Indian Institute of Advanced Studies, Shimla. This Committee submitted its report dated 26.10.2006, which is on record. Qua the present petitioner, the Committee has held as under:

> *"(10)* ***Shri Nokh Ram, Professional Assistant****:*
>
> *Shri Nokh Ram was initially appointed as unskilled Mali (Rs. 70-85) w.e.f. 1.3.73. He was subsequently designated as Peon (Rs. 70-85) w.e.f. 15.7.75 and promoted as LDC (Rs. 260-400) w.e.f. 31.7.85. He was appointed as Library Assistant (Rs. 425-700) on ad-hoc basis w.e.f. 12.12.86 and again appointed as Reference Assistant on ad-hoc basis in the same scale of pay w.e.f. 1.5.87. His appointment as Reference Assistant was subsequently regularized w.e.f. 1.5.87. He was subsequently promoted as Professional Assistant (Rs. 1640-2900) w.e.f. 2.12.93. He was granted first financial upgradation to the scale of pay of Rs. 6500-10500 w.e.f. 1.12.2000.*
>
> ***Audit observation****: Since he got already two promotions he was not eligible for financial upgradation under ACP Scheme.*
>
> ***Observation of the Committee****: Committee agrees with the observations of the Audit. Further, even if the appointment as Reference Assistant is considered as direct recruitment, since Shri Nokh Ram got one promotion to the post of Professional Assistant, he will be eligible for 2nd financial upgradation under ACP scheme on completion of 24 years of service from the date of his appointment to the post of Library Assistant/Reference Assistant on regular basis. Since he did not 24 years of service as on 1.12.2000, he was not eligible for 2nd upgradation from 1.12.2000. Thus, the upgradation given w.e.f. 1.12.2000 is not admissible."*

10. Now, we find that this report of the Special Committee was not assailed by the petitioner before the learned Tribunal. The report of the Committee is dated 26.10.2006, whereas the original application was filed before the learned Tribunal in the year 2010. A perusal of the order passed by the learned Tribunal demonstrates that there is also a reference to an earlier original application filed by the present petitioner, which was withdrawn by him without seeking liberty to file fresh on the same cause. However, we are not making any further reference of the same and we are adjudicating the present petition purely on merits. It is a matter of record that petitioner was initially appointed as unskilled Mali on 1.3.1973 and designated as Peon on 15.7.1975. It is also not in dispute that thereafter he was promoted as an LDC w.e.f. 31.7.1985. It is also not in dispute that in the year 1986, the respondent-institute invited applications for the post of Library Assistant and Reference Assistant (Sanskrit and Reference Assistant (Arabic). Petitioner who applied for the post of Library Assistant was offered the post of Reference Assistant on ad-hoc basis on the pay scale of Rs.1400-2300. He continued to serve as such till he was promoted to the post of Professional Assistant w.e.f. 1.12.1993. This was followed by office memorandum dated 24.12.2002 vide which services of the petitioner were ordered to be regularized as Reference Assistant w.e.f. 30.4.1987 and further regularized as Professional Assistant w.e.f. 10.10.1992. Now even if we take the case of the petitioner from the date on which he was regularized as Reference Assistant, as the learned Counsel for the petitioner wants us to,

then also, we find that after his appointment as Reference Assistant against which post he stood regularized w.e.f. 30.4.1987, he was promoted to the post of Professional Assistant w.e.f. 10.10.1992. This factual position could not be disputed by learned Senior Counsel for the petitioner during the course of arguments. It is in this background that as petitioner was found to have gained one promotion to the post of Professional Assistant w.e.f. 2.12.1993 after his appointment against the post of Reference Assistant w.e.f. 1.5.1987, that the Committee found merit in the audit objection to the effect that the petitioner was not entitled to the said financial upgradation and he could have gained only second financial upgradation under Assured Career Progression Scheme on completion of 24 years of service from the date of his appointment as Reference Assistant on regular basis. It is not in dispute that as on 1.12.2000, the petitioner had not put 24 years of service from the date of his initial appointment as Reference Assistant. Learned Senior Counsel for the petitioner also could not dispute the fact that first upgradation under ACP Scheme could not be granted to an employee who had gained one promotion within stipulated period, i.e. 12 years from the date of his appointment. However, according to her, the promotion of the petitioner to the post of Professional Assistant was no promotion in the eyes of law as the pay scale of post of Reference Assistant and Professional Assistant stood merged into a single pay scale. The genesis of said plea is neither borne out from the averments made in the original application nor the said contention could be substantiated during the course of arguments on the strength of any document. In this background, according to us, there is no infirmity with the act of the respondent-institute which withdrew the upgradation granted to the petitioner under the ACP Scheme on the ground that the petitioner was not eligible for the grant of said upgradation as he had gained a promotion to the post of Professional Assistant from the post of his appointment i.e. Reference Assistant. Similarly, the findings returned by the learned Tribunal to the effect that the petitioner having gained promotion in the course of employment was not eligible to the benefits of ACP Scheme on completion of 12 years service, can also not be faulted with. Though the learned Tribunal has taken into consideration the earlier promotions that were conferred upon the petitioner by the respondent-institute, however, even if we did not refer to the promotions which were conferred upon the petitioner earlier, even then, the petitioner was ineligible for conferment of benefits of upgradation under Assured Career Progression Scheme w.e.f. 01.12.2000, as from the date of his appointment as Reference Assistant, the first upgradation could have been conferred upon him after 12 years from the date of his appointment as Reference Assistant and that too in case he has not gained promotion within the said time period of 12 years, which is not the case here. The petitioner as Reference Assistant was promoted to the post of Professional Assistant w.e.f. 10.10.1992 i.e. within 12 years from the date of his initial appointment as Reference Assistant.

In view of above discussion, we do not find any merit in the present petition nor do we find any infirmity with the order of the learned Tribunal and the same is accordingly dismissed. Pending miscellaneous application(s), if any, also stand disposed of. No order as to costs.

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

Vijaylakshmi ...Appellant.

Versus

State of H.P. & others ...Respondents.

CWP No.3310 of 2016

Date of Decision: November 13, 2017

Constitution of India, 1950- Articles 15(4) and 16(4)- Appointment- Whether a lady marrying a Scheduled Castes / Scheduled Tribes or OBC Citizen, or one transplanted by adoption or any

other voluntary act, ipso facto, becomes entitled to claim reservation and thereupon seeks appointment to government service- **Held**- No. Considering the earlier judgments passed by the Apex Court in ***Murlidhar Dayandeo Kesekar v. Vishwanath Pandu Barde, 1995 Supp (2) SCC 549***, ***R. Chandevarappa v. State of Karnataka, (1995) 6 SCC 309***, ***Heikham Surchandra Singh & others v. Representative or "Lois" Kakching, Manipur (A Scheduled Caste Uplift Body) & others, (1997) 2 SCC 523*** and ***State of Tripura & others v. Namita Majumdar (Barman) (Smt), (1998) 9 SCC 217***- Held- that let alone the General category candidate who marries a person belonging to a Scheduled Caste or a Scheduled Tribe, even a person belonging to Scheduled Caste or Scheduled Tribe of one State cannot get the benefit of Scheduled Caste or Scheduled Tribe in another State. (Para-21 to 33)

The contention of the person that none was misled when the Scheduled Tribes certificate was tendered to gain employment and as such, the appointment of the petitioner could be saved. Contention- repelled- findings returned by the Authorities while dismissing the petitioner from the service on the basis of false Scheduled Tribe certificate- upheld.

(Para-34 and 35)

Cases referred:

Indra Sawhney & others v. Union of India & others, 1992 Supp (3) SCC 217

Nityanand Sharma & another v. State of Bihar & others, (1996) 3 SCC 576 (Two Judges)

Indra Sawhney & others v. Union of India & others, 1992 Supp (3) SCC 217

Heikham Surchandra Singh & others v. Representative or "Lois" Kakching, Manipur (A Scheduled Caste Uplift Body) & others, (1997) 2 SCC 523 (Two Judges)

State of Tripura & others v. Namita Majumdar (Barman) (Smt), (1998) 9 SCC 217

N.E. Horo v. Smt. Jahanara Jaipal Singh, (1972) 1 SCC 771 (Two Judges)

Sobha Symavathi Devi v. Setti Gangadhara Swamy & others, (2005) 2 SCC 244 (Three Judges)

Meera Kanwaria v. Sunita & others, (2006) 1 SCC 344 (Two Judges)

Anjan Kumar v. Union of India & others, (2006) 3 SCC 257 (Two Judges)

Ashok Kumar Thakur v. Union of India & others, (2008) 6 SCC 1 (Five Judges)

Action Committee on Issue of Caste Certificate to Scheduled Castes and Scheduled Tribes in the State of Maharashtra and another Vs. Union of India and another, (1994) 5 SCC 244

Kumari Madhuri Patil & another v. Addl. Commissioner, Tribal Development & others, (1994) 6 SCC 241

U.P. Public Service Commission, Allahabad v. Sanjay Kumar Singh, (2003) 7 SCC 657

S. Pushpa & others v. Sivachanmugavelu & others, (2005) 3 SCC 1

Subhash Chandra & another v. Delhi Subordinate Services Selection Board & others, (2009) 5 SCC 458

Sanjeev Kumar & another v. State of Bihar & others, (2016) 13 SCC 105

Chairman and Managing Director FCI & ors. v. Jagdish Balram Bahira & ors., (2017) 8 SCC 670

Manju v. State of H.P. & others, AIR 2007 HP 74

For the Appellant	Mr. Neeraj Maniktala, Advocate.
For the Respondents	Mr. M.A. Khan and Mr. Anup Rattan, Additional Advocate Generals, with Mr. J.K. Verma, Deputy Advocate General, for respondents No. 1 and 2. Mr. Ashok Sharma, ASGI, with Ms Sukarma Sharma, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

It is not in dispute that either by birth or upbringing, petitioner does not belong to a Schedule Tribe category. She is a Brahmin, born in the State of Uttar Pradesh. Also, her

upbringing is not in a socially or culturally backward set up. It is also not in dispute that Scheduled Tribe certificate was obtained by her solely on the strength of her having married a person who belonged to a Scheduled Tribe category.

2. In the present petition, the sole question, which arises for consideration, is as to whether a lady, who otherwise does not belong to a Scheduled Tribe, on account of her marriage to a person belonging to a Scheduled Tribe, so notified within the State of Himachal Pradesh, acquires the status of that of her husband, i.e. Scheduled Tribe, for the purpose of claiming benefits as envisaged under Article 16(4) of the Constitution of India or not.

3. While the issue is no longer res-integra, for it stands settled by Hon'ble Supreme Court of India in its several decisions, but however, since repeatedly it keeps on cropping, not only with regard to ladies who otherwise do not belong to a Scheduled Tribe but marry a person belonging to a Scheduled Tribe, but also with regard to ladies, who do not belong to a Scheduled Caste but marry a person belong to a Scheduled Caste, we endeavour to reiterate the law, as stands laid down by the Hon'ble Supreme Court of India.

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

> "(a) That the order Annexure P-8 passed by the Naib Tehsildar Holi may kindly be declared illegal and quashed and set aside as the Caste/Tribe Certificate was issued to the petitioner after all the due verification by the authorities and on the basis of the law holding the field as laid down by the Hon'ble Apex Court.
>
> (b) That the enquiry by Respondent No. 3 that the caste/tribe certificate submitted by the petitioner was false, may kindly be declared as arbitrary and against the law as laid down.
>
> (c) Record of the case may be called for the kind perusal of this Hon'ble Court."

5. Case of the petitioner is that she was married to one Shri Prem Chand, resident of Village Gusal, Panchayat Holi, District Chamba in the year 1972, belonging to Gaddi Rajput Tribe. By virtue of her being married to a person belonging to a Scheduled Tribe category, she applied to the authorities for the issuance of a Scheduled Tribe certificate, which was issued to her on 20.03.1985 by the Executive Magistrate, Sub Tehsil Holi, District Chamba. On the strength of the said certificate, petitioner joined as a Primary Teacher under the Kendriya Vidyalaya Sangathan in the year 1986. In the year 2011, i.e. after putting in more than 25 years of service, she was chargesheeted vide memorandum dated 28.02.2011 to the effect that she had gained appointment by submitting a false caste certificate against the post reserved for a Scheduled Tribe category. Petitioner denied the allegations by maintaining that the Scheduled Tribe certificate was rightly issued in her favour by the authorities concerned. In the meanwhile, on 23.12.2014, petitioner received a communication from the office of Naib Tehsildar, Sub Tehsil Holi, calling her for verification/cancellation of the said Scheduled Tribe certificate issued to her. She responded to the same explaining that the certificate stands rightly issued in her favour by the authorities after carrying out all necessary verifications. Despite this, vide order dated 01.01.2015, her Scheduled Tribe certificate was cancelled by the authorities on the ground that by birth she did not belong to a Scheduled Tribe category, for she hailed from an upper caste family in Roorkee (U.P.), therefore, issuance of Scheduled Tribe certificate in her favour was illegal. In view of the tribal certificate issued to the petitioner being declared as illegal in the eyes of law, she was dismissed from service on 18.2.2015. Statutory appeal filed by her also stands rejected.

6. Feeling aggrieved, petitioner has filed the present petition praying for the reliefs reproduced supra.

7. In the reply so filed to the petition, stand taken by the respondents is that the tribal certificate issued in favour of the petitioner rightly stands cancelled, for by birth she did not

belong to a Scheduled Tribe category and as such could not have gained the status of a Scheduled Tribe by simply marrying a person, belonging to a Scheduled Tribe category. In support of this stand, respondent-State has relied upon various notifications issued by the Government of India as well as the respondent-State from time to time.

8. We have heard the learned counsel for the parties and have also carefully perused the records of the case.

9. The Preamble of the Constitution of India is the epitome of the basic structure built in the Constitution guaranteeing justice - social, economic and political - equality of status and of opportunity with dignity of person and fraternity. To establish an egalitarian social order, the trinity, the Preamble, the Fundamental Rights in Part III and the Directive Principles of State Policy in Chapter IV of the Constitution delineate the socio-economic justice.

10. Social justice is the comprehensive form to remove social imbalances by law, harmonising the rival claims or the interests of different groups and/or sections in the social structure or individuals by means of which alone it would be possible to build up a welfare State. The ideal of economic justice is to make equality of status meaningful and life worth living at its best removing inequality of opportunity and of status - social, economic and political.

11. Social democracy means a way of life which recognises liberty, equality and fraternity as principles of life. They are the trinity. One cannot diverse one from the other. Without equality, liberty would produce supremacy of the few over the many. Equality without liberty would denude the individual of his initiative to improve excellence. Without fraternity, liberty and equality would not nurture as their natural habitat. Social and economic justice is a constitutional right enshrined for the protection of the society. The right to socioeconomic justice in the trinity, the Preamble, Fundamental Rights and Directives is to make the quality of life of the disadvantaged people meaningful. Equal protection in Article 14, therefore, requires affirmative action by the State to those unequals by providing facilities and opportunities.

12. Part-XVI of the Constitution carves out special provisions, relating to certain classes. Articles 341 and 342 therein deal with the power of the State to specify the castes, races or tribes, which for the purposes of the Constitution are deemed to be Scheduled Castes or Scheduled Tribes, in relation to the respective State/Union Territory.

13. Article 366 (24) & 366 (25) defines the terms “Scheduled Castes” and “Scheduled Tribes”. It reads as under:

> “(24) “Scheduled Castes” means such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under article 341 to be Scheduled Castes for the purposes of this Constitution.”
>
> “(25) “Scheduled Tribes” means such tribes or tribal communicates or parts of or groups within such tribes or tribal communities as are deemed under article 342 to be Scheduled Tribes for the purposes of this Constitution.”

14. Article 15 reads as under:

> “15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth :-
>
> (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
>
> (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-
>
> (a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30."

15. Article 16 reads as under:

"16. Equality of opportunity in matters of public employment :-

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(4-A) Nothing in this article shall prevent the State from making any provision for reservation 3[in matters of promotion, with consequential seniority, to any class] or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

(4-B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent. reservation on total number of vacancies of that year.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination."

16. It is the mandate of Article 16 that there shall be equality of opportunity to all citizens in matters relating to employment or appointment to any office under the State. However, the Article itself carves out certain exceptions and one such being to make provisions for reservation for appointment or posts in favour of any backward class of citizens, which, in the opinion of the State, is not adequately represented in the services under the State.

17. Significantly, Article 16 or for that matter Article 366 does not define the expression "any backward class of citizens". We notice that such endeavour was made by a Constitution Bench (Five Judges) of the Apex Court in *M. Nagaraj and others v. Union of India and others,* (2006) 8 SCC 212, wherein the Court explained the necessity for reservation, being necessary for transcending castes and not for perpetuating the same. The Court cautioned that reservation had to be used in a limited sense, otherwise it would perpetuate casteism in the country. Equality in Article 16 was held individual specific, whereas reservation in Articles 16(4) and 16(4-A) was enabling. The discretion of the State, however, was subject to the existence of backwardness and inadequacy of representation for public employment. "Backwardness" had to be based on objective factors, whereas "inadequacy" had to be measured on the basis of factual existence.

18. Inadequacy in representation and backwardness of the Scheduled Castes and Scheduled Tribes are circumstances, which enable the State Government to act under Articles 15(4) and 16(4) of the Constitution. Thus, it can safely be held that the expression "any backward class of citizens" would include Scheduled Castes and Scheduled Tribes.

19. We may notice that much prior thereto, a Constitution Bench (Nine Judges) of the Apex Court in *Indra Sawhney & others v. Union of India & others,* 1992 Supp (3) SCC 217, had also observed as under:

> "769. In the former princely State of Travancore, the expression used was "Communities", as would be evident from the Proceedings of the Government of His Highness the Maharaja of Travancore, contained in Order R. Dis. N. 893/general dated Trivandrum, 25th June, 1935. It refers to earlier orders on the subject as well. What is significant is that the expression "communities" was used as taking in Muslims and certain sections of Christians as well; it was not understood as confined to castes in Hindu social system alone. The operative portion of the order reads as follows:
>
> > "....Accordingly, Government have decided that all communities whose population is approximately 2 per cent of the total population of the State or about one lakh, be recognised as separate communities for the purpose of recruitment to the public service. The only exception from the above rule will be the Brahmin community who, though forming only 1.8 per cent of the total population, will be dealt with as a separate community. On the above basis the classification of communities will be as follows:-
> >
> > A. HINDU
> >
> > 1. Brahmin.
> >
> > 2. Nayar.
> >
> > 3. Other Caste Hindu.
> >
> > 4. Kummula.
> >
> > 5. Nudar.
> >
> > 6. Ezlmva.
> >
> > 7. Cheramar (Pulaya)
> >
> > 8. Other Hindu.
> >
> > B. MUSLIM.

C. CHRISTIAN.

1. Jacobite.

2. Marthomite.

3. Syriac Catholic.

4. Latin Catholic.

5. South India United Church.

6. Other Christian."

In the then United Provinces, the term "Backward Classes" was understood as covering both the untouchable classes as well other "Hindu Backward" classes. Marc Galanter says:

> "The United Provinces Hindu Backward Classes League (founded in 1929) submitted a memorandum which suggested that the term "Depressed" carried a connotation "of untouchability, in the sense of causing pollution by touch as in the case of Madras and Bombay" and that many communities were reluctant to identify themselves as depressed. The League suggested the term "'Hindu' Backward'" as a more suitable nomenclature. The list of 115 castes submitted included all candidates from the untouchable category as well as a stratum above. "All of the listed communities belong to non-Dwijas or degenerate or Sudra classes of the Hindus." They were described as low socially, educationally and economically and were said to number over 60% of the population."

The expression "depressed and other backward classes" occurs in the Objectives Resolution of the Constituent Assembly moved by Jawaharlal Nehru on December 13, 1946."

"860. For the sake of ready reference, we also record our answers to questions as framed by the counsel for the parties and set out in para 681. Our answers question-wise are:

> (1). Article 16(4) is not an exception to Article 16(1). It is an instance of classification inherent in Article 16(1). Article 16(4) is exhaustive of the subject of reservation in favour of backward classes, though it may not be exhaustive of the very concept of reservation. Reservations for other classes can be provided under Clause (1) of Article 16.
>
> (2). The expression 'backward class' in Article 16(4) takes in 'Other Backward Classes', S.Cs., S.Ts. and may be some other backward classes as well. The accent in Article 16(4) is upon social backwardness. Social backwardness leads to educational backwardness and economic backwardness. They are mutually contributory to each other and are inter-twined with low occupations in the Indian society. A caste can be and quite often is a social class in India. Economic criterion cannot be the sole basis for determining the backward class of citizens contemplated by Article 16(4). The weaker sections referred to Article 46 do include S.E.B.Cs. referred to in Article 340 and covered by Article 16(4).
>
> (3). Even under Article 16(1), reservations cannot be made on the basis of economic criteria alone."

"(5) There is no constitutional bar to classification of backward classes into more backward and backward classes for the purposes of Article 16(4). The distinction should be on the basis of degrees of social backwardness. In case of such classification, however, it would be advisable - nay,

> necessary - to ensure equitable distribution amongst the various backward classes to avoid lumping so that one or two such classes do not eat away the entire quota leaving the other backward classes high and dry.
>
> For excluding 'creamy layer', an economic criterion can be adopted as an indicium or measure of social advancement."

20. The Apex Court in *Nityanand Sharma & another v. State of Bihar & others,* (1996) 3 SCC 576 (Two Judges), after considering its earlier decision in *Indra Sawhney & others v. Union of India & others,* 1992 Supp (3) SCC 217, reiterated that reservation under Article 16(4) is not made in favour of a "caste" but a "Backward Class". Once a caste satisfies the criteria of backwardness, it becomes a Backward Class for the purpose of Article 16(4). Even that is not enough. It must further be found that the Backward Class is not adequately represented in the services of the State. It would, therefore, be for the authority constituted under Article 340 or the appropriate authority to identify the Backward Class eligible for entitlement under Article 16(4). It would thus be seen that the Dalits, Tribes and identified Backward Classes of citizens who are not adequately represented in a service or office under the State are eligible to be considered under Article 16(1) read with Article 16(4); Equally under Article 15(4) for admission in educational institutions and in other programmes.

21. In the very same decision, the Court framed the following question for itself:

> "Whether a candidate, by marriage, adoption or obtaining a false certificate of social status would be entitled to an identification as such member of the class for appointment to a post reserved under Article 16(4) or for an admission in an educational institution under Article 15(4)?"

And answered the same in the following terms:

> "33. However, the question is : Whether a lady marrying a Scheduled Caste, Scheduled Tribe or OBC citizen, or one transplanted by adoption or any other voluntary act, ipso facto, becomes entitled to claim reservation under Articles 15(4) or 16(4), as the case may be ? It is seen that Dalits and Tribes suffered social and economic disabilities recognised by Articles 17 and 15(2). Consequently, they became socially, culturally and educationally backward; the OBCs also suffered social and educational backwardness. The object of reservation is to remove these handicaps, disadvantages, sufferings and restrictions to which the members of the Dalits or Tribes or OBCs were subjected and was sought to bring them in the mainstream of the nation's life by providing them opportunities and facilities.
>
> 34. In *Murlidhar Dayandeo Kesekar v. Vishwanath Pandu Barde*, 1995 Supp (2) SCC 549, and *R. Chandevarappa v. State of Karnataka*, (1995) 6 SCC 309, this Court had held that economic empowerment is a fundamental right to the poor and the State is enjoined under Articles 15(3), 46 and 39 to provide them opportunities. Thus, education, employment and economic empowerment are some of the programmes the State has evolved and also provided reservation in admission into educational institutions, or in case of other economic benefits under Articles 15(4) and 46, or in appointment to an office or a post under the State under Article 16(4). Therefore, when a member is transplanted into the Dalits, Tribes and OBCs, he/she must of necessity also have had undergone the same handicaps, and must have been subjected to the same disabilities, disadvantages, indignities or sufferings so as to entitle the candidate to avail the facility of reservation. A candidate who had the advantageous start in life being born in Forward Caste and had march of advantageous life but is transplanted in Backward Caste by adoption or marriage or conversion, does not become eligible to the benefit of reservation either under Article 15(4) or 16(4), as the case may be. Acquisition of the status of Scheduled Caste etc. by voluntary mobility into

> these categories would play fraud on the Constitution, and would frustrate the benign constitutional policy under Articles 15(4) and 16(4) of the Constitution.
>
> … … … …
>
> 36. The recognition of the appellant as a member of the Latin Catholics would not, therefore, be relevant for the purpose of her entitlement to the reservation under Article 16(4), for the reason that she, as a member of the Forward Caste, had an advantageous start in life and after her completing education and becoming major, married Yesudas; and so, she is not entitled to the facility of reservation given to the Latin Catholics, a Backward Class." (Emphasis supplied)

22. The aforesaid principles stand reiterated by the Apex Court in *Heikham Surchandra Singh & others v. Representative or "Lois" Kakching, Manipur (A Scheduled Caste Uplift Body) & others,* (1997) 2 SCC 523 (Two Judges), wherein the Court was dealing with a case where a person hailing from a forward class had married a person hailing from a backward class (Fisherman). (Also: *State of Tripura & others v. Namita Majumdar (Barman) (Smt),* (1998) 9 SCC 217).

23. Significantly, not only in the case of appointment but also that of election under the provisions of the Representation of Peoples Act, 1951, the Apex Court consistently followed the aforesaid principles. Noticing its earlier decision rendered in *N.E. Horo v. Smt. Jahanara Jaipal Singh,* (1972) 1 SCC 771 (Two Judges), which it partly over-ruled, the Court in *Sobha Symavathi Devi v. Setti Gangadhara Swamy & others,* (2005) 2 SCC 244 (Three Judges), specifically held that the principle relating to reservation under Articles 15(4) and 16(4) has to be extended to the constitutional reservation of a seat for a Scheduled Tribe in the House of People or under Article 332 to the Legislative Assembly, for the said reservations are also constitutional reservations, intending to benefit the real underprivileged and not extending to those who come to the class by way of marriage.

24. The principle, even in a case of election to the Municipal Council (Delh), stands reiterated by the Apex Court in *Meera Kanwaria v. Sunita & others,* (2006) 1 SCC 344 (Two Judges).

25. What is the meaning of word "tribe" stands explained by the Apex Court in *Anjan Kumar v. Union of India & others,* (2006) 3 SCC 257 (Two Judges), wherein also the Court was dealing with an identical issue in the following terms:

> "8. The 'tribe' has been characterized by Dr. Gupta, Jai Prakash in *The customary Laws of the Munda and the Oraon* quoted by this Court in *State of Kerala v. Chandramohanan*, (2004) 3 SCC 429 at 432 as under:
>
> > "Tribe has been defined as a social group of a simple kind, the members of which speak common dialect, have a single government and act together for such common purposes as warfare. Other typical characteristics include a common name, a contiguous territory, a relatively uniform culture or way of life and a tradition of common descent. Tribes are usually composed of a number of local communities e. g. bands, villages or neighbourhoods and are often aggregated in clusters of a higher order called nations. The term is seldom applied to societies that have achieved a strictly territorial organization in large States but is usually confined to groups whose unity is based primarily upon a sense of extended kinship ties though it is no longer used for kin groups in the strict sense, such as clans."
>
> Bhowmik, K. L. in Tribal *India: a profile in Indian Ethnology* observed:
>
> > "Tribe in the *Dictionary of Anthropology* is defined as 'a social group, usually with a definite area, dialect, cultural homogeneity and unifying social organization. It may include several sub-groups, such as

> sibs or villages. A tribe ordinarily has a leader and may have a common ancestor, as well as patron deity. The families or small communities making up the tribe are linked through economic, social, religious, family or blood ties'.'"

26. Significantly, in the very same decision, the Court reiterated that the object of Articles 341, 342, 15 (4) , 16 (4) and 16 (4A) is to provide preferential treatment for the Scheduled Castes and Scheduled Tribes having regard to the economic and educational backwardness and other disabilities wherefrom they suffer. So also considering the typical characteristic of the tribal including a common name, a contiguous Territory, a relatively uniform culture, simplistic way of life and a tradition of common descent, the transplantation of the outsiders as members of the tribe or community may dilute their way of life apart from such persons do not suffer any disabilities. Therefore, the condition precedent for a person to be brought within the purview of the Constitution (Scheduled Tribes) Order, 1950, one must belong to a tribe and suffer disabilities wherefrom they belong.

27. In *Ashok Kumar Thakur v. Union of India & others,* (2008) 6 SCC 1 (Five Judges), while dealing with the constitutional validity of the Constitution (93rd amendment) Act, 2005, whereby, by law, for the advancement of any socially and educationally backward class of citizens/Scheduled Castes/ Scheduled Tribes/special provisions relating to admissions to educational institutions, private or otherwise, aided or unaided, other than the minority educational institutions, the Apex Court again highlighted the absence of equality, both on social and economic plane, necessitating insertion of the Articles providing for reservation under the Constitution. What is the real meaning of "Caste"? Is "caste" a "class"? We quote the following from the said judgment:

> "149. "Caste" is often used interchangeably with "class" and can be called as the basic unit in social stratification. The most characteristic thing about a caste group is its autonomy in caste related matters. One of the universal codes enforced by all castes is the requirement of endogamy. Other rules have to do with the regulations pertaining to religious purity or cleanliness. Sometimes it restricts occupational choices as well. It is not necessary that these rules be enforced in particular classes as well, and as such a "class" may be distinguished from the broader realm of "caste" on these grounds. Castes were often rated, on a purity scale, and not on a social scale.
>
> 150. The observations made by Venkataramaiah J. in *K.C. Vasanth Kumar v. State of Karnataka, 1985 Supp SCC 714,* are relevant in this regard:
>
> > "110. We are aware of the meanings of the words caste, race, or tribe or religious minorities in India. A caste is an association of families which practise the custom of endogamy i.e. which permits marriages amongst the members belonging to such families only. Caste rules prohibit its members from marrying outside their caste. There are sub-groups amongst the castes which sometimes inter-marry and sometimes do not. A caste is based on various factors, sometimes it may be a class, a race or a racial unit. A caste has nothing to do with wealth. The caste of a person is governed by his birth in a family. Certain ideas of ceremonial purity are peculiar to each caste. Sometimes caste practices even led to segregation of same castes in the villages. Even the choice of occupation of members of castes was predetermined in many cases, and the members of a particular caste were prohibited from engaging themselves in other types of callings, professions or occupations. Certain occupations were considered to be degrading or impure. A certain amount of rigidity developed in several matters and many who belonged to castes which were lower in social order were made to suffer many restrictions, privations and humiliations. Untouchability was practised

against members belonging to certain castes. Inter-dining was prohibited in some cases. None of these rules governing a caste had anything to do with either the individual merit of a person or his capacity. The wealth owned by him would not save him from many social discriminations practised by members belonging to higher castes. Children who grew in this caste ridden atmosphere naturally suffered from many social disadvantages apart from the denial of opportunity to live in the same kind of environment in which persons of higher castes lived. Many social reformers have tried in the last two centuries to remove the stigma of caste from which people born in lower castes were suffering. Many laws were also passed prohibiting some of the inhuman caste practices."

151. Rivers, the leading anthropologist, criticizes the use of the terms "caste" and "class" as synonyms. However, many others, such as Lowie and Kimball Young W.H.R. Rivers, *Social Organization* (New York, 1924), use these terms as though they were identical.

... ...

156. On the other hand, it is possible that within a caste group there is a marked inequality of status, opportunity, or social standing which then defines the "class" within that particular "caste" system. For example, all the Brahmins are not engaged in highly respectable employment, nor are all very wealthy. It may even be that some Brahmins may be servants of members of a lower caste, or it may also be so that the personal servant of a rich Brahmin may be a poor Brahmin. Hence, there is every reason to believe that within a single caste group there are some classes or groups of people to whom good fortune or perseverance has brought more dignity, social influence and social esteem than it has to others.

157. In India, caste, in a socio-organizational manner would mean that it is not characterized merely by the physical or occupational characteristics of the individuals who make it up; rather, it is characterized by its codes and its close-knit social controls. In the case of classes, however, there may not exist such close-knit unit social controls, and there may exist great disparity in occupational characteristics.

158. A social class is therefore a homogeneous unit, from the point of view of status and mutual recognition; whereas a caste is a homogeneous unit from the point of view of common ancestry, religious rites and strict organizational control. Thus the manner in which the caste is closed both in the organizational and biological sense causes it to differ from social class. Moreover, its emphasis upon ritual and regulations pertaining to cleanliness and purity differs radically from the secular nature and informality of social class rules. In a social class, the exclusiveness would be based primarily on status. Social classes divide homogeneous populations into layers of prestige and esteem, and the members of each layer are able to circulate freely with it.

159. In a caste, however, the social distance between members is due to the fact that they belong to entirely different organizations. It may be said, therefore, that a caste is a horizontal division and a class, a vertical division."

(Emphasis supplied)

28. A Constitution Bench (Five Judges) of the Hon'ble Supreme Court in *Action Committee on Issue of Caste Certificate to Scheduled Castes and Scheduled Tribes in the State of Maharashtra and another* Vs. *Union of India and another*, (1994) 5 SCC 244 has also observed that:

"3. On a plain reading of clause (1) of Articles 341 and 342 it is manifest that the power of the President is limited to specifying the castes or tribes which shall, for the purposes of the Constitution, be deemed to be Scheduled Castes or Scheduled Tribes in relation to a State or a Union Territory, as the case may be. Once a notification is issued under clause (1) of Articles 341 and 342 of the Constitution, Parliament can by law include in or exclude from the list of Scheduled Castes or Scheduled Tribes, specified in the notification, any caste or tribe but save for that limited purpose the notification issued under clause (1), shall not be varied by any subsequent notification. What is important to notice is that the castes or tribes have to be specified in relation to a given State or Union Territory. That means a given caste or tribe can be a Scheduled Caste or a Scheduled Tribe in relation to the State or Union Territory for which it is specified. These are the relevant provisions with which we shall be concerned while dealing with the grievance made in this petition.

....

16. We may add that considerations for specifying a particular caste or tribe or class for inclusion in the list of Scheduled Castes/Schedule Tribes or backward classes in a given State would depend on the nature and extent of disadvantages and social hardships suffered by that caste, tribe or class in that State which may be totally non est in another State to which persons belonging thereto may migrate. Coincidentally it may be that a caste or tribe bearing the same nomenclature is specified in two States but the considerations on the basis of which they have been specified may be totally different. So also the degree of disadvantages of various elements which constitute the input for specification may also be totally different. Therefore, merely because a given caste is specified in State A as a Scheduled Caste does not necessarily mean that if there be another caste bearing the same nomenclature in another State the person belonging to the former would be entitled to the fights, privileges and benefits admissible to a member of the Scheduled Caste of the latter State "for the purposes of this Constitution". This is an aspect which has to be kept in mind and which was very much in the minds of the Constitution-makers as is evident from the choice of language of Articles 341 and 342 of the Constitution. That is why in answer to a question by Mr Jaipal Singh, Dr Ambedkar answered as under:

"He asked me another question and it was this. Supposing a member of a Scheduled Tribe living in a tribal area migrates to another part of the territory of India, which is outside both the scheduled area and the tribal area, will he be able to claim from the local Government, within whose jurisdiction he may be residing the same privileges which he would be entitled to when he is residing within the scheduled area or within the tribal area? It is a difficult question for me to answer. If that matter is agitated in quarters where a decision on a matter like this would lie, we would certainly be able to give some answer to the question in the form of some clause in this Constitution. But so far as the present Constitution stands, a member of a Scheduled Tribe going outside the scheduled area or tribal area would certainly not be entitled to carry with him the privileges that he is entitled to when he is residing in a scheduled area or a tribal area. So far as I can see, it will be practicably impossible to enforce the provisions that apply to tribal areas or scheduled areas, in areas other than those which are covered by them...."

Relying on this statement the Constitution Bench ruled that the petitioner was not entitled to admission to the medical college on the basis that he belonged to a Scheduled Tribe in the State of his origin."

29. The aforesaid principles stand reiterated by the Apex Court in *Kumari Madhuri Patil & another v. Addl. Commissioner, Tribal Development & others,* (1994) 6 SCC 241; *U.P. Public Service Commission, Allahabad v. Sanjay Kumar Singh,* (2003) 7 SCC 657; *S. Pushpa & others v. Sivachanmugavelu & others,* (2005) 3 SCC 1; *Subhash Chandra & another v. Delhi Subordinate Services Selection Board & others,* (2009) 5 SCC 458; and *Sanjeev Kumar & another v. State of Bihar & others,* (2016) 13 SCC 105.

30. Thus, it is evident from the above judgment that let alone a General category candidate who marries a person belonging to a Scheduled Caste or a Scheduled Tribe, even a person belonging to Scheduled Caste or Scheduled Tribe of one State cannot get the benefit of Scheduled Caste or Scheduled Tribe in another State.

31. Recently a three Judge Bench of the Hon'ble Supreme Court in *Chairman and Managing Director FCI and others* v. *Jagdish Balram Bahira and ors.*, (2017) 8 SCC 670 has held as under:

> "51. Since the decision of the Bench of three judges in R. Vishwanatha Pillai Vs. State of Kerala (supra) the position of law which has been laid down by this Court is that where an appointment to a post or admission to an educational institution is made against a vacancy which is reserved for a Scheduled Caste or Tribe or a socially and educationally backward class, the invalidation of the claim of the candidate would result in the appointment or, as the case may be, the admission being void and non est. This principle has been followed by another judgment of three Judges in Dattatray (supra). The same position has been propounded by a two judge bench in Bank of India Vs. Avinash Mandivikar (supra). The formal termination of an employment or the withdrawal of admission is a necessary consequence which flows out of the invalidation of the caste or tribe claim. The only exception to this principle consists of those cases where, in exercise of the power conferred by Article 142, the Court considered it appropriate and proper to protect the admission which was granted or, as the case may be, the appointment to the post.

32. We notice similar view to have been taken by a Coordinate Bench of this Court in *Smt. Manju v. State of H.P. & others,* AIR 2007 HP 74.

33. Therefore, as per the law as it stands today, it is very clear and categorical that a person who does not belongs to a Scheduled Tribe or a Scheduled Caste category by birth, simply by virtue of marrying a person belonging thereto cannot gain the status of that particular caste or tribe.

34. Coming to the facts of this case, the contention of the learned counsel for the petitioner that petitioner mislead none at the time when the Scheduled Tribe certificate was obtained by her, on the strength of which, she gained employment, in our considered view, is of no help to the petitioner. This we say so for the reason that undisputedly, petitioner was not entitled to be issued a certificate that she belonged to a Scheduled Tribe category only on the strength of her husband belonging to the said tribe. Not only this, findings returned by the authorities while dismissing the petitioner from service also do not call for any interference, because perusal of the orders passed by the said authorities demonstrate that in fact the petitioner had submitted a false tribal certificate. In the certificate submitted, she did not mention the name of her father. It was got issued by referring therein, name of her husband.

35. Order, dated 12.09.2016 (Annexure P-12) demonstrates that petitioner was called upon by the Principal of the Kendriya Vidyalya to submit Scheduled Tribe certificate in which she was referred to as *'daughter of'* in place of *'wife of'*, but she failed to submit the same within the stipulated time.

36. We find principles of natural justice to have been fully complied with.

37. Therefore, in view of the above discussion, as admittedly by birth petitioner did not belong to a Scheduled Tribe category, she could not have gained status thereof, by simply marrying a person belonging to such category, we do not find any illegality with the action of the authorities whereby Scheduled Tribe certificate issued in her favour was cancelled and employment obtained by her on the strength of said certificate was terminated.

In view of above, as there is no merit in the present petition, the same is accordingly dismissed, so also miscellaneous applications, if any. No order as to costs.

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

State of H.P. and others .....Petitioners.

Vs.

Dr. Rohit Sharma and another .....Respondents.

CWP No. 1980 of 2017
Date of Decision: 14.11.2017

Constitution of India, 1950- Article 226- Civil Writ Petition- Petitioner seeking regularization- cut off mentioned by way of administrative instructions curtailing the benefit to those who had completed 6 years service as on 31.3.2012- petitioner challenging the imposition of cut off date before the H.P. Administrative Tribunal- Original Application allowed- feeling aggrieved State challenge the same before the High Court- while dismissing the writ petition, **High Court held**- that the cabinet had taken a decision to confer the right of regularization on contract employees on completion of six years of service – any subsequent executive instructions curtailing the benefit of regularization to employees having completed 6 years on 31.3.2013 was illegal and unjust- any instructions in this behalf could not have been passed without the approval of the cabinet- writ petition dismissed. (Para-5 to 7)

For the petitioners: Mr. Anup Rattan, Additional Advocate General.
For the respondents: Mr. Lovneesh Kanwar, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral):

By way of this writ petition, the State has assailed order, dated 31.03.2016, passed by the learned Himachal Pradesh Administrative Tribunal, Shimla in T.A. No. 1710 of 2015, vide which, learned Tribunal disposed of the Transfer Application in the following terms:

> *"The applicants were appointed as Veterinary Officers, on contract, and joined service on 17.06.2006. They had completed six years service for regularization in terms of decision dated 8.8.2012 taken by the CMM of Himachal Pradesh. The respondent did not regularize the services of the applicant on completion of six years service. The cutoff date mentioned in notification dated 31.8.2012 superseding the decision of the CMM that the persons who had completed six years service as on 31.3.2012 were to be regularized was illegal. The applicants have completed six years service, on contract, for regularization.*
>
> *2. Consequently, the transferred application is allowed and the respondents are directed to consider case of the applicants for regularization on completion of six years service.*

3. The pending miscellaneous application(s), if any, also stand disposed of."

2. Brief facts necessary for the adjudication of the present petition are that respondents before this Court joined the services of the respondent-State as Veterinary Officer on contract basis in June 2006. Vide instructions, dated 17th August, 2012, issued by the Department of Personnel, Government of Himachal Pradesh, on the subject "*Regularization of contract appointees in the Government Departments-Instructions thereof*", it was notified that matter regarding regularization of services of contractual employees working in various departments which was under consideration of the Government, stood decided by the Government, wherein a decision had been taken to regularize the services of the contractual appointees after completion of six years of service, provided they had been engaged as such after observing all codal formalities. By virtue of said instructions right of regularization accrued upon the present respondents on completion of six years of service as contract employees, as they had been engaged after observing all codal formalities. However, Department of Personnel again issued instructions, dated 31st August, 2012, wherein it was mentioned that the Government has decided to regularize the services of only those contractual appointees after completion of six years service, who had put in six years of service on contract basis as on 31.03.2012. Present respondents were aggrieved by the issuance of the said instructions, dated 31st August, 2012, because as per them, the right of regularization, which had accrued upon them vide instructions, dated 17th August, 2012, was arbitrarily curtailed by mentioning a cut off date, i.e., 31.03.2012. As per the present respondents, as a result of this arbitrary act on the part of the respondent-State, their regularization was delayed by nine months' time, as rather than their services being regularized after completion of six years of service on contract basis, the respondent-State regularized their services on 31.03.2013. Accordingly, they assailed the said act of the State by filing CWP No. 8926/2012. The impugned instructions were *inter alia* also challenged on the ground that whereas instructions, dated 17th August, 2012 were in consonance with the decision of the Cabinet, i.e. the decision taken vide Item No. 27 in the Cabinet meeting held on 08.08.2012, which correctly stood reflected in instructions, dated 17.08.2012, however, the subsequent instructions, dated 31.08.2012, were not in consonance with the decision of the Cabinet, dated 08.08.2012, as there was no cut off date mentioned in the Cabinet decision.

3. This writ petition was subsequently transferred to the learned Administrative Tribunal and the same stood disposed of vide order, dated 31.03.2016, which we have already quoted above, which stands assailed before this Court by way of this writ petition.

4. We have heard the learned Additional Advocate General as well as learned counsel for the respondent. We have also perused the original records of the case, which were made available for the perusal of the Court by the learned Additional Advocate General.

5. Records demonstrate that there was no cut off date prescribed in the Cabinet memorandum, wherein the decision was taken by the Cabinet to regularize the services of employees serving in various departments of the Government, who had completed more than six years of service. Learned Additional Advocate General also did not dispute the fact that instructions, dated 31.08.2012 were not issued after getting necessary approval from the Cabinet or in other words, that the insertion of the cut off date, which finds mentioned in the said instructions was not with the approval of the Cabinet.

6. Having heard learned counsel for the parties and having gone through the records of the case, we do not find any infirmity with the order passed by the learned Tribunal. We say so for the reason that in terms of the decision of the Cabinet, dated 08.08.2012, the right of regularization stood conferred upon the present respondents on completion of six years of service and this right stood crystallized by the Government pursuant to the issuance of instructions, dated 17.08.2012. It is not the case of the State that inadvertently the cut off date was not mentioned in instructions, dated 17.08.2012. Explanation which has been given at the Bar by the learned Additional Advocate General is that the cut off date was given for the sake of convenience, because otherwise the State would have had to issue the orders of regularization

almost every day, as employees serving in various Departments of Government complete six years of service every other day.

7. Be that as it may, when Cabinet had taken the decision to confer the right of regularization on contract employees, who had been so appointed after observing all codal formalities, then this right of regularization on completion of six years of service could not have been arbitrarily delayed by the State, as has been done by it by issuance of instructions, dated 31.08.2012. Convenience of the Executive cannot defeat the right of regularization, which stood conferred upon the employees by virtue of the decision of the Cabinet. In fact, in our considered view, as instructions, dated 17.08.2012, were issued on the basis of the recommendations of the Cabinet, no alteration in the same could have been done by the State without the approval of the Cabinet. In this background, when we peruse order, dated 31.03.2016 passed by the learned Tribunal, we do not find any infirmity with the same. Learned Tribunal has rightly held that the cut off date mentioned in instructions, dated 31.08.2012, supersedes the decision of the Cabinet and the same thus was illegal.

8. Therefore, as we do not find any infirmity with the order, dated 31.03.2016, passed by the learned Tribunal and further as we are also of the view that the right of regularization conferred upon the private respondents on completion of six years of service by the Cabinet could not have been arbitrarily altered or delayed to their disadvantage by the Executive, we dismiss the present writ petition being devoid of any merit. Miscellaneous application(s), if any, also stand disposed of.

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

Gian Dass and others .....Plaintiffs/Petitioners.

Versus

Daulat Ram and others .....Defendants/Respondents.

CMPMO No.379 of 2017.
Judgment reserved on : 31.10.2017.
Date of decision: 16th November, 2017.

Constitution of India, 1950- Article 227- Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013- Section 64- National Highways Act, 1956- Section 3H (4)- Petitioners while claiming objection vis-à-vis the land acquired for construction of National Highway laying exclusive claim for the award amount- Land Acquisition Collector however passed an award and issued notices to the petitioners as well as respondent No.1 to receive the compensation for the acquisition. Petitioners filed a Reference under Section 64 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, which was dismissed as not maintainable- Consequently, petitioners filed a civil suit under Sections 34 to 39 of the Specific Relief Act. Respondents question the jurisdiction of the Civil Court to entertain the suit in view of specific bar under Section 63 of the Rehabilitation and Resettlement Act- **Held**- that acquisition carried out under the National Highways Act, 1956, having been specified in the 4th Schedule of the Rehabilitation and Resettlement Act, 2013 shall be applicable vis-à-vis determination of compensation as per notification dated 28.8.2015 issued by the Central Government- the apportionment of the amount of the compensation, however, can be challenged before the Principal, Civil Court of original jurisdiction within the limits of whose jurisdiction land is situated, as per Section 3H(4) of the National Highways Act. (Para-4 to 8)

For the Petitioners : Mr.Sanjeev Kuthiala, Advocate.

For the Respondents : Mr.Maan Singh, Advocate, for respondent No.1.
Mr.Neeraj K.Sharma, Dy.A.G., for respondents No. 6 and 8.
Ms.Jyotsna Rewal Dua, Senior Advocate with Ms.Shalini Thakur, Advocate, for respondent No.7.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This petition under Article 227 of the Constitution of India has been filed with the following substantive prayers:-

"a) *To call for the record of the case pertaining to CMA 121-IV/17, registered No.255/17 instituted on 08.06.2017, titled as Gian Dass & others vs. Daulat Ram and others, pending before the Ld. Civil Judge (Senior Division) Mandi District Mandi H.P. and after examining the legality and propriety of the case direct the Ld. Trial Court to ask respondent No.8 to take steps for recovering the released amount from the respondent No.1.*

b) To direct the Ld. Trial Court to expedite the matter and to decide the stay application and other application and also pass the orders on the stay of the application immediately.

c) To direct the Ld. Trial Court to take appropriate tangible security/bank guarantee from the respondent No.1 with respect to the amount so received by the respondent No.1 from the respondent No.8 and to further direct the respondent No.8 to release the undisputed compensation amount to the plaintiffs/petitioners."

2. The dispute in question relates to land comprised in Khasra Nos.321, 322 and 323, situate in Mauza Jhiri, Tehsil Aut, District Mandi, which were abutting to the National Highway No.21 and were acquired by respondents No.7 and 8 vide notification dated 16.02.2015 published on 27.03.2015 under the National Highways Act (for short 'Act'). The petitioners filed objections against the said notification and laid exclusive claim for the award insofar it pertained to Khasra Nos. 322 and 323, respectively. On 18.01.2017, the Land Acquisition Collector passed the award in respect of the aforesaid Khasra Numbers and issued notices to the petitioners as also respondent No.1 to receive compensation vide notice dated 24.05.2017. Since the respondents were also held entitled to a part of compensation, the petitioners filed a reference under Section 64 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (for short 'Rehabilitation and Resettlement Act, 2013'). However, the said reference was dismissed as not maintainable constraining the petitioners to file a civil suit under Sections 34 to 39 of the Specific Relief Act for the relief as already reproduced hereinabove.

3. Upon notices to the respondents, they questioned the jurisdiction of the Civil Court to entertain the suit in view of the specific bar contained under Section 63 of the Rehabilitation and Resettlement Act, 2013. It was further submitted that in absence of any challenge to the lawful award made by the Collector in exercise of powers conferred in sub-section (1) of Section 3-G of the National Highways Act, the suit was not maintainable.

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

4. At the outset, it may be noticed that the provisions of the erstwhile Land Acquisition Act of 1894, were specifically excluded to the acquisitions made under the National Highways Act, 1956, as is clearly evident from perusal of Section 3-J of the Act which reads thus:-

"***3J. Land Acquisition Act 1 of 1894 not to apply***

Nothing in the Land Acquisition Act, 1894 shall apply to an acquisition under this Act.]"

5. However, as regards the applicability of the Rehabilitation and Resettlement Act, 2013 which in turn repealed the Act of 1894, there is a difference in position of law. The Central Government was empowered to extend the benefit of First, Second and Third Schedules to the acquisition under the enactment specified in Fourth Schedule of the Rehabilitation and Resettlement Act, 2013, within one year in terms of Section 105(3) of the Act, however, no such notification was issued within one year. In the meantime, three ordinances being Ordinance No.9/2014, 4/2015 and 5/2015 were issued, but all these ordinances lapsed. The Central Government thereafter issued a notification dated 28.08.2015 which is extracted below:-

"MINISTRY OF RURAL DEVELOPMENT ORDER New Delhi, the 28th August, 2015. Now, therefore, in exercise of the powers conferred by sub-section(1) of Section 113 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (30 of 2013), the Central Government hereby makes the following Order to remove the aforesaid difficulties, namely:-

1. (1) This order may be called the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Removal of Difficulties) Order, 2015.

(2) It shall come into force with effect from the 1st day of September, 2015.

2. The provisions of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, relating to the determination of compensation in accordance with the First Schedule, rehabilitation and resettlement in accordance with the Second Schedule and infrastructure amenities in accordance with the Third Schedule shall apply to all cases of land acquisition under the enactments specified in the Fourth Schedule to the said Act."

6. Thus, in view of the aforesaid notification, the provisions of Rehabilitation and Resettlement Act, 2013, relating to determination of compensation in accordance with the First Schedule, rehabilitation and resettlement in accordance with the Second Schedule and infrastructure amenities in accordance with the Third Schedule, shall apply to all cases of land acquisition under the enactment specified in Fourth Schedule of the Rehabilitation and Resettlement Act, 2013. Admittedly, the National Highways Act is included in the Fourth Schedule and finds mention at Serial No.7 thereof. Yet, it needs to be noticed that save and except what has been set out in the notification dated 28.08.2015, the entire provisions of the Act have not been made applicable to the acquisition carried out under the National Highways Act. Therefore, the provisions of the Rehabilitation and Resettlement Act have only to be read to the extent the acquisition carried out under the National Highways Act as have been specifically spelt out in the notification dated 28.08.2015 and nothing beyond that.

7. Having taken note of the Rehabilitation and Resettlement Act, 2013, I may now advert to the relevant provisions of the National Highways Act. Section 3H (4) of the Act provides for apportionment of the amount and reads thus:-

"3-H. Deposit and payment of amount.-

(4) If any dispute arises as to the apportionment of the amount or any part thereof or to any person to whom the same or any part thereof is payable, the competent authority shall refer the dispute to the decision of the principal Civil Court of original jurisdiction within the limits of whose jurisdiction the land is situated."

8. It would be noticed that Section 3H (4) of the National Highways Act, 1956, prescribes that if any dispute as to the apportionment of the amount or any part thereof or to any person to whom the same or any part thereof is payable, the competent authority shall refer the dispute to the decision of the Principal Civil Court of original jurisdiction within the limits of whose jurisdiction the land is situated.

9. Indisputably, in the instant case, the dispute raised by the petitioners relates to apportionment and, therefore, the dispute was required to be referred to the jurisdiction of the Principal Court of original jurisdiction.

10. Now, the moot question is as to which Court can be said to be a Principal Civil Court of original jurisdiction as the same has not been defined in the Act. However, Section 3(17) of the General Clauses Act, 1897, defines the "District Judge" as "Judge of Principle Civil Court of original jurisdiction", but shall not include a High Court in exercise of its ordinary or extraordinary original civil jurisdiction. This means that the Principal Civil Court of original jurisdiction contemplated in Section 3H(4) of the National Highways Act, 1956 is the "District Judge" of the Civil Court within the limits of whose jurisdiction the land is situated.

11. Now, in this background, the further question that arises as to whether the civil suit filed by the petitioners of their own is maintainable in view of what has been noticed above. The answer to the said question is obviously in the negative for more than one reason. Firstly, the Civil Court where the suit has been instituted is not the Principal Civil Court of original jurisdiction and secondly the claim having not been forwarded by the competent authority under Section 3H (4) is otherwise not maintainable.

12. In view of the aforesaid discussion, it can conveniently be held that the civil suit instituted by the petitioners before the Civil Court is not maintainable. Accordingly, there is no merit in this petition and the same is dismissed and even the suit instituted by the petitioners is held to be not maintainable and is accordingly dismissed. The parties are left to bear their own costs. Pending application, if any, also stands disposed of.

13. However, dismissal of the petition will not debar the petitioners from approaching the competent authority under Section 3H (4) of the National Highways Act, 1956 and in case such application is filed, then needless to say, the competent authority shall consider such application strictly in accordance with law without being influenced by what has been observed above and decide the same as expeditiously as possible.

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

Mandeep Kaur ...Petitioner.

Versus

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

Cr.MMO No. 182 of 2017

Date of decision: 16.11.2017

Code of Criminal Procedure, 1973- Section 482- Sections 498A, 406, 506 read with Section 34 IPC- Petitioner in pursuance of FIR under Sections 498A, 406, 506 read with Section 34 IPC had sought recovery of Istridhan and same were taken into possession by the police vide seizure memo dated 23.3.2017- petitioner however filed a Cr.MMO and appending an additional list of Istridhan**,** which were stated to have not been recovered by the I.O. from the accused- thus, sought transfer of the investigation from the I.O. (respondent No.3)- while dismissing the petition, Court held that the petition apparently was based on sheer contrivance besides stratagem of the petitioner as the list prepared on 23.3.2017 did not reflect any of the items listed subsequently by the petitioner- further held that based on such allegations investigation cannot be transferred- petition dismissed.

For the petitioner: Mr. Shanti Swaroop, Advocate.

For the respondents: Mr. Vivek Singh Attri, Addl. A.G.for Respondents No. 1 and 2.

Mr. Ramakant Sharma, Sr. Advocate with Ms. Devyani Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J. (oral)

In F.I.R. bearing No. 5 registered, at Mahila Police Station, Baddi, the complainant/ petitioner herein reared allegations against respondents No. 4, 5 and 6 qua theirs, committing offences, embodied, in Sections 498A, 406, 506 read with Section 34 IPC. In pursuance, to, the lodging of the aforesaid F.I.R, the Investigating Officer concerned, with utmost promptitude, proceeded to recover items of Istridhan, from respondent No.5. The aforesaid seizure occurred on 23.3.2017, in respect whereof, a seizure memo stood prepared, copy whereof is appended with the instant petition, as annexure R-3. In the reply on affidavit furnished by the State, it is ear-marked, that, at the time of preparation of seizure memo, on 23.3.2017, the complainant/petitioner being also present AND also hers identifying all the items of Istridhan embodied therein. Subsequently on 17.05.2017, the complainant has instituted the instant petition, before this Court, wherewith she has appended an additional list of Istridhan items, items whereof she contends, to remain yet un-recovered, by the Investigating Officer, from the accused concerned. Hence a prayer is made for the investigation(s) being ordered to be transferred from respondent No.3, given his not holding fair investigations therein.

2. However, the preparation of the list appended with the writ petition AND bearing annexure P-3, appears, to be a sequel of sheer contrivance besides stratagem, deployed by her given (a) The aforesaid items being un-enumerated in the F.I.R (b) the State of H.P. with its reply appending annexure R-4, annexure whereof stood prepared on 23.3.2017 itself (c) at the time of its preparation, the purported items of Istridhan, mentioned herein, not, finding their enumeration therein (d) thereupon this fact of theirs being purportedly, not returned viz-a-viz her, is, obviously engineered by sheer afterthought, for only maligning**,** the investigation(s) conducted by the I.O. Consequently, the prayer made by the petitioner, for the transfer of investigation(s) from respondent No.3, is not properly constituted, hence is declined. The respondents No. 2 and 3 have also been prayed to be arrested, whereas, no allegations, for their arrest, arising from theirs committing any non-bailable offence, stands, embodied either in any apposite complaint or in any F.I.R lodged with the Police Station concerned. Even if the petitioner still intends, to, make a prayer for their arrest, she is enjoined to prior thereto, make apposite motion(s) before the authority(s) concerned, whereas hers not making the apposite motion hence constrains, this Court to also decline the aforesaid relief to her. Accordingly, the petition is dismissed alongwith all pending applications.

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

Davinder Kumar ...Appellant

Versus

State of Himachal Pradesh ...Respondent

Criminal Appeal No. 65 of 2009
Date of Decision : November 17, 2017

N.D.P.S. Act, 1985- Section 20- Appeal under Section 374(2) Cr.P.C- Appellant convicted under Section 20 of the Act and sentenced to undergo rigorous imprisonment for a period of six months and pay a fine of Rs.2,000/-- an appeal preferred against the conviction and sentence- conviction passed on the sole testimony of the police officials- no endeavour made to associate

independent witnesses- **Held**- that sole testimony of the police official can be relied without any corroboration by other admissible evidence, but provided, it is reliable, trustworthy and cogent. On appreciation of facts held that the testimony of the police officials rendered the genesis of the prosecution version highly doubtful, presence of the police officials on the spot was also shrouded in doubt- Further held that the non-availability of an independent witness, as was proclaimed by the prosecution was also doubtful- Conviction and sentence of the accused set aside.

(Para-19 to 30)

Cases referred:

Shivaji Sahabrao Bobade and another Versus State of Maharashtra, (1973) 2 SCC 793
Lal Mandi v. State of W.B., (1995) 3 SCC 603
Govindaraju alias Govinda v. State by Srirampuram Police Station and another, (2012) 4 SCC 722
Tika Ram v. State of Madhya Pradesh, (2007) 15 SCC 760
Girja Prasad v. State of M.P., (2007) 7 SCC 625
Aher Raja Khima v. State of Saurashtra, AIR 1956
Tahir v. State (Delhi), (1996) 3 SCC 338

For the appellant	:	Mr. Ajay Chandel, Advocate, for the appellant.
For the respondent	:	Mr. R. S. Verma and Mr. M.L. Chauhan, Addl. Advocate Generals for the respondent-State. Ms. Shreya Chauhan, Advocate, as *amicus curiae*.

The following judgment of the Court was delivered:

Sanjay Karol, ACJ.

Assailing the judgment dated 30.3.2009, passed by the learned Special Judge, Hamirpur, H.P., in Sessions Trial No. 21 of 2008, titled as *State of Himachal Pradesh vs. Davinder Kumar*, whereby the appellant-accused stands convicted for having committed an offence punishable under the provisions of Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act) and sentenced to undergo rigorous imprisonment for a period of six months and pay fine of Rs.2,000/-, he has filed the present appeal under the provisions of Section 374(2) of the Code of Criminal Procedure, 1973.

2. It is the case of prosecution that on 12.2.2008, police party headed by SI Fauja Singh (PW-8) were travelling in a vehicle and at about 3.00 p.m. at a place known as Kot, they saw the accused, who seeing the police party got perplexed and tried to flee. However while doing so, he threw a packet which the police picked and on opening found charas. Total quantity was of 200 grams. Two samples of 10 grams each were drawn. The samples as also the bulk parcel were separately sealed with seal impression – S and taken into possession vide recovery memo (Ext. PW-1/A). Fauja Singh filled up NCB forms (Ext. PW-8/A) on the spot, where after, ruka (Ext. PW-4/A) was sent through Const. Jitender Kumar (PW-4) which led to registration of F.I.R. No. 35/2008, dated 12.2.2008 (Ext. PW 9/A) at Police Station Sadar, Hamirpur, Distt. Hamirpur, H.P., against the accused under the provisions of Section 20 of the Act. With the completion of codal formalities on the spot, accused was arrested. The case property was produced before SHO Anjni Kumar (PW-9), who after resealing the same with seal impression-H, entrusted MHC Vijay Parkash (PW-6), Incharge of the Maalkhana, with the same for keeping it in safe custody. Const. Sant Ram (PW-5) took the sample parcel for chemical analysis to the State Forensic Science Laboratory, Junga, and report (Ext. PW-9/E) taken on record. Also special report (Ext. PW-7/A) was sent to the office of Superintendent of Police, Hamirpur. With the completion of investigation, which prima facie revealed complicity of the accused in the alleged crime, challan was presented in the Court for trial.

3. Accused was charged for having committed an offence punishable under the provisions of Section 20 of the Act, to which he did not plead guilty and claimed trial.

4. In order to establish its case, prosecution examined as many as nine witnesses and statement of the accused under Section 313 of the Code of Criminal Procedure was also recorded, in which he took the following defence:

> "... I am innocent. I have been falsely implicated. In fact, a bus had collided with a car because of which, the road was blocked and I alongwith my friend were forcibly apprehended and thrown in the vehicle and mercilessly beaten. A false case has been planted upon me by the police."

5. It is a matter of record that accused did not lead any evidence in defence.

6. Appreciating the material placed on record by the prosecution, trial Court convicted the accused for the charged offence and sentenced as aforesaid. Hence the present appeal.

7. Having heard learned counsel for the parties as also perused the record, this Court is of the considered view that the reasoning adopted by the trial Court is perverse and not based on correct and complete appreciation of testimonies of the witnesses, evidence and other material placed on record, causing serious prejudice to the accused, resulting into miscarriage of justice.

8. In *Shivaji Sahabrao Bobade and another Versus State of Maharashtra,* (1973) 2 SCC 793, the apex Court, has held that:

> ".....Lord Russel delivering the judgment of the Board pointed out that there was "no indication in the Code of any limitation or restriction on the High Court in the exercise of its powers as an appellate Tribunal", that no distinction was drawn "between an appeal from an order of acquittal and an appeal from a conviction", and that "no limitation should be placed upon that power unless it be found expressly stated in the Code". ....
>
> (Emphasis supplied)

9. The apex Court in *Lal Mandi v. State of W.B.,* (1995) 3 SCC 603, has held that in an appeal against conviction, appellate Court is duty bound to appreciate the evidence on record and if two views are possible on the appraisal of evidence, benefit of reasonable doubt has to be given to the accused.

10. Also it is settled position of law that graver the punishment the more stringent the proof and the obligation upon the prosecution to prove the same and establish the charged offences.

11. Undoubtedly, no independent witness has been associated by the police, in carrying out the search and seizure operations. The issue as to whether in every case, and under the all circumstances, police must associate independent witnesses, while carrying out search and seizure operations, is no longer *res integra*.

12. It is also a settled proposition of law that sole testimony of police official, which if otherwise is reliable, trustworthy, cogent and duly corroborated by other admissible evidence, cannot be discarded only on the ground that he is a police official and may be interested in the success of the case. It cannot be stated as a rule that a police officer cannot be a sole eye-witness in a criminal case. It will always depend upon the facts of a given case. If testimony of such a witness is reliable, trustworthy, cogent and if required, duly corroborated by other witnesses or admissible evidences, then the statement of such witness cannot be discarded only on the ground that he is a police officer and may have some interest in the success of the case. It is only when his interest in the success of the case is motivated by overzealousness to an extent of his involving innocent people, in that event, no credibility can be attached to the statement of such witness.

13. It is not the law that Police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other

independent evidence. The presumption applies as much in favour of a police officer as any other person. There is also no rule of law which lays down that no conviction can be recorded on the testimony of a police officer even if such evidence is otherwise reliable and trustworthy. Rule of prudence may require more careful scrutiny of their evidence. If such a presumption is raised against the police officers without exception, it will be an attitude which could neither do credit to the magistracy nor good to the public, it can only bring down the prestige of police administration.

14. Wherever, evidence of a police officer, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and absence of some independent witness of the locality does not in any way affect the creditworthiness of the prosecution case. No infirmity attaches to the testimony of the police officers merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. Such reliable and trustworthy statement can form the basis of conviction. [See: *Govindaraju alias Govinda v. State by Srirampuram Police Station and another,* (2012) 4 SCC 722; *Tika Ram v. State of Madhya Pradesh,* (2007) 15 SCC 760; *Girja Prasad v. State of M.P.,* (2007) 7 SCC 625); and *Aher Raja Khima v. State of Saurashtra,* AIR 1956].

15. Apex Court in *Tahir v. State (Delhi)*, (1996) 3 SCC 338, dealing with a similar question, held as under:-

> "6. ... .In our opinion no infirmity attaches to the testimony of the police officials, merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. The Rule of Prudence, however, only requires a more careful scrutiny of their evidence, since they can be said to be interested in the result of the case projected by them. Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and the absence of some independent witness of the locality to lend corroboration to their evidence, does not in any way affect the creditworthiness of the prosecution case."

16. In view of the aforesaid statement of law, we shall now examine the testimony of police officials.

17. We shall first examine the testimonies of spot witnesses in whose presence the contraband substance was recovered from the accused. They are Const. Ashok Kumar (PW-1), Const. Krishan Chand (PW-2), Const. Jitender Kumar (PW-4) and SI Fauja Singh (PW-8). Having carefully gone through their statements, this Court is of the considered view that the genesis of the prosecution story of the police party having travelled together to village Kot and recovered the contraband substance from the conscious possession of the accused appears to be doubtful. Doubt is with regard to the (a) presence of the police party on the spot; (b) time and place from where the contraband substance was recovered; (c) persons present on the spot; and (d) non association of independent witnesses. All this renders the genesis of the prosecution story of having recovered the contraband substance from the conscious possession of the accused to be extremely doubtful.

18. Fauja Singh states that he alongwith other police officials were travelling in a vehicle. At Kot they saw the accused. Seeing the police party he tried to run away. On suspicion he was overpowered but in this process accused threw a packet which he had kept in his pant. It contained charas. Const. Krishan Chand brought weights and scale from the shop of Krishan Pal (PW-3) and when weighed, charas was found to be 200 grams. Two samples of 10 grams each were drawn from the recovered charas. The samples as also the remaining bulk charas were separately sealed with seal impression-S. Well this is what the witness states in his examination-in-chief.

19. To begin with, it be only observed that there is no cogent documentary evidence on record establishing presence of this witness on the spot. Constable Jitender Kumar states that he received a telephone call from Fauja Singh and as such, in his vehicle went to Anu Chowk from where police party left towards village Kot. But then there is no evidence establishing such fact and such version is not corroborated by Constables Krishan Chand and Ashok Kumar. Which is that vehicle? who owns the same? what was the vehicle used for? what was the police party doing at Anu Chowk? and for what purpose they were proceeding towards Kot? itself remains unexplained, rendering the genesis of the prosecution version to be highly doubtful.

20. This takes us to the cross examination part of testimony of Fauja Singh who admits that close by there were residences, shops and a temple. Yet none from the locality was associated before carrying out the seizure operations. Witness does try to state that there was no requirement as police officials were present on the spot but then if scale and weights could have been brought from the shop of a goldsmith so could they have endeavoured to bring an independent witness. It is not that police was not aware about the contents of the packet. It contained charas, for according to Fauja Singh from the smell and looks of the packet, he could made out that the stuff was charas. This Court is of the view that non association of independent witnesses, more so, when presence of the police officials on the spot itself is in doubt, would have only lend credence to their story.

21. Further one notices the contradictions and improbabilities in their statements.

22. Const. Jitender Kumar states that the accused was made to sit in the vehicle which is not the case of Fauja Singh. Const. Ashok Kumar states that accused was apprehended after he had covered certain distance which is not so stated by other police officials.

23. Krishan Chand states that Jitender Kumar and Fauja Singh (police party) reached Kot at about 3.00 p.m. which version stands contradicted by Ashok Kumar according to whom it was at about 2.15/2.45 p.m. Further as per the version of Krishan Chand, the place of incident was secluded and no house or shop was found to be close by, which version stands contradicted by other police officials present on the spot.

24. Further, Ashok Kumar and Krishan Chand state that they were present at Anu Chowk where Fauja Singh met them and from there they proceeded towards village Kot. Whereas Jitender Kumar states that when he alongwith other police officials had gone to Anu they were telephonically instructed by Fauja Singh to come to Anu Chowk.

25. In this view of the matter, this Court finds testimony of the prosecution witnesses not to be inspiring in confidence.

26. There is yet another reason for disbelieving the prosecution version. Weighing scale was brought from Krishan Pal who is a shop keeper at Hamirpur Town. He is categorical that he accompanied police official Krishan Chand to the spot for weighing the contraband substance. Well this totally knocks down the prosecution story of non availability of any independent witness who could have been associated in conducting the seizure operations.

27. As has come in the testimony of Fauja Singh, Hamirpur is at a distance of 8 k.m. from the spot. Now if a goldsmith could be brought from such a distance, why no endeavour was made to fetch scales from close by shops or why accused was not taken straightaway to the police station for carrying out seizure operations.

28. Further timing of apprehension of the accused stands contradicted by the goldsmith, according to whom Krishan Chand had reached his shop at about 3.15 p.m.

29. Not only that, even by way of corroborative evidence, prosecution has not been able to establish its case beyond reasonable doubt.

30. All these contradictions, improbabilities, embellishments stood ignored by the trial Court and as such, findings returned on all the points being perverse and contrary to law are unsustainable in law.

31. Findings returned by the trial Court, convicting the accused, cannot be said to be based on correct and complete appreciation of testimonies of prosecution witnesses. Such findings cannot be said to be on the basis of any clear, cogent, convincing, legal and material piece of evidence, leading to an irresistible conclusion of guilt of the accused. Incorrect and incomplete appreciation thereof, has resulted into grave miscarriage of justice, inasmuch as accused stands wrongly convicted for the charged offence.

32. Since prosecution has not been able to establish its case of having recovered the contraband substance from the conscious possession of the accused, no statutory presumption as envisaged under Section 35 of the Act, can be drawn against the accused.

33. Hence, for all the aforesaid reasons, appeal is allowed and the judgment of conviction and sentence dated 30.3.2009, passed by the learned Special Judge, Hamirpur, H.P., in Sessions Trial No. 21 of 2008, titled as *State of Himachal Pradesh vs. Davinder Kumar*, is set aside and the accused is acquitted of the charged offence. Fine amount, if deposited, be refunded to the accused. Bail bonds furnished by the accused are discharged.

34. Efforts put in by Ms. Shreya Chauhan, learned Amicus Curiae in rendering valuable assistance to the Court are highly appreciable.

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

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

Kundan Lal Sharma .....Petitioner.

Vs.

Union of India and others .....Respondents.

CWP No. 513 of 2009
Reserved on: 28.08.2017
Date of Decision: 20.11.2017

Constitution of India, 1950- Article 226- Civil Writ Petition- Grant of ACP under the Assured Career Progression Scheme- **Held-** that financial upgradation under the ACP scheme shall be available only if no regular promotion during the prescribed period has been availed by employee- if an employee gains promotion within 12 years, then he becomes entitled for second upgradation, which is available only after 24 years- it was also held that in case an employee is conferred the benefit under FR 22(I) at the time of officiating appointment, the benefit of ACP is not permissible.

(Para-9 to 11)

For the petitioner Mr. M.L. Sharma, Advocate.

For the respondents: Mr. Ashok Sharma, Assistant Solicitor General of India, for respondents No. 1 to 3.
None for respondent No. 4.

The following judgment of the Court was delivered:

***Ajay Mohan Goel, Judge**:*

Brief facts necessary for the adjudication of the present petition are as under:

Petitioner before this Court initially joined the respondent-Institute as a Peon w.e.f. 30.04.1966. He was thereafter promoted to the post of Clerk on 27.02.1968 and Upper Division Clerk w.e.f. 15.01.1975. As per the petitioner, respondent-Institute invited applications

vide Annexure A/1 appended with the Original Application for various posts including the post of Auditor. Petitioner applied for the said post and was appointed against the same by way of direct recruitment on the basis of recommendations of the Selection Committee vide order, dated 01.09.1986 in the pay scale of Rs.425-800/- (revised to Rs.5000-8000/-). On the recommendations of 5th Central Pay Commission, which were accepted by the respondent-Institute, petitioner was granted first up-gradation under the Assured Career Progression Scheme after completion of 12 years of service in the pay scale of Rs.6500-10500/- vide office order, dated 25th October, 2001 w.e.f. 19.10.2000. However, on audit objection, said up-gradation was withdrawn vide office order, dated 28th December, 2006.

2. Feeling aggrieved, the petitioner assailed the order, dated 28th December, 2006, vide which the up-gradation was withdrawn by way of filing an Original Application No. 33/HP/2007 before the learned Central Administrative Tribunal, Chandigarh Bench (Circuit At Shimla). According to the petitioner, as he stood appointed against the post of Auditor by way of direct recruitment, therefore, he was rightly conferred benefits under the Assured Career Progression Scheme on completion of 12 years of service and the same were wrongly withdrawn vide impugned order, dated 28th December, 2006.

3. Respondents while contesting the claim of the petitioner, took the stand before the learned Tribunal that before the applicant therein was selected against the post of Auditor, he had earned two separate benefits, i.e., firstly he was granted the benefit of age relaxation for appointment to the post of Auditor and thereafter he was conferred the benefit under than FR (c) (now renamed as FR 22(I)(a)(1) for fixation of his pay from his earlier position of UDC, which was done when the petitioner was promoted as Section Officer. Thus, as per the respondents, the petitioner had to be construed to have been promoted to the post of Auditor instead of having been appointed to the said post at the entry level. It was further the stand of the respondent-State that the post of Auditor, against which the petitioner was appointed, was re-designated as Assistant in the same pay scale only after six years after the petitioner had joined as Auditor and thereafter when the post of Section Officer in the pay scale of Rs.6500-10,500/- became available, he was promoted against the said post w.e.f. 25th June, 2002. It was also the stand of the said respondents that the applicant was not even in the feeder cadre of Assistant and he could not have been promoted to the post of Section Officer and this clearly demonstrated that the applicant had drawn two separate benefits while reaching the post of Section Officer, i.e., firstly the benefit of pay fixation under FR 22 (c), which he gained while being posted as Auditor and second on having returned to the normal channel of promotion from UDC to Assistant and to Section Officer by virtue of the fact that the post of Auditor, which would otherwise have been an isolated post, was re-designated as Assistant.

4. Respondent No. 3 filed a separate reply and the said respondent also denied the claim of the petitioner.

5. Learned Tribunal vide order, dated 24.10.2008, dismissed the Original Application so filed by the petitioner. While dismissing the Original Application, it was held by the learned Tribunal that Para 5.1 of the conditions for grant of benefits under the ACP Scheme provided that in the entire Government service career of an employee, two financial up-gradations shall be counted against regular promotions and the same shall be available if no regular promotions during the prescribed period of 12-24 years had been gained by an employee. If employee gets one regular promotion, then he shall qualify for the second financial up-gradations only after completion of 24 years of service under the ACP Scheme and no benefit shall accrue under the said Scheme in case employee gains two promotions. Learned Tribunal further held that the petitioner, who had initially joined the Institute as Peon, was promoted thereafter as a Clerk and then as UDC and thereafter promoted/re-designated as Accountant to suit his convenience and ensure up-gradations/promotion to him. Learned Tribunal further held that as the applicant had already earned two promotions, he could not be granted financial up-gradation under the ACP Scheme. Learned Tribunal further ordered the Ministry of H.R.D. to constitute a

high level committee to scrutinize the matters like that of the petitioner, who as per the learned Tribunal were conferred undue benefits in his service career, with further direction that if any deviation from the established procedure is noticed, then such appointments may be reviewed and appropriate action shall be taken against the respondents. Said order passed by the learned Tribunal stands assailed by way of this writ petition.

6. We have heard the learned counsel for the petitioner as well as learned Assistant Solicitor General of India and have also gone through the records of the case.

7. Office order, dated 1st September, 1986 (Annexure A/3) demonstrates that on the recommendations of the Selection Committee and in relaxation of age limit laid down in the Recruitment Rules, the petitioner was approved for officiating appointment as Auditor in the pay scale of Rs.425-800/-. Vide office order, dated 25th October, 2001, benefit under the Assured Career Progression Scheme was conferred upon the petitioner w.e.f. 19th October, 2000. This benefit was conferred upon the petitioner by construing his appointment as Auditor w.e.f. 01.09.1986 and as not having gained any promotion from the said post for a period of 12 years. An audit objection was raised qua the benefits so conferred upon the petitioner, which reads as under:

> *"Para 25A Irregular grant of ACP Rs. 0.16 lakh.*
>
> *As per provision for Assured Career Progression Scheme two financial up-gradation in the entire career are admissible to a direct.*
>
> *It was noticed that Sh. Kundan Lal, Section Officer, who joined the Institute on 30/4/66 as Peon was promoted as Clerk on 27/2/68 and subsequent promoted as UDC on 15/1/75 in the scale of Rs.330-560. The official was further appointed as auditor on 1/9/86 in the scale of Rs.425-800. The official has got more than two financial up gradation in his career and was thus not entitled for any financial up gradation under the ACP Scheme. The official was granted financial up gradation in the scale of Rs.6500-10500 w.e.f. 1/1/2001. Irregular grant of ACP resulted in overpayment of Rs.16490/- as per details given in Annexure D to this para.*
>
> *In reply to audit memo No. 32 dated 13/9/2004 it was stated by the Institute that the official was appointed to the post of auditor as a direct recruit 1/9/86 and first financial up gradation was granted after a period of twelve years from 1/9/86. The reply is not tenable because on appointment as Auditor his pay was fixed under FR 22 giving the benefit of post service and post. The pay fixation of the official may be re-examined and got confirmed from the ministry."*

8. Response was sought by the Institute from the petitioner qua the said objection and the response submitted by him is reproduced hereinbelow:

> *"With reference to the Office Memorandum No. Admn.F.1 (Audit) No. 1570 dated 29th August 2006, in connection with the Audit objection, I beg to bring to your kind notice the following for your kind perusal and sympathetic consideration:*
>
> *1. On 10th March, 2005, I submitted a representation to the Director of the Institute mentioning the facts of the case and requesting the authorities of the Institute to take a decision in the matter on the basis of the records available in the office. I enclose a copy of the representation for ready reference (Annexure –I).*
>
> *2. In the Audit Para, the Audit has mentioned that I was not entitled to any financial upgradation under the ACP Scheme because of the fact that according to the Audit I already got financial benefits.*
>
> *The observation of the Audit seems to be incorrect because of the reasons mentioned below:*

(a) In terms of the provisions contained in the Office Memorandum No. 35034/1/97-Estt.(D) dated 9th August 1999 issued by the Ministry of Personnel, Public Grievances and Pensions, "residency periods (regular service) for grant of benefits under the ACP Scheme shall be counted from the grade in which an employee was appointed as a direct recruit" (relevant GOI document is enclosed as Annexure-II).

(b) In the year 1996, I was appointed (not promoted) as Auditor under the category of "direct recruitment" as per provisions contained in the Recruitment Rules of the Institute. The vacancy was duly advertised in the national dailies. I applied for the post with reference to the advertisement/I was called for a written test followed by interview. Then, on the recommendations of the duly constituted Selection Committee, I was offered the post of Auditor in the pay-scale of Rs.425-800 (Revised: Rs.1400-2600) and I was put on probation for two years. Therefore, for all intents and purposes, my appointment to this post ought to be treated as "direct recruit".

(c) The post of Auditor was later re-designated as Assistant with the same pay-scale of Rs. 425-800 (Revised: Rs. 1400-2600).

(d) In the existing Recruitment Rules of the Institute, the posts of Assistants in the pay-scale of Rs.1400/-2600/- have been included in the feeder cadre for promotion to the post of Section Officer in the pay-scale of Rs.6,500/-Rs.10,500/-

(e) In terms for the provisions of the ACP Scheme, one becomes eligible for first upgradation after completion of 12 years of continuous service.

(f) The ACP Scheme was introduced at the Institute in October 2000. By that time I already completed more than 12 years of continuous service. Therefore, the DPC rightly recommended the pay-scale of Rs.6,500/- 10,500/- in my case as first financial upgradation under the ACP Scheme.

In view of the above, I request you kindly place this before the Audit so that the Audit Para could be settled."

9. After perusal of the said reply, office order, dated 28th December, 2006 was passed by the respondent-Institute, vide which the benefits so conferred upon the petitioner were withdrawn. It is not in dispute that as per Para 5.1 of the conditions for grant of benefits under ACP Scheme, an employee is entitled for the said benefit upon completion of 12-24 years of service provided employee has not gained any promotion from the initial post of his appointment for the said period. If an employee gains promotion within 12 years, then he becomes entitled for only second up-gradation, which is available after 24 years. If an employee gains second promotion, then he is not eligible for the said benefits. Para 5.1 of the Conditions for grant of benefits under the ACP Scheme is reproduced hereinbelow:

"Two financial upgradations under the ACP Scheme in the entire Government Service career of an employee shall be counted against regular promotions (including in-situ promotion and fast track promotion availed through limited departmental competitive examination) availed from the grade in which an employee was appointed as a direct recruit. This shall mean that two financial upgradations under the ACP Scheme shall be available only if no regular promotions during the prescribed periods (12-24 years) have been availed by an employee. If an employee has already got one regular promotion, he shall qualify for the second financial upgradations only on completion of 24 years of regular service under the ACP Scheme. In case two prior promotions on regular basis have already been received by an employee, no benefit under the ACP Scheme shall accrue to him."

10. Now coming to the facts of the present case, it is a matter of record that the appointment of the petitioner was approved as Auditor, which was officiating appointment, on the recommendations of Selection Committee in relaxation of age limit laid down in the Recruitment Rules vide office order, dated 1st September, 1986.

11. Be that as it may, it was the specific stand of the respondents in the reply, which has gone un-rebutted by the petitioner that the post of Auditor was subsequently re-designated as Auditor in the same pay scale only after six years of incumbent having joined as Auditor and thereafter he continued to serve as such and was promoted against the post of Section Officer when the said promotional post became available w.e.f. 25.06.2002. Further stand of the respondents that had the petitioner not been re-designated as Assistant, he could not have been promoted to the post of Section Officer, has also gone un-rebutted by the petitioner. Para 5.1 of the ACP Scheme (supra) confers benefit of ACP after completion of 12 and 24 years of service on a particular post in case an employee is not able to gain any promotion in the interregnum and after 24 years in case employee gains one promotion in the interregnum. Though the petitioner was appointed on officiating basis against the post of Auditor in the year 1986, however, he did not complete 12 years of service against this particular post. After six years of service, he was re-designated as Assistant. It is not the case of the petitioner that from the date of his re-designation as Assistant, no promotion stood conferred upon him within 12 years of service. The factum of the petitioner having been conferred the benefits under FR 22(I) (a)(1) at the time of his officiating appointment as an Auditor in the year 1986 is also not in dispute. Further more, there is a definite finding returned by the learned Tribunal about the mode and manner in which the petitioner gained promotions/officiating appointment/re-designation in the respondent-Institute. We are also surprised by the mode and manner in which the petitioner gained such promotions/officiating appointment/re-designation. According to the petitioner, he was appointed against the post of Auditor by way of direct recruitment. As per the records, his appointment to the said post was an "officiating appointment". We fail to understand as to how there can be any "officiating appointment" of an incumbent by way of direct recruitment. Service jurisprudence envisages that when a person is appointed by way of direct recruitment, his initial appointment may be temporary, permanent or on contract basis. Besides this, an employee recruited on regular basis is initially kept on probation and his services are regularized on completion of successful completion of probation, though from the date of his initial appointment. According to us, there is no concept of "officiating appointment" by way of direct recruitment. This lends credence to the doubts which have been mentioned by the learned Tribunal in its order about the mode and manner in which the petitioner gained promotion/officiating appointment/re-designation. According to us, learned Tribunal has rightly called upon the Ministry of H.R.D. to constitute a high level committee to scrutinize the matters like that of the petitioner and find out whether the appointments made in the Institute were as per procedure and Rules of the Government or not. When we take all these facts together, then according to us, there is no infirmity with the order passed by the learned Tribunal. In fact, learned Tribunal by way of a well reasoned order has dismissed the Original Application filed by the present petitioner and the reasonings given by the learned Tribunal are duly borne out from the records of the case and the same are as such not perverse.

12. Besides this, taking into consideration the factual matrix involved in the case *qua* which learned Tribunal has directed the concerned Ministry to hold an inquiry, we otherwise also feel that no interference is warranted with the order, dated 24.10.2008, passed by the learned Tribunal.

13. In view of above discussion, as there is no merit in the present petition, the same is accordingly dismissed. Miscellaneous application(s), if any, also stand disposed of. No order as to costs.

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

Rajni Devi Dhiman .....Petitioner
Versus
Abhishek Kaushal & another .....Respondents

Cr. MMO No. 379 of 2016
Reserved on :07.11.2017
Decided on : 20.11.2017

Code of Criminal Procedure, 1973- Section 482- Petitioner seeking to set aside the summoning order passed by the Learned Judicial Magistrate under Section 420 of I.P.C.- the respondent who proclaimed that he was in a live-in-relationship with the present petitioner was being threatened by her to commit suicide- thus he preferred a complaint under Sections 499, 500 & 506 of the I.P.C- the Learned Trial Court however summoned the accused/petitioner only under Section 420 of I.P.C- feeling aggrieved, accused/petitioner had preferred the present petition- **The Court held**- that no offence of cheating were made out as there was nothing on record to hold that the person had been put to disadvantage as there was nothing on record to remotely suggest that accused had ever married the complainant/respondent nor there was no promise by the accused/petitioner to marry the complainant/respondent- summoning order quashed and set aside. (Para-11 and 12)

For the Appellant : Mr. R.P. Singh, Advocate.
For the Respondents: Mr. Imran Khan, Advocate, for respondent No. 1.
Mr. Rajat Chauhan, Law Officer, for respondent No. 2.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge *(oral)*

The present petition is maintained by the petitioner-accused (hereinafter to be referred to as 'the accused') under Section 482 of the Code of Criminal Procedure, 1973, (hereinafter to be referred to as 'Cr.P.C.'), for setting aside the impugned order dated, 25.10.2016, passed by the learned Judicial Magistrate, 1st Class, Court No. III, Una, H.P., in Case No. 19/2016, RBT No. 228-1/2016, titled as Abhishek Kaushal versus Rajni Devi Dhiman.

2. The key facts, giving rise to the present petition, are that Shri Abhishek Kaushal (hereinafter to be referred to as 'the complainant') has filed a complaint against the accused, wherein he alleged that he is the resident of Industrial Area, Tehsil Mehatpur, District Una, (H.P.) and the accused has been living with him for the last 20 years with her free and sweet consent. The complainant further alleged that both the parties were living in social circle of relatives, friends and other social dignities, as husband and wife. The other people also had been accepting and recognizing them as husband and wife. As per the complainant, they have also celebrated ritual and ceremonies of 'Granth Sahib' for conducting their marriage. There are some instances of 'WhatsApp' massages, leading to presumption and assumption that the parties are husband and wife. The complainant further alleged that due to undue influence and coercion from the strangers and relatives, the accused has threatened the complainant to commit suicide, if the marriage tie is not broken by him. She was requested not to take such a drastic step to end her precious life and harass and lower the complainant in the estimation of relatives, parents, friends and dignitaries. She was further requested to wait for the adjudication of controversy between the parties, with respect to the marriage, pending in the Civil Court, but she began to shower filthy language and dirty and unsocial strictures on the bond and mind of the complainant to compel him to commit suicide alongwith her. According to the complainant, the accused further threatened him that in case he does not commit suicide alongwith her, she would leave a suicide

note to entangle him in a murder case. She further tried to give back the dowry articles and ornaments to the complainant, if he agreed to break the marriage tie. She was requested to solve the controversy by *Khangi* assembly of the both the sides, but in vain. According to the complainant, the threatening words of the accused to commit suicide alongwith other threats, leading to break in the marriage ties, are looming large 24 hours on his mind, due to which, he has lost his sleep and may give him jolts of heart attack. He prayed that the accused be tried for the commission of offences under Sections 420, 499, 500 & 506 of the Indian Penal Code (for short 'IPC). Thus, the complainant filed the complaint before the learned Trial Court, whereby he examined four witnesses in all including himself. He examined CW-1 Smt. Kusum Kaushal, CW-2, Smt. Anita Sharma, CW-3, Shri Rohit Sharma and also appeared himself in the witness box as CW-4. The witnesses in their testimonies, supported the contents of the complaint. In view of the evidence on record, the learned Trial Court held that there is no sufficient ground to proceed against the accused for commission of offences punishable under Sections 499, 500 & 506 of the IPC, but summoned the accused for the commission of an offence punishable under Section 420 of the IPC. Feeling aggrieved by the impugned order, dated 25.10.2016, the accused has preferred this petition.

3. Learned Counsel for the petitioner-accused has argued that the learned Court below, without appreciating the fact that no case was made out against the accused, even after going through the pleadings of the parties, has issued summons against the petitioner-accused under Section 420 of the IPC. He has further argued that as no case is made out, even after going through the evidence and the complaint, so the summoning order is required to be quashed.

4. On the other hand, learned Counsel for respondent No. 1 has argued that when the petitioner-accused has lived with respondent No. 1-complainant, as his wife and they were knowing each other for the last so many years, her refusal to live with him as wife, is an offence punishable under Section 420 of the IPC. He has further argued that the summoning order is not required to be interfered with.

5. In order to appreciate the rival contentions of the parties, I have gone through the record in detail.

6. The case of respondent No. 1-complainant is based upon the 'WhatsApp' messages and the fact that the accused remained with the complainant for some time as his wife and they are knowing each other for the last so many years. Further, his case is that he has lost his business and spent huge money upon the accused and so, her refusal to marry the complainant and live with him as wife, is a cheating.

7. To appreciate the aforesaid fact, I have gone through the averments contained in the complaint as well as the evidence adduced on behalf of the complainant.

8. In order to prove his case, the complainant examined his mother-Smt. Kusum Kaushal as CW-1. She alleged that the accused has relations with the complainant for the last 20 years and they remained in live-in relationship. They are recognized as husband and wife publicly. She further stated that the complainant has spent huge money upon the accused. As per her, when the accused and the complainant were asked to marry each other, the accused refused and asked the complainant to break the marriage ties. The accused threatened the complainant that in case, he does not break the marriage tie, she would commit suicide and entangle him in a murder case. She further stated that due to this kind of threatening given by the accused, the complainant is suffering from depression and he may suffer from heart attack, at any time.

9. Smt. Anita Sharma and Shri Rohit Sharma appeared in the witness box as CW-2 and CW-3, respectively. They also supported the versions of CW-1.

10. Complainant himself appeared in the witness box as CW-4. He stated that his father was an Industrialist and he had a Computer Coaching Institute. He was financially very

strong and earned about `1.50 lacs per month. He further stated that he is living with the accused since the childhood and are in live-in-relationship for the last 10-15 years. As per him, they are recognized publicly as husband and wife and they had also performed a secret marriage at home and Rohit is the witness to that marriage. He further alleged that he has spent huge money upon the accused and has lost his business. According to him, the accused has sent many 'WhatsApp' messages to him. When the complainant asked the accused to marry him, she flatly refused and now, she is threatening him that in case he does not break the marriage ties, she would commit suicide and entangle him in a murder case. Now, he is suffering from depression.

11. As far as the ingredients of Section 415 of the IPC are concerned, the same read as under:

> *"415 Cheating: Whoever, by deceiving any person fraudulently or dishonestly induces the person, so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".*

12. The case was required to be proved that if facts, which do not exist, are made out to exist and thereby, the other person is put to disadvantage. However, in the instant case, neither there is anything on record to show that the accused has ever married the complainant nor there was any promise to marry the complainant. In these circumstances, it can safely be held that the offence punishable under Section 420 of the IPC is not made out against the accused-petitioner. At the same point of time, the statements of the parties recorded before the police, show that the parties had agreed to abide by the outcome of the civil litigation, pending in the Civil Court, with respect to the marriage,. There is also nothing on record to come to the conclusion that parties have ever married each other and the accused has put the complainant at loss, after deceiving him. On the other hand, when the statements of the parties were recorded before the police, the father of the accused had stated that they would abide by the outcome of the civil litigation with respect to the marriage, which is pending in the Civil Court. The 'WhatsApp' messages do not show that there was any marriage inter-se the parties. The present complaint and evidence do not make out any prima-facie case against the accused-petitioner. It seems that the learned Court below, without any application of mind, had issued the summons against the accused, as no prima-facie case punishable under Section 420 of the IPC is made out, even after going through the complaint and the evidence, which has come on record.

13. The net result of the above discussion, is that the impugned order dated, 25.10.2016, passed by the learned Court below, summoning the accused, is without any application of mind and requires to be quashed and set aside. Ordered accordingly. The complaint against the accused-petitioner is without any basis, as there is no prima-facie case. Thus, the same is ordered to be dismissed.

14. Accordingly, petition is dismissed alongwith pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Raj Kumar Garag ...Appellant.

Versus

Raj Kumar & others ...Respondents.

OSA No.16 of 2011

Date of Decision: November 22, 2017

Code of Civil Procedure, 1908- OSA- Appeal under Section 10 of the Letters Patent Appeal read with Section 96 of C.P.C- Suit for specific performance of agreement to sell filed- plaintiff had agreed to purchase 65 bighas of agricultural land owned by respondents No.1 and 2 for a sale consideration of Rs.48,00,000/-, out of which 4 lacs was said to have been paid at the time of signing the agreement- while balance the amount was agreed to be paid at the time of registration i.e. on or before 23.4.2007- defendant while denying the agreement, termed it to be an act of fraud and concoction on the part of plaintiff, in connivance with one Ankush Vasishta – in this behalf defendants had even lodged a police complaint on 22.2.2007, he had also filed complaints to the DGP and the Chief Minister- defendants had also filed a suit for declaration against said Ankush Vasishta and the plaintiffs - suit dismissed- in appeal, Division Bench also dismissed the appeal.

Code of Civil Procedure, 1908- Order 20 Rule 5- Held -that if findings returned in respect of any one or more of the issues are sufficient for the decision of the suit, clubbing of the issues does not prejudice the party- further held that there was nothing on record to remand the matter back for re-adjudication afresh, on all issues. (Para-13 to 17)

Code of Civil Procedure, 1908- Standard of Proof- Further held- that mere admission of document in evidence does not amount to its proof and the standard of proof required in civil cases is dependent upon the balance of probabilities, as opposed to proof beyond reasonable doubt in criminal matters. (Para-49 to 53)

Specific Relief Act- Section 20- Specific relief of contract- Held- that in a suit for specific performance even if the plaintiff proves the issues and establishes his case, it is not that under all circumstances, suit is to be allowed- power is discretionary, more particularly, If the contract is not equal and fair. (Para-54)

Cases referred:

Vinod Kumar vs. Gangadhar, (2015) 1 SCC 391
State Bank of India and another vs. Emmsons International Limited and another, (2011) 12 SCC 174
Madhukar and others vs. Sangram and others, (2001) 4 SCC 756
Santosh Hazari vs. Purushottam Tiwari (Deceased) By LRs., (2001) 3 SCC 179
Kalahasti Veeramma vs. Prattipati Lakshmoyya and others, AIR (35) 1948 Madras 488
Pitamber Prasad vs. Sohan Lal and others, AIR 1957 Allahabad 107
P.C. Thomas v. P.M. Ismail and others, (2009) 10 SCC 239
N.E. Horo v. Smt. Jahanara Jaipal Singh, (1972) 1 SCC 771
Ranvir Singh and another v. Union of India, (2005) 12 SCC 59
LIC of India and another v. Ram Pal Singh Bisen, (2010) 4 SCC 491
Sait Tarajee Khimchand and others v. Yelamarti Satyam and others, (1972) 4 SCC 562
Laxman Tatyaba Kankate & another v. Smt. Taramati Harishchandra Dhatrak, (2010) 7 SCC 717
Rakesh Mohindra v. Anita Beri & others, 2015 AIR(SCW) 6271
Anvar P.V. v. P.K. Basheer and others, (2014) 10 SCC 473
R.V.E. Venkatachala Gounder v. Arulmigu Visweswaraswami & V.P. Temple and another, (2003) 8 SCC 752
P.V. Joseph's son Mathew v. N. Kuruvila's Son, 1987 (Supp1) SCC 340
Bal Krishna v. Bhagwan Das, (2008) 12 SCC 145
Mahammadia Cooperative Building Society Ltd. v. Lakshmi Srinivasa Cooperative Building Society Ltd. and others, (2008) 7 SCC 310
Laxman Tatyaba Kankate & another v. Smt. Taramati Harishchandra Dhatrak, (2010) 7 SCC 717

For the Appellant	Mr. G.D. Verma, Senior Advocate, with Mr. B.C. Verma, Advocate.
For the Respondents	Mr. Sudhir Thakur, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

Appellant-plaintiff Raj Kumar Garag (hereinafter referred to as the plaintiff), whose suit for specific performance of agreement to sell dated 24.8.2006 (Ex.PW-2/A), stands dismissed by the learned Single Judge of this Court, lays challenge to the judgment dated 26.9.2011, passed in Civil Suit No.45 of 2007, titled as *Raj Kumar Garg v. Raj Kumar and another*, by way of present appeal, preferred under Section 10 of the Letters Patent Appeal and Section 96 of the Code of Civil Procedure.

2. Facts, in brief, are as under:

(a) Allegedly, vide Agreement dated 24.8.2006 (Ex.PW-2/A), plaintiff agreed to purchase 65 bighas of agricultural land, owned by respondents No.1 & 2 - defendants Raj Kumar and Ajay Kumar (hereinafter referred to as the defendants). Total sale consideration being 48 lakhs, out of which Rs.4 lakhs was paid at the time of signing of the agreement, with the remaining amount agreed to be paid at the time of registration of the sale deed, which was to be done on or before 23.4.2007. On 20.4.2007, plaintiff sent a registered communication (Ex.PW-2/C) to the defendants, asking them to execute the sale deed. On 23.4.2007, though plaintiff made himself available before the Sub Registrar, but defendants chose neither to respond to the notice nor remain present for execution of the sale deed. Resultantly, on 21.6.2007, plaintiff presented the plaint, seeking specific performance of the agreement.

(b) While specifically denying the plaintiff's case, in the written statement, so filed by them, defendants termed the agreement to be an act of fraud and concoction on the part of the plaintiff, in connivance with one Ankush Vasishta in whose favour they had initially executed Power of Attorney for sale of 50 bighas of agricultural land, for a consideration of Rs.3 crores. Sale deed was to be executed in favour of Sudarshan Sharma of Chandigarh. On the asking of said Ankush Vasishta, on 16.1.2007, they executed certain papers. However, while leaving, by mistake, copy of one such paper was left behind, which, when shown to their well-wisher and neighbour Gopal, revealed the fraud perpetuated upon the defendants. Resultantly, they firstly cancelled the Power of Attorney issued in favour of Ankush Vasishta and thereafter reported the matter to the police and lodged several complaints. On 22.2.2007, a complaint was lodged at Police Station, Dharampur. Similar complaint was sent to the Director General of Police, Shimla and Hon'ble the Chief Minister of Himachal Pradesh for conducting an enquiry. Further, defendants filed a suit for declaration, impleading Ankush Vasishta and the present plaintiff as party defendants.

(c) Undoubtedly, in the replication, plaintiff refuted allegations of falsehood, but admitted pending litigation.

3. Pleadings led to the striking of following issues:

"1. Whether this suit is liable to be stayed under Section 10 of the Code of Civil Procedure as the defendants have instituted a suit against the plaintiff regarding the property which is subject matter of this suit in the court of Civil Judge (Jr. Division), Kasauli and which suit was instituted prior in point of time to the present suit? .....OPD

2. Whether the plaintiff entered into an agreement dated 24.8.2006 with the defendants for purchasing the suit land as alleged? .....OPP

3. Whether the plaintiff paid a sum of rupees 4 lacs to defendants as advance of the consideration amount as alleged? .....OPP

4. Whether the plaintiff is entitled to the decree of specific performance of agreement dated 24.8.2006, and injunction or any other relief as pleaded? .....OPP

5. Whether the agreement dated 24.8.2006 is illegal, false or fictitious and obtained by committing fraud and misrepresentation by plaintiff on the defendants? .....OPD

6. Whether the plaintiff is stopped by his own acts, conduct and acquiescence to file and maintain the present suit? .....OPD

7. Whether the suit is not maintainable in the present form?.....OPD

8. Whether the plaintiff has no legal, valid enforceable and subsisting cause of action against the defendants? ...OPD

9. Whether the suit is bad for non joinder of necessary parties?.....OPD

10. Relief."

4. Vide impugned judgment, learned Single Judge decided Issue No.1 as not pressed, Issues No.2,3 & 4 against the plaintiff and Issues No.5,6,7 & 8 in favour of the defendants. Issue No.9 also was decided in favour of the defendants.

5. It is a matter of record that during the pendency of the lis, vide various agreements entered in the year 2014, defendants transferred the suit land in favour of third party, who also stand impleaded as respondents No.3 to 5 in the present appeal.

6. Noticeably, learned Single Judge clubbed and together decided Issues No.2 to 9, holding the plaintiff not to have proven valid execution of agreement to sell dated 24.8.2006 (Ex.PW-2/A). Documents proven on record by the parties probablized the defendants' version. Learned Single Judge found the version, emanating from the plaintiff's witnesses to be contradictory and the agreement to be a self-serving document, prepared without the parties being *ad idem* with regard thereto. Sale consideration was found to be inadequately low. What also weighed with the learned Single Judge was the status of the parties, for the plaintiff being a property broker and the defendants being agriculturists and rustic villagers.

7. We shall deal with each one of the contentions raised by the learned counsel appearing on both the sides.

8. The Appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. First appeal is a valuable right of the parties. Unless restricted by law, the whole case therein is open for rehearing both on questions of fact and law. The judgment of the Appellate Court must reflect its conscious application of mind and record findings supported by reasons on all the issues arising alongwith the contentions put forth and pressed by the parties for decision of the Appellate Court. The Appellate Court be it High Court or Court subordinate thereto, is to deal with all the issues and the evidence led by the parties. As per the requirement of Rule 31 of Order 41 CPC, judgment of the Appellate Court must state: (a) points for determination; (b) decision there upon; (c) reasons for the decision; and (d) where the decree in appeal is reversed or varied, the relief to which the appellant is entitled to. [*Vinod Kumar vs. Gangadhar,* (2015) 1 SCC 391 (Two Judges); *State Bank of India and another vs. Emmsons International Limited and another,* (2011) 12 SCC 174 (Two Judges); Madhukar and others vs. Sangram and others, (2001) 4 SCC 756 (Three Judges); and *Santosh Hazari vs. Purushottam Tiwari (Deceased) By LRs.,* (2001) 3 SCC 179 (Three Judges)].

9. In this backdrop, the following points arise for consideration:-

(i) As to whether suit filed by the plaintiff ought to have been stayed in view of previously instituted suit;

(ii) Whether the learned Single Judge was right in clubbing the issues and returning common findings there upon;

(iii) Whether the findings returned, reasons assigned and conclusions derived by the learned Single Judge are borne out from the record and legally sustainable;

(iv) Whether plaintiff is entitled to specific performance of agreement dated 24.8.2006 or not.

10. It is a matter of record that prior to the filing of the instant suit, which was so done on 21.6.2007, defendants had already filed a suit against the plaintiff, Ankush Vasishta and Sudarshan Sharma. This was so done on 23.4.2007. It is also a matter of record that subsequently the said suit was withdrawn and as such learned Single Judge rightly held Issue No.1 to have been rendered infructuous.

11. Further, we are unable to persuade ourselves with the submission made by Mr. G.D. Verma, learned Senior Advocate, that withdrawal of the suit amounted to closure of defendants' defence. Significantly, plaintiff did not elaborately discuss or disclose the averments of the said suit in the instant plaint, leaving it to the defendants, elaborately apprising the Court about the same. In the plaint, there is only a passing reference of earlier suit filed by defendant Raj Kumar. What is the nature of the suit? What are the issues involved? Who all are the parties? Whether the issues involved are same in both the suits or not? was never disclosed. It is in this backdrop, one cannot hold that mere withdrawal of the earlier suit by the defendants would foreclose their right of taking all the pleas in their defence in a subsequently instituted suit by the plaintiff.

12. Point No.(i) is answered accordingly.

13. Next, it is contended that the learned Single Judge erroneously clubbed all the issues and did not return any findings, specific in nature, on Issue No.5.

14. Order 20 Rule 5 CPC read as under:-

> "5. Court to State its decision on each issue
>
> In suits in which issues have been framed, the court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit."

15. With profit we may reproduce what stands observed by the High Court of Madras in *Kalahasti Veeramma vs. Prattipati Lakshmoyya and others,* AIR (35) 1948 Madras 488, which read as under:-

> "2. The type of judgment complained of by the learned Subordinate Judge is no doubt open to serious criticism. Unfortunately, many judicial officers have a habit of clubbing together all or most of the issues and writing a diffuse judgment, without bringing their minds to bear on the particular matters that have to be decided under each issue, and then giving their conclusions on the several issues at the end of the judgment. The objection to that form of judgment is not so much that it contravenes the provisions of O.20, R. 5 of the Code, which does not seem to require anything more than that reasons should be given for the findings under the individual issues, but rather that it tends to loose thinking; with the result that the Judge does not keep before his mind the essential points to be considered; so that the judgment not only loses clarity but often leads to wrong conclusions, which would have been avoided if the Judge had discussed the various issues separately. Having said this, however, I do not find the judgment under consideration so bad that it was impossible for the appellate Court to appreciate what the findings of the trial Court were. In almost every paragraph a point which had to be determined was considered and the learned Munsif's findings given. The appellate Court would have therefore had no difficulty if it had taken some trouble to ascertain what the findings of the

District Munsif were on the various points that had to be considered in the suit and in the appeal—and presumably the learned counsel would have drawn its attention to the findings and the reasons given for them."

16. Having perused the impugned judgment, we notice that the sole issue arising for consideration was valid execution of agreement dated 24.08.2006 and its enforceability. It is in this backdrop, we are of considered view that the findings upon any one or more of the issues was sufficient for decision of the suit. To our understanding, it is this which weighed with the learned Single Judge in clubbing the issues and deciding as such. We notice that learned Single Judge has extensively reproduced the evidence and in the later part of his judgment, also assigned reasons holding the agreement not to be legally enforceable, and as such plaintiff not entitled to the relief prayed for. In our considered view, learned Single Judge has answered the core issue pertaining to the legality and validity of the execution of the agreement.

17. It is in this backdrop, we are not inclined to accede to the request of Mr.G.D.Verma, learned Senior Counsel, of remanding the matter back for re-adjudication afresh, on all the issues. It is not the requirement of law that in every case matter ought to be remanded. Power of the Appellate Court to hear and adjudicate the matter on law and fact is wide enough to decide the issues, even if required to be answered separately, in accordance with law.

18. 'Issue' as per the dictionary meaning is a point in question, an important subject of debate, disagreement, discussion or argument. It is a disputed point or question to which the parties to action have narrowed their several allegations upon which they are desirous of obtaining decision of Court, either on the question of law or fact. It is the issues framed and not pleadings that guide the parties in the matter of leading evidence. Issues must be confined to the material questions of fact or law (*facta probanda)* and not on subordinate facts or evidence by which material questions of fact or law are proved or disproved (*facta probantia).* They are lamp-post which enlighten the parties to the proceedings, the trial Court and even the Appellate Court with regard to the controversy and the evidence for eliciting truth and justice. Quite often distinction between burden of proof and onus of proof is overlooked and forgotten. Whereas the former denotes legal burden and never shifts, on the other hand, the latter would necessarily mean the evidentiary burden and keeps on shifting.

19. A decree is not dependent upon the quality of the judgment but upon the fact that the court has given formal expression of an adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. [*Pitamber Prasad vs. Sohan Lal and others,* AIR 1957 Allahabad 107 (Two Judges)]

20. Point No.(ii) is answered accordingly.

21. Well, it is true that the learned Single Judge has not used the words "falsehood", "fiction", "fraud" or "misrepresentation", while deciding the issues, but then bare reading of Paras No.28-30 of the judgment reveals that in dismissing the suit, he agreed with the defendants' contention.

22. But, let us examine the evidence, led by the parties to the suit.

23. In his support, plaintiff examined the following witnesses:

PW-1	Shri K.K. Sharma
PW-2	Shri Raj Kumar Garg, Plaintiff.
PW-3	Shri Sandeep Kumar
PW-4	Shri Pankaj Kumar

And placed on record the following documentary evidence:

Ex.PW-1/A	Plaintiff's affidavit.

Ex.PW-2/A	Agreement to Sell
Ex.PW-2/B	Receipt
Ex.PW-2/C	Legal Notice dated 20.4.2007
Ex.PW-2/D-1 & Ex.PW-2/D-2	Postal receipts
Ex.PW-2/D-3 & Ex.PW-2/D-4	RAD envelopes
Ex.PW-2/E	Copy of Jamabandi

24. In defence, defendants examined the following witnesses:

DW-1	Shri Om Parkash
DW-2	Shri Parveen Gupta
DW-3	Shri Ram Pal Sharma
DW-4	Ms Anuradha Sood
DW-5	Shri Deepak Kumar
DW-6	Shri Raj Kumar, (defendant).
DW-7	Shri Gopal Singh
DW-8	Shri K.K. Sharma

And placed on record the following documentary evidence:

Ex.D-1	Agreement for Sale of Land
Ex.DW-2/A	Copy of complaint to the Additional Secretary to the Chief Minister
Ex.DW-2/B	Copy of complaint to The Principal Secretary to the Chief Minister.
Ex.DW-3/A	Copy of Daily Station Diary, Police Station Dharampur, District Solan.
Ex.DW-4/A	Copy of Civil Suit No.94/1 of 2007
Ex.DW-4/B	Copy of Order dated 23.4.2007 in Civil Suit No.94/1 of 2007
Ex.DW-5/A	General Power of Attorney
Ex.DW-5/B	Cancellation/Revocation of General Power of Attorney
Ex.DW-5/C	Copy of complaint to Deputy Commissioner, Solan, District Solan, H.P., alongwith statements.
Ex.DW-5/D	Copy of complaint to Hon'ble Chief Minister.
Ex.DW-7/A	Copy of Judgment in Sessions Trial No.1-S/7 of 2009.
Ex.DW-7/B, 7/C & 7/D	Per year average charts.
Ex.DW-7/E	Legal notice to Shri Ankush Vasishtaa
Ex.DW-7/F	Postal receipt
Ex.DW-7/G	Counter foil of bank deposit receipt.

Ex.DW-7/H	Legal Notice to Shri Ankush Vasishta.
Ex.DW-7/J & 7/K	Postal receipts.
Ex.DW-7/L	Copy of a letter written to the Manager of Bank of Baroda.
Ex.DW-7/M	Postal receipt
Ex.DW-7/N	Copy of Jamabandi
Ex.DW-7/O	Copy of Jamabandi

25. It is well settled principle of law that unless by way of categorical and unequivocal admission, defendants so admit, the onus to prove its case is on the plaintiff, more so in a case of the present nature and that being Specific Performance of Agreement to Sell.

26. From the documents so filed by the plaintiff, one finds the defendants to be owners of the suit land, i.e. the land allegedly agreed to be sold by them in his favour, vide Agreement to Sell dated 24.8.2006 (Ex.PW-2/A); plaintiff having issued legal notice dated 20.4.2007 (Ex.PW-2/C); such notice having been sent by Registered AD (Ex.D-1 & D-2); Registered ADs returned with the remarks "Recipient was not found at home. Retuned to sender" (Ex.DW-2/D-2 & Ex.DW-2/D-4); and the plaintiff's affidavit of having made himself available on the date of execution of the sale deed (Ex.PW-1/A).

27. Significantly, defendants have categorically denied contents of the Agreement to Sell (Ex.PW-2/A); Legal Notice (Ex.PW-2/C); dispatch of Registered AD letters (Ex.PW-2/D-3 & 2/D-4).

28. Hence, initial onus to prove execution of the agreement would be upon the plaintiff.

29. Now, bare perusal of the agreement (Ex.PW-2/A) reveals that on all the three pages, at least at six places, there are blanks which are filled up in hand. So much so, name of the purchaser, i.e. the plaintiff, is filled in hand, so also the amount of sale consideration and the advance paid for. Even the column with regard to the date of agreement is left blank. Also, Annexure-I forming part of the agreement, referred to in the recital clause (f) is not appended with the same. Thus, prima facie, agreement itself does not inspire confidence.

30. We only remind ourselves about the status and the background of the parties to the lis. Plaintiff is a property broker/shopkeeper/hotel owner and defendants are agriculturists and rustic villagers. The first thing which strikes us is as to why would a person, entering into transaction of huge extent of land, not execute a properly filled up agreement.

31. Before we deal with the ocular evidence of the plaintiff, we may only notice what the defendants had to state in their written statement and deposed in Court. They being owners of agricultural land, had executed Power of Attorney in favour of Ankush Vasishta for sale of 50 bighas of agricultural land for a total consideration of Rs.3 crores. On 16.1.2007, on the asking of said Ankush Vasishta, they executed certain papers and by mistake copy of one such paper was left behind, which when shown to a neighbour, revealed the fraud. Defendants immediately cancelled the Power of Attorney as also lodged report with the police. Necessary remedial actions were taken. Categorically they have deposed that Ankush Vasishta and plaintiff are property brokers, working together at Dharampur.

32. In this backdrop, let us examine whether plaintiff has been able to establish valid execution of the agreement or not. And for such purpose we need only examine testimonies of the plaintiff (PW-2) and witnesses to the agreement Shri Sandeep Kumar (PW-3) and Shri Pankaj Kumar (PW-4).

33. In his examination-in-chief, plaintiff states that he entered into an agreement with the defendants, who knew him, for purchase of the suit land. He further states that the

defendants and the witnesses [Sandeep Kumar and Shri Pankaj Kumar] signed the agreement in his presence, whose signatures he identifies, at Points B1, B2, C1, C2 & D1. Out of total sale consideration of Rs.48 lakhs, a sum of Rs.4 lakhs was paid to the defendants. This was at the time of execution of the agreement and the balance sale consideration was to be paid at the time of registration of the sale deed. On 20.4.2007, he got sent a registered Legal Notice (Ex.PW-2/C), assuring his presence on 23.4.2007, in the Office of Sub Registrar, Kasauli for the purposes of registration of sale deed. On the said date, even though he remained present from 10 a.m. to 4 p.m., but defendants did not come. For making payment he carried a sum of Rs.50 lakhs. Defendants refused to execute the sale deed, for the reason that they were demanding more money as the value of the land had increased. He was and is ready and willing to perform the obligations in terms of agreement to sell and is also possessed of sufficient funds.

34. From the cross-examination part of the testimony of this witness, we find the defence of the defendants to have been somewhat probablized, if not established. He admits to be a businessman and having known Ankush Vasishta, but denies any business relationship of property dealership. He admits proforma of agreement to have been prepared and the one placed on record by the defendants (Ex.D-1) to be similar to agreement to sell (Ex.PW-2/A). He states that agreement was executed in his office at about 4 p.m. and that blank columns were filled by Shri Pankaj Kumar, so also receipt (Ex.PW-2/B) on the back side of first page of the agreement (Ex.PW-2/A) is scribed by Shri Pankaj. He does not remember whether the receipt was dated or not. He admits that with respect to the very same agreement, police had lodged a complaint against him. He admits that prior to the filing of the suit in question, defendants had already filed a suit against him and Ankush Vasishta, which even though, as on the date of recording of the statement, was pending, but neither he nor Ankush Vasishta had filed any written statement.

35. It be noticed that it was more than one year that the plaint came to be instituted.

36. Crucially, he admits that agreement (Ex.D-1) was handed over to defendant Raj Kumar one month prior to the execution of the agreement of sale. But then, this is not his pleaded case. He does not state that copy of the agreement was ever handed over to the defendants or that for more than one month parties had been negotiating execution of agreement (Ex.PW-2/A). What is important is his admission that the property in question stood mortgaged with the State Bank of India, which mortgage was redeemed by making payment of Rs.7 lakhs. Though he denies that it was Ankush Vasishta who paid a sum of Rs.8 lakhs for the said purpose, but defendants have proven such fact.

37. Further, we notice that though Sandeep Kumar (PW-3) admits execution of agreement but not that it was scribed in his presence. Only blanks were filled up in his presence. But then, he contradicts the plaintiff's version by deposing that blanks were filled up by Ghan Shyam, brother of plaintiff Raj Kumar. We reiterate the plaintiff to have categorically deposed that "*The blank columns in Ext.PW2/A were filled in by Pankaj who was a witness of this agreement. Ext.PW2/B has been scribed by Pankaj. The figure 48 lacs in words as well in the numerical has been written by Shri Pankaj*". The contradiction is major and material, rendering the version of the witnesses to be extremely doubtful and their creditworthiness to be impeached. Valid execution of the agreement is thus rendered doubtful, in fact not proven. Well, who is this Ghan Shyam? is a mystery. That part, witness (PW-3) does not remember whether the receipt was executed separately or on the same stamp paper. Further, according to this witness, agreement was signed around 4.45 p.m., unlike the version of the plaintiff, who states it was at 4 p.m. Also, he admits that two criminal cases are pending against him in the Courts at Kasauli. He does not categorically deny that in the year 2006, value of the suit land was approximately 5 lakhs per bigha, which in fact matches with the figure indicated by the defendants.

38. Further, when we peruse the testimony of another witness Shri Pankaj (PW-4), we find him to be an employee of the plaintiff and working in his hotel. He does not know whether the agreement was typed or not. But what is material is the contradiction he has brought in the statement of plaintiff and Sandeep Kumar with regard to the place of execution of agreement. According to the plaintiff, agreement was signed in his office (Gas Agency), whereas

according to this witness (PW-4), it was so done at the Shivalik Guest House, which is at a distance of 3 kms from the Gas Agency. When we peruse the statement of the plaintiff, we find the Gas Agency to be owned by him and it is from here that he runs his office. Further, this witness contradicts the plaintiff by deposing that blanks were not filled up in his presence. Not only that, he is categorical that all the parties signed the agreement at "around 4 PM", so also receipt was scribed at that time. Now, there is contradiction with regard to the time, place and the persons in whose presence blanks were filled up.

39. Thus, having perused the evidence, documentary and ocular, so led by the plaintiff, we are of the considered view that though contradictory, but self serving testimonies of plaintiff's witnesses cannot be said to be inspiring in confidence.

40. Resultantly, we find the plaintiff not to have established execution of agreement dated 24.8.2006 (Ex.PW-2/A) or a sum of Rs.4 lakhs advanced as sale consideration in terms thereof.

41. Not only that, when we peruse the testimonies of the defendants' witnesses, we find the element of falsehood, illegality and the agreement being prepared falsely for the purpose of filing of the suit, to have been established on record.

42. Defendant Raj Kumar categorically states that he executed a Power of Attorney (Ex.DW-5/A) in favour of Ankush Vasishta for disposing of his 50 bighas of land for a sale consideration of Rs.3 crores. Allegedly, Ankush and the plaintiff are partners. Well, there is nothing on record to establish such fact. Be that as it may, but the witness does state that Ankush made him sign certain papers. It was at 9-10 p.m., when three persons, i.e. Raj Kumar, Pankaj and Sandeep had come to his house. He was told that papers being executed were for sale of 50 bighas of land. In the meanwhile, there was power failure and as such after obtaining the signatures, these persons left away. But while doing so, by mistake, document (Ex.D-1) was dropped, which next day he showed it to Shri Gopal Singh and learnt about the instant deal. Realizing the fraud perpetuated by these persons, immediately he got the Power of Attorney cancelled and lodged a complaint at Police Station, Dharampur. Also, he sent a copy thereof (Ex.DW-5/B) to the Director General of Police, Himachal Pradesh and Hon'ble the Chief Minister. Neither did he ever execute any agreement with the plaintiff, much less the instant agreement (Ex.PW-2/A), nor did he receive any amount towards the sale consideration. In fact, Ankush deposited a sum of Rs.8 lakhs in the loan account of his son, which he returned in cash. He got issued notice to Ankush Vasishta (Ex.DW-7/E), indicating the element of fraud and cheating. Also, he filed a Civil Suit (Ex.DW-4/A), both against Ankush Vasishta and the plaintiff. In cross-examination, unrefutedly he clarifies being semi-illiterate, hailing from the family of agriculturists. Though he admits his signatures on Ex. PW-2/A, but denies having executed any such agreement in favour of the plaintiff.

43. The question arising for consideration is as to why would Ankush Vasishta redeem the mortgage by paying a sum of Rs.8 lakhs. Defendants have established that at the relevant time and place, average price of the land was approximately Rs.5 lakhs per bigha (Ex.DW-7/B, Ex.DW-7/C & Ex.DW-7/D). It is not a case of distress sale. Why would a person sell his land at a price far lower than the present market price. It is also not the case of the plaintiff that defendants wanted to sell the land as a large chunk, which factored the sale consideration to be low.

44. We reiterate that we are dealing with the defendants who are agriculturists and rustic villagers. They were not made aware of the terms of the agreement. Only their signatures were obtained on blank papers, that too not by the plaintiff but Ankush Vasishtaa, who, undisputedly is acquainted to the plaintiff. Necessary remedial action was taken by the defendants, both against Ankush Vasishtaa and the plaintiff.

45. Version of defendant Raj Kumar stands corroborated by Gopal Singh (DW-7), according to whom, in the morning of 17.1.2007, defendant Raj Kumar had shown him the

agreement paper (Ex.D-1), which led to the discovery of fraud and initiation of appropriate proceedings.

46. The factum of filing of the suit, in which the present plaintiff was proceeded ex-parte, stands established by Civil Ahalmad posted in the office of Civil Judge (Sr. Division), Kasauli, District Solan (DW-4).

47. Factum of the complaints written to the Hon'ble the Chief Minister as also the Police officials, stands proved through the testimonies of Shri Om Parkash (DW-1), Shri Parveen Gupta (DW-2), Shri Ram Pal Sharma (DW-3), Shri Deepak Kumar (DW-5) and Shri K.K. Sharma (DW-8).

48. Thus, in our considered view, defendants have been able to discharge the burden that the agreement was an act of falsehood and a fraudulent act and there being no legal valid enforceable cause of action subsisting in favour of the plaintiff for the suit being decreed. We do not find any reason to interfere with the findings returned by the learned Single Judge.

49. Mr. G.D. Verma, leanred Senior Advocate, relying on the ratio of law laid down by the Apex Court in *P.C. Thomas v. P.M. Ismail and others,* (2009) 10 SCC 239, contends that since the agreement to sell (Ex.PW-2/A) stands exhibited, correctness of contents thereof, be presumed with the plaintiff having established his case and discharged the onus with regard to its valid execution. (*N.E. Horo v. Smt. Jahanara Jaipal Singh,* (1972) 1 SCC 771; and *Ranvir Singh and another v. Union of India,* (2005) 12 SCC 59).

50. We are afraid, the decisions do not lay down the principle of law, sought to be so propounded. That apart, in the instant case, with the filing of the written statement, while carrying out admission and denial of the documents and leading ocular evidence, defendants have categorically denied and disputed its contents. As such contention needs to be rejected.

51. In *LIC of India and another v. Ram Pal Singh Bisen,* (2010) 4 SCC 491, the Apex Court held that mere admission of document in evidence does not amount to its proof. In other words, mere marking of exhibit on a document does not dispense with its proof, which is required to be so done in accordance with law. (Also: *Sait Tarajee Khimchand and others v. Yelamarti Satyam and others,* (1972) 4 SCC 562; *Laxman Tatyaba Kankate & another v. Smt. Taramati Harishchandra Dhatrak,* (2010) 7 SCC 717; *Rakesh Mohindra v. Anita Beri & others,* 2015 AIR(SCW) 6271).

52. In fact, on the issue raised by Mr. G.D. Verma, we deem it appropriate to reproduce the following observations made by the Apex Court in *Anvar P.V. v. P.K. Basheer and others,* (2014) 10 SCC 473:

> "Construction by plaintiff, destruction by defendant. Construction by pleadings, proof by evidence; proof only by relevant and admissible evidence. Genuineness, veracity or reliability of the evidence is seen by the court only after the stage of relevancy and admissibility. These are some of the first principles of evidence. What is the nature and manner of admission of electronic records, is one of the principal issues arising for consideration in this appeal."

53. Further, in *R.V.E. Venkatachala Gounder v. Arulmigu Visweswaraswami & V.P. Temple and another,* (2003) 8 SCC 752, the Apex Court has observed as under:

> "20. .....The objections as to admissibility of documents in evidence may be classified into two classes :- (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as "an exhibit", an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken before the evidence is tendered and once the document has been

admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The later proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons : firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the later case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in superior Court."

"28. Whether a civil or a criminal case, the anvil for testing of "proved", "disproved" and "not proved", as defined in S. 3 of the Indian Evidence Act, 1872 is one and the same. A fact is said to be "proved" when, if considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of a particular case, to act upon the supposition that it exists. It is the evaluation of the result drawn by applicability of the rule, which makes the difference.

"The probative effects of evidence in civil and criminal cases are not however always the same and it has been laid down that a fact may be regarded as proved for purposes of a civil suit, though the evidence may not be considered sufficient for a conviction in a criminal case. BEST says : There is a strong and marked difference as to the effect of evidence in civil and criminal proceedings. In the former a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision : but in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required. (BEST, S. 95). While civil cases may be proved by a mere preponderance of evidence, in criminal cases the prosecution must prove the charge beyond reasonable doubt." (See *Sarkar on Evidence*, 15th Edition, pp. 58-59).

In the words of Denning, LJ (*Bater v. B*, 1950 2 All ER 458, 459 B-C). "It is true that by our law there is a higher standard of proof in criminal cases then in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. So also in civil cases there may be degrees of probability." Agreeing with this statement of law, Hodson, LJ said "Just as in civil cases the balance of probability may be more readily fitted in one case than in another, so in criminal cases proof beyond reasonable doubt may more readily be attained in some cases than in others." (Hornal v. Neuberger P. Ltd., 1956 (3) All ER 970 at p. 977D)."

54. The law with regard to grant of relief of specific performance is now well settled. Even if plaintiff was able to prove the issues and establish its case, it is not that under all

circumstances, suit is to be allowed. Provisions of Section 20 of the Specific Reliefs Act, 1963, are evidently clear. The power is discretionary. If the contract is not equal and fair, though not void, still it can refuse the relief of specific performance. (*P.V. Joseph's son Mathew v. N. Kuruvila's Son,* 1987 (Supp1) SCC 340*; Bal Krishna v. Bhagwan Das,* (2008) 12 SCC 145; *Mahammadia Cooperative Building Society Ltd. v. Lakshmi Srinivasa Cooperative Building Society Ltd. and others,* (2008) 7 SCC 310; and *Laxman Tatyaba Kankate & another v. Smt. Taramati Harishchandra Dhatrak,* (2010) 7 SCC 717).

55. Points No.(iii) & (iv) are answered accordingly.

In view of the above, there being no merit in the appeal, same is dismissed. Pending application(s), if any, also stand disposed of.

****

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

Akhil Kumar and others .....Petitioners/Defendants.
Versus
Anil Kumar & others .....Respondents.

CMPMO No. 437 of 2017.
Reserved on : 15.11.2017.
Date of Decision: 23rd November, 2017.

Code of Civil Procedure, 1908- Temporary Mandatory Injunction- Principal reiterated that the relief of interlocutory mandatory injunction should be granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy or to restore the wrongful taking of possession. (Para-5 to 8)

Cases referred:
Dorab Cawasji Warden versus Coomi Sorab Warden and others, (1990)2 SCC 117
Mohd. Mehtab Khan & others v. Khushunma Ibrahim & others, AIR 2013 SC 1099

For the Petitioners: Mr. Pratap Singh Goverdhan, Advocate.
For the Respondents: Mr. C.P. Attri, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant petition stands directed against the orders recorded by the learned Additional District Judge-1, Solan in Civil Msc. Appeal No. 11-2/14 of 2017, whereby, he during, the pendency of Civil Suit No. 9/1 of 2016, granted relief, of, temporary mandatory injunction vis-a-vis the plaintiff besides directed one Kulbhushan Gupta to forthwith handover keys of the demised shop to the plaintiff, one, Anil Kumar. Moreover relief of ad interim permanent prohibitory injunction, was, pronounced upon the defendants, for restraining them from theirs, during the pendency of the aforesaid civil suit, hence interfering/obstructing the plaintiff, from running the demised shop. Being aggrieved therefrom, the defendants/petitioners herein, have instituted the instant petition before this Court, whereupon they concert to beget its reversal.

2. Uncontrovertedly, one Phool Chand, held tenancy in the shop forming a part of House No.148 situated at Muaza Lower Bzar Solan, Tehsil and District Solan, H.P. The aforesaid Phool Chand expired on 30.12.2014. Upon demise, of Phool Chand, the plaintiff claimed exclusivity of rights, of, tenancy vis-a-vis the demised premises, (I) on anvil of an unregistered

testamentary disposition executed on 27.08.2014 vis-a-vis him by the aforesaid Phool Chand. It is averred in the suit that, since, the occurrence of demise of Phool Chand, (ii) AND upto 21.09.2015, the plaintiff holding possession of the demised shop, (iii) hence, on anvil of the plaintiff, holding possession, vis-a-vis the demised premises/shop, for more than six months prior, to the institution of the suit, he contends, of, his holding a legitimate right to vindicate his possession. Moreover, an averment, is borne in the suit, of, since 21.09.2015, the demised premises/shop being respectively locked by each of the litigants AND of one Kulbhushan Gupta, to whom, the respective keys, of, the locks respectively, put on shutters thereof, by each of the contestants stood handed over, under supurdari, being directed to handover its possession, to the plaintiff.

3. The defendants contested the suit, by instituting a written statement thereto, wherein, they propagated that the Will propounded by the plaintiff, not, being validly executed. Thereupon, they also canvass of theirs and not the plaintiff, at the relevant time, holding possession, of the demised premises. They, in their written statements also in their replies to the apposite application, contended, that the relief claimed by the plaintiff being not affordable to him.

4. The landlord of the demised premises, impleaded in the extant suit, as co-defendant No.3, has, in his written statement, to the plaint not supported the plaintiff's averment, of his at the relevant stage, holding, possession of the demised premises, rather he has contended therein, of the demised premises being locked. He has also denied the factum of the plaintiff, residing, with his father, during the latter's life time. However, defendant No.7, one Kulbhushan Gupta, who also stood impleaded as a party to the suit and is arrayed as defendant No.7, has, supported the plaintiff's averments, of, his since December, 2014, whereat the demise, of, one Phool Chand, occurred, his, holding possession of the tenanted premises and has further recorded, a contention therein, of, in the morning of 21.09.2016, a quarrel erupting inter se the parties at contest, especially at the stage when the plaintiff's son, opened the lock(s) of the tenanted premises, whereafter, the defendants No.1 to 3, proceeded to also lock the shutters of the tenanted premises. He has continued to therein record, a, contention of the matter being reported to the police and the contesting parties, being summoned by the Police at Police Station Sadar, whereat, a compromise occurred inter se them, in sequel whereof, the keys of the locks respectively put upon the shutter(s) of the demised premises/shop, by each of the litigants, were entrusted to him.

5. The principles, for guaging the validity(ies) of granting a relief of ad interim mandatory injunction are borne in paragraph No.16, of, a judgment rendered by the Hon'ble Apex Court in a case titled as ***Dorab Cawasji Warden versus Coomi Sorab Warden and others, (1990)2 SCC 117,*** paragraph whereof reads as under:

> "16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:
>
> (1) The plaintiff has a strong case for trail. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction. (2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.
>
> (3) The balance of convenience is in favour of the one seeking such relief. "

....(p.126-127)

The aforesaid relief, has been therein expostulated, to be an equitable relief, meant only for (i) preserving or restoring the status quo, existing on the last non contested status, immediately, preceding the controversy AND for compelling undoing(S) of illegal acts and (ii) for restoration of, that, which was wrongfully taken from the party complaining. The aforesaid principles STAND further reiterated, by the Hon'ble Apex Court, in a case titled as ***Mohd. Mehtab Khan & others v. Khushunma Ibrahim & others, AIR 2013 SC 1099,*** the relevant paragraph No.12 whereof reads as under:-

> "12. A proceeding under Section 6 of the Specific Relief Act, 1963 is intended to be a summary proceeding the object of which is to afford an immediate remedy to an aggrieved party to reclaim possession of which he may have been unjustly denied by an illegal act of dispossession. Questions of title or better rights of possession does not arise for adjudication in a suit under Section 6 where the only issue required to be decided is as to whether the plaintiff was in possession at any time six months prior to the date of filing of the suit. The legislative concern underlying Section 6 of the SR Act is to provide a quick remedy in cases of illegal dispossession so as to discourage litigants from seeking remedies outside the arena of law. The same is evident from the provisions of Section 6(3) which bars the remedy of an appeal or even a review against a decree passed in such a suit." (p1103-1104)

therein also it is expostulated that (i) prima facie proof qua unjust and illegal ouster from possession vis-a-vis the apposite suit property, of the complaining party, being the sine qua non, for making an adjudication upon an application, espousing a relief for grant, of, ad interim mandatory injunction vis-a-vis the suit property concerned also it is expostulated therein (ii) that the question of title or of better right(s) of any of the contesting party(ies), is insignificant, for making any pronouncement, upon, the aforesaid application, (iii) rather the solitary indispensable principle warranting its prima facie proof, being of, possession of the suit property concerned, standing prior, to the institution of the application, being evidently held by the litigant concerned, (iv) also proof emanating, of, the aspiring litigant, holding evident possession thereof, (v) his being evidently dispossessed therefrom, by unlawful acts, of, a party, who, on the basis of superior title or superior possessory right, claims possession thereof. Bearing in mind the aforesaid principles of law, the factum of validity(ies) of the Will propounded by the plaintiff, is, insignificant (vi)also any questioning(s) by the defendants in respect of its validity, is insignificant, nor any non adjudication being meted thereupon, by the learned Civil Court is also unworthwhile, as, (viii) upon invalidity thereof being judicially pronounced, thereupon, the apposite title vis-a-vis the demised premises, as claimed by the defendants, would atain validation, (ix) whereas, for testing the validity of any adjudication pronounced, upon, the apposite application, the afore referred factum of evident settled possession thereof, being, at the relevant time, standing held by either of them, is, the more overwhelming factum to be borne in mind.

6. Consequently, it has to be determined, from, the evidence on record, whether the plaintiff or the defendants/petitioners herein, satisfy the aforesaid tests, (i) thereupon, with one Kulbhushan Gupta, the signatory, of a compromise, occurring at page 87 of the record, of the learned trial Court, also who stands constituted therein, to be the enstrustee, of, the keys of the locks, respectively, put on the shutters of the demised premises, by each of the contesting parties, (ii) in consonance therewith hence rearing a contention in his written statement, thereupon, he is to be prima facie construed to be credible. The imputation of prima facie credence, to the aforesaid factum (ii) underscores, an inference of prima facie, all, the contesting parties locking the disputed premises, on 21.09.2015, (iii) since then Kulbhushan Gupta, constituted, in the apposite memo, of supurdari, as prepared on the aforesaid date, to be the entrustee, of, the keys of the locks respectively, put upon the shutters of the demised premises, by each of the litigants, holding possession of the apposite keys, (iv) hence, reiteratedly his contention in his written

statement, of the plaintiff/applicant, prior thereto, holding possession thereof, is to be imputed credence also, the averred contention, borne in the written statement of defendant No.7 Mr. Kulbhushan Gupta, of, a quarrel erupting inter se the contesting parties on 21.09.2015, is to be also imputed prima facie sanctity. Nonetheless, it is also to be, from other best befitting material existing on record, hence determined, of, prior to 21.09.2015, the plaintiff evidently holding settled lawful possession of the demised premises AND only thereafter, the defendants/petitioners herein, by their unlawful acts, concerting to usurp his possession, (v)whereupon, on occurrence hereat of affirmative material qua the aforestated trite factum hence spurring vis-a-vis the plaintiff, it, would be permissible for this Court, to, hold of the afore extracted principles of law, for hence imputing validation, to the impugned order also begetting satiation.

7. (i) The bills of the electricity standing defrayed vis-a-vis the demised premises, immediately prior to 21.09.2015, by the plaintiff. (ii) An affirmative order being recorded by the learned Rent Controller, Solan, on an application preferred before him, by the plaintiff, wherein he sought its permission, to deposit the rent qua the demised premises, for the period commencing from 1.11.2014 upto 31.08.2015, in sequel whereto, the subsequenlty sought apposite permission by the plaintiff for its deposit, stood also accorded on 18.8.2015, (iii) begets an inference, of the denial of the landlord of the plaintiff, not, holding possession, of the demised premises prior to 21.09.2015, prima facie, not at this stage carrying any tenacity.

8. Since, the afore said application, moved, by the plaintiff before the learned Rent Controller, Solan, for his hence seeking its permission, to, deposit the quantum of rent, before him, appertained to the period commencing from 1.11.2014 upto 31.08.2015, (i) hence, with its covering the period prior to 21.09.2015, on latter date whereof, each of the contesting parties respectively put their respective locks upon the shutters of the demised premises. (ii) Besides, when during pendency whereof, the defendants/petitioners herein also instituting, an application cast under the provisions of Order 1, Rule 10 of the CPC, wherein they sought their impleadment, as co-petitioners therein, (iii) whereas, with the aforesaid application standing dismissed, (iv) besides when, the aforesaid order was, not, concerted, to be reversed by theirs making a challenge thereagainst, before the learned Appellate Authority concerned, (v) thereupon, the disaffirmative order pronounced, upon, an application instituted by the defendants/petitioners under Order 1, Rule 10 of the CPC has attained conclusivity. (vi) rather also the affirmative order pronounced, upon, the plaintiff's application wherein he sought permission to deposit rent, for the aforesaid period, with respect to the demised premises, and in compliance therewith the apposite deposit, was, also made, renders a conclusion, of, the defendants/petitioners herein being estopped, to, contend of the plaintiff, not, holding possession of the demised premises, since 31.12.2014 to 21.09.2015, also they are estopped to contend that prior to the incident of 21.09.2014, the plaintiff not holding possession thereof. The defendants, on 30.06.2016, also filed an application for permission to deposit rent with respect to the demised shop, for, the period commencing from 1.9.2015 upto June, 2016, application whereof stood allowed by the learned Rent Controller Solan on 4.8.2016. Nonetheless, the aforesaid affirmative pronouncement made upon the defendants' application, would not, tear apart the sanctity of an earlier thereof affirmative order pronounced upon the plaintiff's application, for the reason(s), (i) the plaintiff's application appertaining, to, the period commencing subsequent to the demise of the original tenant, one Phool Chand; (ii) during pendency whereof, the defendants' effort to seek therein their impleadment standing rejected, (iii) hence, the affirmative order made upon the plaintiff's application, satiating the cardinal test, of, prior to the institution, of, the suit AND prior to the incident of 21.09.2014, the plaintiff holding, possession of the demised premises, (iv) contrarily, the permission, as accorded vis-a-vis the defendants, upon their application, to deposit rent qua the disputed shop, when appertains to a period commencing prior to the incident of 21.09.2015 AND lasts upto a period, when, the Appellate Court pronounced an order upon the apposite application, for relief of ad interim injunction AND when on 21.09.2015, the lawful possession of the plaintiff qua the demised premises, was, evidently unlawfully usurped by acts of the defendants, (v) thereupon defrayments of rent, if any, by the defendants, do not carry any

effect nor beget satiation of the cardinal tests. (vi) More so, when the apposite contention of defendant No.7, supportive of the plaintiff, subsumes besides overwhelms all effects thereof.

9. Be that as it may, the defendants also seek capitalization, from theirs liquidating expenses towards electricity tariffs, appertaining to the demised premises, yet the aforesaid liquidation(s) by them, are meaningless and cannot erode the tenacity, of the aforestated prima facie inference marshalled by this Court, qua, the plaintiff prior to 21.09.2015 holding settled possession, of, the demised premises, (I) given theirs appertaining, to, a period subsequent to the demise of deceased Phool Chand. Moreover, photographic evidence in respect of the plaintiff/applicant, holding, possession of the demised premises, whereto imputation of reliance, was meted by the learned Appellate Court, has not, been in the grounds of the instant revision petition, canvassed, to be not appertaining to the identity of the plaintiff also stands not therein canvassed, to be not appertaining to the demised premises, (ii) sequel whereof is of immediately prior to the incident of 21.09.2015, the plaintiff/applicant holding possession, of the demised premises, (iii) reinforced vigour, to, the aforesaid inference, is drawn, from, the factum of a newspaper cutting, occurring at page 70 of the record, of, the learned trial Court, wherein an news item is printed qua deceased original tenant, Phool Chand disinheriting one Akhil Kumar and his family members, (iv) renders hence a firm inference of the plaintiff, residing with his father throughout the latter's life time, whereas, obviously hence the defendants/petitioners, not, residing with him. Even if, the plaintiff is alloted a shop in Ganj Bazar, Solan, also if he is holding control thereof, yet effects thereof, not, undermining the effect(s) of the aforesaid inference(s), drawn, from formidable apposite material existing in respect thereto, (ii) wherefrom, it is established that prior, to and subsequent, to the demise of his father also immediately prior to the incident of 21.09.2015, his, holding possession of the demised premises. Consequently, with the material referred above hence satiating the principle(s) borne, in the afore extracted apt portion(s) of the decision(s) rendered by the Hon'ble Apex Court, significantly also when in tandem therewith, the plaintiff establishes (a) his hence holding settled possession of the disputed premises; (b) his settled possession thereof being concerted, to be unlawfully usurped by the defendants/petitioners herein. In sequel, the order of the learned First Appellate Curt is well merited and does not warrant any interference. More so, when the balance of convenience lies in favour of the plaintiff also when in the event of refusal of the ad interim injunction, it will put the plaintiff/applicant to a loss which, cannot, be compensated in terms of money.

10. For the foregoing reasons, the instant petition is dismissed and the impugned orders are maintained and affirmed. However, it is made clear that the the observations made hereinabove shall not be construed as any expression on the merit(s) of the case. No order as to costs. All pending applications also stand disposed of .

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

Shri Dalbir Singh Pathania & Anr. .....Appellants/Defendants.

Versus

Sushil Kumar & Ors. .....Respondents/Plaintiffs.

RSA No. 656 of 2005 and CMP No. 423 of 2009.
Reserved on : 17.11.2017.
Decided on:23rd November, 2017.

Code of Civil Procedure, 1908- Suit for Mandatory Injunction alongwith Permanent Prohibitory Injunction- Held- if the documentary evidence adduced by the plaintiff is infirm and not worth credence oral evidence cannot be a substitute thereof, enabling the plaintiff to prove his case. (Para-10 and 11)

For the Appellant: Mr. Bhupender Gupta, Sr. Advocate with Ms. Rinki Kashmiri, Advocate.

For the Respondents: Mr. Rajnish K. Lal, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs' suit for rendition of a decree for mandatory injunction, with, consequential relief of permanent prohibitory injunction being rendered qua the passage in dispute, was, under concurrent pronouncements recorded thereon, by both the learned Courts below, hence, decreed.

2. Briefly stated the facts of the case are that the plaintiff filed a suit for declaration and against the defendants seeking declaration that there is a path show shown as ABCD in the site plan which is being enjoyed by the plaintiffs for long and the defendants have got no right, or title to obstruct it, it being a Rasta Share Aam in the land comprising khasra No.415. The defendants who purchased the land comprising khasra No.1013 from one Mangla obstructed the passage by installing an iron gate over it and thereby the plaintiffs have been obstructed from proceeding to their houses from the bazar, whereas, this passage was being enjoyed by them for long. The plaintiffs had also sought a decree of mandatory injunction directing the removal of the iron gate raised by the defendants. It has also been averred that the passage in addition to going to the house, his being also used to proceed to the fields and is within the Lal Lakeer (Abadi deh land). This land is being enjoyed by the plaintiff and other villagers. Thus the suit.

3. The defendants contested the suit and filed written statement, wherein, it is averred that the path claimed never existing to be utilized by the plaintiff but it is exclusive passage leading to the house of the defendants and the defendants had earlier constructed a gate in the year 1972 which was wooden gate but in the year 1995, the defendants after removing the wooden gate constructed an iron gate over there. Prior to it, the defendants were tethering their animals over this land. It has been averred that prior to the settlement operation the Share-Aam-Rasta was in the land comprising khasra No.415 which was on the four marlas but during settlement operation of the land of khasra No.1013 was merged into the khasra No.415 which was earlier bearing khasra No.930 and thereby merging the land of another khasra No. which was earlier owned by one Mangla and was thereafter purchase by the defendants the area of land showing Share-Aam-Rasta comprising khasra No.415 has been increased, whereas, the area of land of defendants has been decreased. Thereby depriving the defendants of the valuable rights. The matter was taken up before the Settlement Officer, who decided in favour of defendants and necessary corrections were ordered. Thereafter the matter was taken to the Court of Divisional Commissioner by the plaintiffs but that revision petition was dismissed. As per the latest record the area of land comprising khasra No.415 has been decreased to the area which was earlier having four marlas and thus the path claimed is not available to the plaintiff and the iron gate has rightly been constructed which is in the ownership and possession of the defendants.

4. The plaintiffs/respondents herein filed replication to the written statement of the defendants/appellants herein, wherein, they denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the passage mentioned ABCD shown in red colour in the site plan attached, is a public passage as alleged? OPP

2. If issue No.1 is proved in affirmative, whether the plaintiffs are entitled to the relief of permanent injunction and mandatory injunction, as prayed for?OPP

3. Whether the suit is not legally maintainable in the present form?OPD.

4. Whether the plaintiffs have no locus standi to file the present suit?OPD.

5. Whether the plaintiffs have no cause of action to sue the defendants? OPD.

6. Whether the plaintiffs are estopped by their act and conduct from bringing the present suit? OPD.

7. Whether this Court has no jurisdiction to try the present suit?OPD.

8. Whether the plaintiffs have not come to the court with clean hands and have suppressed material facts, as alleged, if so, its effect? OPD.

9. Whether the suit of the plaintiffs is bad for non joiner of necessary parties? OPD.

10. Whether the suit of the plaintiffs is bad for mIs joinder of causes of action? OPD.

11. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiffs/respondents herein. In an appeal, preferred therefrom by the defendants/appellants, before the learned First Appellate Court, the latter Court dismissed the appeal and affirmed the findings recorded by the learned trial Court.

7. Now the defendants/appellants herein, have instituted the instant Regular Second Appeal before this Court wherein, they assail the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission , this Court, admitted the appeal instituted by the defendants/appellants against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether both the Courts have committed grave error of law and jurisdiction in not appreciating that the rights of easement as claimed by the plaintiffs over the suit land, lacked proper pleadings and proof and also that such suit was incompetent for right of passage by easement of prescription and necessity together? Have not courts below acted in erroneous and perverse manner in not taking into consideration the bare provisions of Easement Act?

b) Whether both the courts have misdirected themselves in not relying on the latest revenue entries which have presumption of truth attached to them, which is considered would have entailed in dismissal of the suit?

Substantial questions of Law No.1 and 2.

8. Upon suit khasra number 415, the plaintiffs' averred right of its user, as a passage, by them, for theirs reaching the bazar, (i) whereas in the defendants erecting an iron gate upon the aforesaid passage, hence are espoused in the plaint, to unlawfully forbid the plaintiffs from using the aforesaid path, (ii) hence, the plaintiffs claimed rendition of a decree, for permanent prohibitory injunction, for restraining the defendants, from, preventing them from using passage delineated, as, ABCD in the site plan, appended with the plaint, (iii) also claimed a decree for mandatory injunction being pronounced vis-a-vis the defendants, for the latter demolishing the iron gate erected by them, upon, the passage delineated, as ABCD in the site plan, appended with the plaint.

9. The defendants instituted a written statement to the plaint, wherein, they espoused (i) of the propagation, of, the plaintiffs of theirs holding since times immemorial, a right of easement, upon, the suit path recorded in the revenue record as “shre-aam-rasta” being unacceptable, (ii) given theirs holding apposite access(es) from a route alternative thereto. However, with reflections occurring, in Ex.P3/A, Ex.P-1 and P4/A, of suit khasra number being reflected therein as “shre-aam-rasta”, hence, the plaintiffs' claim for its apposite user is lawful,

dehors theirs holding alternative thereto accesses to reach the bazar. Consequently, the plaintiffs' suit for user of path borne in suit kahsra No.415, is properly constituted, even if, they purportedly apart from the suit khasra number, hold, an alternative path, for reaching the bazar.

10. Be that as it may, the plaintiffs' were entailed with a dire legal necessity, to prove (i) that the reflections borne in Ex.P1, proven by PW-1, wherein the dimensions of the recorded suit "Share-aam-rasta", are embodied, (ii) also wherein he elucidates the points of commencement and termination of the suit "path" borne, on suit kahsra No.415, (iii) standing prepared by PW-1, with his evidently in contemporaneity of its preparation, holding, the relevant settlement map/aks musabi; (iv) his borrowing the dimensions, of the path reflected in Ex.P-1, from, the relevant apt aks musabi/settlement map, (v) whereafter, his proceeding to relay the aforesaid dimensions borrowed by him from the Aks Musabi, onto the lands, apposite vis-a-vis the lands borne in suit khasra No.415. (vi) whereupon, Ex.P-1, would be formidably concluded to appertain to the suit path. For making the aforesaid discernments, an allusion to the testification, of PW-1 is imperative, (vii) wherein he is unable to articulate, of, his at the time of his preparing Ex. P-1, his carrying the apt aks musabi/settlement map, (viii) obviously hence he has also been unable to communicate therein, of, his therefrom making borrowing(s), of, the dimensions of suit kahsra No.415, whereafter, he relayed them onto the ground/land apposite vis-a-vis suit khasra number. In aftermath, lack of the aforesaid articulations in the testification of PW-1, who prepared Ex.P-1, contrarily constrain a conclusion of (ix) PW-1 imprecisely and conjecturally preparing EX.P-1; (x) the reflections borne in Ex.P-1 being amenable to a construction of theirs bearing no linkage nor holding any connectivity with suit kahsra No.415. Consequently, for lack of efficacious proof being lent qua Ex.P-1 carrying precise linkage with suit kahsra No. 415, rendered any imputation of credence thereon, to be wholly insagacious. Apart therefrom any reliance imputed vis-a-vis Ex. P-3, exhibit whereof is the report of the Local Commissioner, who, therein has made alike inapt communication(s) vis-a-vis those rendered by PW-1 also hence for alike infirmities gripping Ex.P-1, proven by PW-1, also thereupon renders, Ex. P-3 to be not carrying any probative vigour, (xi) for thereupon making any firm conclusion, of, the plaintiffs proving qua thereupon, theirs, firmly establishing, of, the defendants by purportedly erecting an iron gate upon suit kahsra number, theirs hence impeding or forbidding the plaintiffs from using it as a path, for enabling theirs accessing to bazar, (xii) nor it can be concluded that by theirs purportedly erecting an iron gate upon the suit khasra numbers, theirs precluding its user by the plaintiffs. Consequently, the decree for permanent prohibitory injunction as well as for mandatory injunction was not pronounceable against the defendants as inaptly done by both the learned Courts below.

11. Since, the best documentary evidence, adduced by the plaintiffs, for proving the averments borne in the plaint, is, for all the reasons aforestated, hence, infirm, thereupon, oral evidence, if any, adduced by the plaintiffs, is, neither a befitting substitute thereto nor is a befitting piece, of evidence, for enabling the plaintiffs, to contend that their suit claim, stands formidably proven.

12. During the pendency of the instant appeal before this Court, the counsel, for the defendants/appellants herein, has instituted before this Court, an application bearing CMP No. 423 of 2009, application whereof, is cast under the provisions of Order 41, Rule 27 of the CPC , wherein they seek the leave of this Court, to adduce on record, a verdict pronounced by the learned Financial Commissioner, wherein, he has affirmed, the findings recorded by the Revenue Officer concerned, qua the dimensions of old khasra No.930, wherefrom suit khasra No.415, was carved, being untenably increased from four marlas, to about 15 marlas. Since, this Court for all the reasons recorded hereinabove, has pronounced that the plaintiffs' endeavour, to prove their suit claim, vis-a-vis the suit khasra number, being founded, upon infirm evidence, (i) thereupon, this Court deems it fit, to, not afford any relief vis-a-vis the defendants/applicants, vis-a-vis adduction into evidence, of the order pronounced by the learned Financial Commissioner, (ii) given its adduction being neither just nor essential for deciding the controversy. Preeminently also any occasion for granting the apposite leave, to the defendants/applicants, would arise, only when the Local Commissioner concerned and PW-1, had carried, valid demarcation(s) of the suit kahsra number, whereupon the effects thereof would stand denuded by the order rendered by the

Financial Commissioner, (iii) whereas, when this Court hereinabove concludes, of, the aforesaid apt pieces of documentary evidence prepared by PW-1 and by the Local Commissioner concerned, being infirm nor theirs carrying any evidentiary worth, (iv) thereupon, it is also befitting to decline the apposite leave, to the defendants/applicants. Accordingly, both the substantial questions of law, are answered in favour of the appellants and against the respondents.

13. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as well as by the learned trial Court are not based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court have excluded germane and apposite material from consideration.

14. In view of the above discussion, the instant appeal is allowed and the impugned judgments and decrees rendered by both the learned Courts below are set aside. Consequently, the suit of the plaintiffs is dismissed. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back.

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

Gian Chand & others .....Appellants/Plaintiffs.
Versus
Kailasho Devi & Ors. .....Respondents/Defendants.

RSA No. 494 of 2004.
Reserved on : 17.11.2017.
Decided on:23rd November, 2017.

Specific Relief Act, 1963- Section 39- Permanent Prohibitory Injunction- Plaintiffs assail the agreement entered into Civil Suit No. 136-I/1986 titled as Mangtu Versus Jai Devi saying that neither they were party to and nor they authorized anyone to enter the said agreement and same is, as such, illegal, null and void- they claimed themselves to be tenants alongwith defendants No.13 to 15 under defendants No.1 to 12 except defendant No.6, a widow and further claimed that they have matured their title- **Held**, that plaintiffs have not challenged the judgment, wherein, the agreement/compromise in question had been entered- they could not have challenged the compromise only without assailing the judgment, so relief is not competent. (Para-7 to 9)

Code of Civil Procedure, 1908- Order 6 Rule 17- Plaintiffs sought to amend the pleadings to incorporate the relief of challenging the impugned judgment- **Held**, that in view of proviso appended under Order 6 Rule 17 CPC- amendment cannot be allowed as plaintiffs were aware of the judgment in question, brought by them on record in the beginning of the suit- they have not exercised due diligence - no grounds for interference- appeal dismissed. (Para-10 to 11)

For the Appellants: Mr. Rajneesh K. Lal, Advocate vice to Mr. Sanjeev Sood, Advocate.

For Respondents No.1 to and 10 to 17: Mr. R.K. Sharma, Senior Advocate with Ms. Anita Parmar, Advocate.
Other respondents already proceeded against ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs' suit for rendition of a decree of permanent prohibitory injunction restraining from causing any interference over the suit land, was, under concurrent pronouncements recorded thereon by both the learned Courts below, hence, dismissed.

2. Briefly stated the facts of the case are that the plaintiff filed a suit for permanent prohibitory injunction against the defendants claiming that the land comprised in Khata No. 3, Khatauni No.4, Khasra No.711, measuring 9 marlas, Khata No.10, Khatauni No.8, khasra No.713, measuring 9 marlas, Khata No.10, Khatauni No.11, Khasra No.712, measuring 16 marlas, total measuring 3 K-5M, as per jamabandi for the year 1985-86, situated in Tika Lag, Mauza Mewa, Tehsil Bhoranj and District Hamirpur, H.P., is shown to be in possession of the plaintiffs and the defendants No.13 to 15. The plaintiffs and defendants No.13 to 15 were tenants over the suit land and were cultivating the same. They are in possession and lateron proprietary rights were confirmed upon the plaintiffs and defendants No. 13 to 15, in respect of the suit land along with other land of which they were tenants under the defendants No.1 to 12, except the share of widow Jai Devi, defendant No.6. Defendant No.1 to 12 are threatening to take forcible possession of the suit land by showing that there was a compromise between Jagdish Chand and defendants No.1 to 12 on 23.2.1988. The plaintiffs and defendants no.13, 15 and 16 have never entered into an agreement nor they authorised any body to enter in to such agreement and the said agreement/compromise is illegal, null and void. The alleged compromise/agreement in Civil Suit No.137/1 of 1986, titled as Mangatu vs. Jai Devi is illegal, null and void.

3. The defendants contested the suit, however, they have failed to file written statement to the plaint despite several opportunities standing granted to them, hence, the learned trial Court under an order recorded on 17.12.1996, closed their right to file written statement to the plaint.

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

1. Whether the plaintiffs are entitled to the relief of permanent prohibitory injunction? OPP.

2. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiffs/appellants herein. In an appeal, preferred therefrom by the plaintiffs/appellants before the learned First Appellate Court, the latter Court dismissed the appeal and affirmed the findings recorded by the learned trial Court.

6. Now the plaintiffs/appellants herein, have instituted the instant Regular Second Appeal before this Court wherein they assail the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. The instant appeal stand admitted, on 4.9.2017, on the hereinafter extracted substantial questions of law:-

a) Whether in the facts and circumstances of the case, the compromise judgment and decree Exts. P-13 and P-14 were liable to be set aside being not lawful when admittedly, at the time of alleged relinquishment, the plaintiffs/appellants were tenants and defendants No.13, 15 and 16 were tenants in possession of the property and relinquishment could not be made in favour of the landlord?

b) Whether the suit of the plaintiff was within limitation when admittedly, the appellants were in possession of the property and suit was brought when cloud was cast on the title by the defendants seeking to interfere with their possession?

c) Whether the findings recorded are perverse based on misreading of documents, judgment and decree Exts. P13 and P-14 and the statement of

the plaintiff and the inferences drawn are not warranted on the material on record?

Substantial questions of Law No.1 to 3.

7. Previous suit bearing C.S. No. 137 of 1986, was on anvil, of the statement(s), of the contesting parties hence decreed. The judgment pronounced by the learned Senior Sub Judge, Hamirpur upon Civil Suit No. 137-I/1986 bears Ext. P-13, decree rendered in pursuance thereto is borne in Ex. P-14. The suit land embodied, in the previous suit, is, uncontrovertedly congruous vis-a-vis the suit land in the extant suit. In the previous suit, one of the co-plaintiff herein, namely, Roshan Lal was arrayed as co-defendant No.12. Prem Dass and Gain Chand, respectively arrayed as co-plaintiffs No. 2 and 1, in the extant suit, were, also arrayed therein as co-defendants No.13 and 14. Hence, the conclusive verdicts recorded, in the previous suit, borne in Ex. P-13 and Ex. P-14 are enforceable besides binding upon them. Since Mangatu was arrayed in the previous suit as co-plaintiff No.1 along with one Jagdish Chand, arrayed herein as co-plaintiff No.2, hence, with hereat co-plaintiffs No. 4 to 8, deriving an interest in the extant suit, purportedly through Mangatu, thereupon, they are bound, by the conclusive rendition recorded in Ex.P-13 and in Ex.P-14. One Purkha, co-plaintiff No.9 herein, was, arrayed in the previous suit as co-defendant No.10, whereas, one Bhura, co-defendant No.15 in the extant suit, was, arrayed in the previous suit as co-defendant No.9, thereupon, the affinity(ies) occurring inter se the contesting parties in the previous suit vis-a-vis the extant suit, render the previous rendition(s) to be binding besides enforceable vis-a-vis them. Nanak Chand and Nikka, who are respectively arrayed as co-defendants No.12 and 13 in the extant suit, were, respectively arrayed in the previous suit as co-defendants No.7 and 11, hence, they are also bound by the previously recorded conclusive verdict borne in Ex.P-13 and Ex.P14. Onkar Chand and Om Sagar, respectively arrayed as co-defendants No.4 and 5 in the extant suit, were respectively arrayed in the previous suit, as, co-defendants No. 4 and 5, hence, they are also bound by the conclusive verdict recorded in previous suit, borne in Ex. P-13 and P-14. Moreover with Biasan Devi, Rohit Kumar, Vikas, Amriti and Taran, being respectively arrayed hereat as co-defendants Nos. 9(a), 9(b), 9(c) and co-defendants No.10 and 11, AND claim interest(s) in the extant suit khasra numbers, in the capacity of theirs, respectively being the widow, sons and daughters of deceased Sarwan Kumar, who was arrayed in the previous suit as defendant No.3, hence render themselves to be bound by the judgment and decree recorded in the previous suit. Similarly, Satya Devi, Santosh, daughters of Mauzi Ram only arrayed hereat, respectively as co-defendants No. 2 and 3, as also, Thakur Dass arrayed hereat as co-defendant No.7, like wise Kailsho Devi, who stood impleaded as co-defendant No.1 in the extant suit, AND was arrayed in the previous suit as co-defendant No.6, besides Jai Devi, arrayed as co defendant No.6 in the extant suit, was arrayed as defendant No.1 in the earlier suit. Since, the aforesaid, claim an interest in the extant suit khasra numbers, in the capacity of theirs being respectively the daughters of Mouzi Ram as also widow and son of Brahmu, besides when the interest of the aforesaid, in the previous litigation, stood respectively either personally represented or through their respective apposite predecessors-in-interest, hence they are also bound by the previously recorded verdicts borne in Ex.P-13 and P-14. Consequently, with, in the afore referred manner analogity occurring inter se the suit khasra numbers borne in the extant suit vis-a-vis the previous suit, as also with, visible congruity occurring inter se the contesting parties hereat vis-a-vis the contesting parties in the previous suit, (i) thereupon, hence the judgement and decree pronounced in the previous suit bearing Civil Suit No. 136-I/1986, is , inter se binding upon the alike contesting parties hereat vis-a-vis alike contesting parties therein besides is binding upon the respective successors-in-interest of litigants in the previous suit, latter whereof's interest vis-a-vis the suit property herein bearing similarity vis-a-vis the suit property therein, stood earlier represented by their respective predecessors-in-interest, hence the previous judgment and decree, is rendered enforceable upon all the litigants hereat.

8. With conclusivity being fastened vis-a-vis the previous rendition(s), thereupon, the plaintiffs' espousal, in the extant suit, (I) of, no lawful valid agreement being entered vis-a-vis the suit property borne therein nor the previous litigants besides their respective predecessors-

in-interest holding the apposite authorization(s), for the relevant purpose, (ii) thereupon, hence the previous rendition(s), being vitiated cannot be accepted, for reversing the binding and conclusive verdicts, rendered upon the previous suit bearing C.S. No. 136-1/1986, verdicts whereof are comprised in Ex.P-13 and in Ex.P-14. Preeminently, also the aforesaid plea, was, to be firmly rested upon firm evidentiary material, wherefrom evincings spurred, of, (iii) despite, theirs at the time of institution of the previous suit besides at the stage of its consummation, hence theirs holding an independent valid indefeasible interest in the suit property, (iv) yet the respective predecessors-in-interest of the apposite contestants in the extant suit, willfully abandoning theirs being arrayed as part(ies) in the previous suit, (v) whereupon their interests in the previous suit property, were earlier not properly watched. However, evidence in support of the aforesaid factum remains, not, adduced by the contestants. Consequently, previous renditions embodied in Ex.P-13 and in Ex.P-14, AND as rendered upon the previous suit, wherein, some of the contestants therein are common vis-a-vis the contestants herein, also when visibly some of the contestants herein, were in the previous suit, represented by their respective predecessors-in-interest, latter whereof were therein either arrayed in the array of co-plaintiffs or in the array of co-defendants, (vi) thereupon, the earlier verdict(s) pronounced upon alike contestants therein vis-a-vis the contestants hereat, also the previous verdict(s) pronounced upon the predecessors-in-interest of the apposite contestants hereat, latters' interest in the analogous suit property, was, earlier watched by their predecessors-in-interest, (viii) are binding besides enforceable upon all the apposite successors-in-interest AND upon all alike contestants therein vis-a-vis contestants hereat. Preeminence vis-a-vis the aforesaid inference is galvanized from the suit property therein being alike vis-a-vis the suit property hereat.

9. The aforesaid conclusion formed by this Court, though may not render, it, imperative upon the plaintiffs, to also make a specific claim for setting aside the pronouncement, borne in Ex.P-13 and in Ex.P-14. (i) Nonetheless, failure(s), of the plaintiff, to make a challenge vis-a-vis the judgment and decrees recorded in the previous suit, rather theirs making challenge, to the purported compromise, compromise whereof, though, has been referred in the previous suit, yet scribed compromise whereof, remains unadduced on record, (ii) thereupon, any relief in respect of setting aside, of any purported compromise, entered, in the previous suit, would also not beget any further relief from this Court, for quashing and setting aside the previous judgment and decree, respectively borne in Ex. P-13 and Ex.P 14, the latter exhibits remaining unimpugned in the extant suit. Preeminently, also when the snag in pleadings qua the aforesaid fact, would, forbid any according of relief qua it.

10. During the pendency of the instant appeal before this Court, the plaintiffs/appellants herein instituted an application, bearing CMP No. 1061 of 2004, application whereof is cast under the provisions of Order 6, Rule 17 of the CPC, provisions whereof read as under:-

> **"17. Amendment of Pleadings.-** the Court may at any stage at the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:
>
> Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

Through the aforesaid application, the plaintiffs/appellants herein, concert to cure the effect of all infirmities besides omission(s) on their part, to, make a challenge upon the judgement(s) and decree(s) pronounced, in previous suit bearing C.S. No. 136-I/1986, pronouncements whereof are respectively borne in Ex.P-13 and in Ex.P14. Even, though, the aforesaid amendment, may be necessary, for conclusively putting to rest, the entire gamut of the controversy engaging the parties to the lis besides for removing the apposite snags, (i) yet with the proviso, occurring

underneath Order 6, Rule 17 of the CPC casting an interdiction upon Courts of law, against according, of, the apposite leave, to the litigant concerned, concerting to beget amendment(s) in the apposite pleadings, (ii) if evidence comes forth, qua despite exercise of due diligence, the facts, for whose incorporation, in the apposite pleadings, the leave of the Court is sought, (iii) were yet discoverable at the earliest or at the stage contemporaneous vis-a-vis the institution of the suit. Bearing in mind the aforesaid principle of law encapsulated in the proviso appended underneath Order 6, Rule 17 of the CPC, hence, when even, if the aforesaid leave to the plaintiff may be affordable, it being just and essential, for firmly resting the controversy, engaging the parties, nonetheless with (iv) the instant suit standing instituted on 6.11.1991, (v) also during the course of trial thereof, adduction of Ex.P13 and Ex.P14, hence, occurring, at the instance of the plaintiffs; (vi) hence with the plaintiffs, during, the course of trial of the instant suit, before the learned trial Court, hence acquiring knowledge qua rendition(s), comprised in Ex. P-13 and Ex. P-14, (vii) yet theirs failing, to, at the earliest, seek leave of the Court to make apt amendments in the relief clause of the plaint, especially in consonance therewith, (v) renders the mandate of the statutory interdiction to hence stand attracted against the plaintiffs whereupon, this Court is constrained to decline leave, vis-a-vis the plaintiffs, for theirs begetting the espoused amendments in the plaint. Accordingly, CMP No. 1061 of 2004 is dismissed.

11. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as well as by the learned trial Court are based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court have not excluded germane and apposite material from consideration. Accordingly, all the substantial questions of law are answered in favour of the respondents and against the appellants.

12. In view of the above discussion, the instant appeal is dismissed and 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.

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

Smt. Jayoti Kumari Sharma .....Appellant.
Versus
Sh. Shashi Pal .....Respondent.

FAO No. 256 of 2012.
Reserved on : 06.11.2017.
Decided on : 23rd November, 2017.

Hindu Marriage Act, 1955- Section 13- Nullity of Marriage and Divorce- Respondent wife has illicit relation with one 'A'- she was caught alone in matrimonial home with 'A' twice and could not explain the presence of latter- respondent used to pick up quarrels with petitioner and his parents- she did not visit her ailing mother –in- law in the IGMC despite the fact that she was working there as staff nurse- she filed false case against petitioner and his parents under Sections 498-A and 323 of IPC, in consequence of which they were arrested- **Held** relying upon the judgment of the Supreme Court in ***Samar Ghosh versus Jaya Ghosh, (2007)4 SCC 511*** that comprehensive appraisal of the entire matrimonial life of the parties needs to be made and marriage shall be deemed to have irretrievably broken down, if owing to the acute mental pain, agony and sufferings, the parties cannot be expected to live with each other at all- **Further held** that evidence on record clearly shows that marriage of the parties is fully covered in the parameters of the aforementioned authority and, as such, annulment of their marital status is

necessary in given circumstances- Court below has rightly annulled the marriage- petition stands dismissed. (Para-8 to 10)

Case referred:
Samar Ghosh versus Jaya Ghosh, (2007)4 SCC 511

For the Appellant: Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.
For the Respondent : Mr. Ramakant Sharma, Senior Advocate with Mr. Basant Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed against the pronouncement recorded by the learned District Judge, Shimla, on 07.06.2012 in H.M.A. Petition No. 23-S/3 of 2010, whereby, he dissolved the marital ties inter se the appellant herein with the respondent herein.

2. The brief facts of the case are that the respondent (hereinafter called as the petitioner) was married to the appellant (hereinafter called as the respondent) on 02.05.2005, according to the Hindu rites and ceremonies at in village Karen (Sundernagar-Mandi). Thereafter, parties lived as husband and wife. The petitioner had been working in Vidhan Sabha Secretariat. He stood allotted government accommodation, Set No.5, Metropole annexe. At the time of her marriage, the respondent had been working as staff nurse in Fortis Hospital, Mohali. The petitioner had got the respondent employed on contract and she stood posted in Civil Hospital, Jogindernagar in January, 2006. In may, 2006, the petitioner had got the respondent transferred to Shimla and she had started working in IGMC, Shimla. The petitioner has averred that the respondent had treated him with cruelty. The conduct of the respondent from very beginning had been nagging, dominating and far from satisfactory. The petitioner had been tolerating cruelty meted out to him with a view to carry on his marriage. The respondent had been picking up quarrel with the petitioner and his parents over petty matters. The parents of the petitioner had been suffering from various ailments requiring time-to-time medical check up. Hence, the parents of the petitioner had been residing with him. The respondent had opposed the residing of her father-in-law and mother-in-law with her. At occasions, the respondent had manhandled the petitioner. When asked to improve her conduct, the respondent had threatened to commit suicide. The petitioner had been compelled to report against the respondent to the local police on 10.11.2006. The respondent had been getting salary of Rs.13,500/- per month. As against this, the petitioner had been in receipt of salary of Rs.12,737/- per month. The petitioner had been contributing to GPF, GIS and his carry home salary had been Rs.5000/- per month. The respondent had been snatching salary of the petitioner and had not been contributing in any way for maintenance and upkeep of the household. The respondent had given birth to one male issue on 6.2.2008. It is averred that after some time of marriage, the respondent had developed intimacy with one Ajay Negi. It so happened that in the month of March, 2007, the petitioner had returned to his house earlier than his usual time and had found Sh. Ajay Negi present in his house. The petitioner had interrogated the respondent about the presence of a stranger with her. Instead of admitting her fault, the respondent had started quarrelling with the petitioner. In the month of April, 2007, the petitioner had left ofr his village, but could not board the bus and had returned to his house only to find Sh. Ajay Negi at his house at about 8.00 p.m. The respondent had ot been able to give any satisfactory explanation of presence of stranger with her. On 8.4.2007, the petitioner's mother had visited him in connection with her medical treatment. The respondent had picked up a quarrel with her mother-in-law. The ailmentof the petitioner's mother had got complicated and she required immediate medical aid. The petitioner had been compelled to take his mother to I.G.M.C. The respondent though employed in IGMC yet did not visit her mother-in-law and had started

proclaiming her good health. On 3.9.2007, the respondent had picked up a quarreled with the petitioner. She had caused injury on the finger of the petitioner with blade. The respondent had reported crime under Sections 498-A, 323 IPC against the petitioner vide FIR No. 237/07, Police Station, Sadar. The petitioner had been arrested by the police on 4.9.2007 and had been released on bail on 5.9.2007. Parents of the petitioner had also been arrested in false case registered by the respondent. The petitioner avers that his marriage with the respondent had completely broken down. The respondent had treated the petitioner with cruelty and, hence the petition for dissolution of marriage.

3. The petition for divorce instituted by the petitioner herein before the learned District Judge, Shimla, stood contested by the respondent, by hers instituting a reply thereto, wherein, she controverted all the allegations constituted against her in the apposite petition. She has denied that she had ever treated the petitioner with cruelty. She has also denied that she was extremely violent in nature and has an errant behaviour. It is averred that the conduct of the respondent had not been nagging, dominating or in any way objectionable to the petitioner. The petitioner wanted to wriggle out of his marriage on false grounds. The respondent had given birth to one son out of her union with her husband on 6.2.2008. The petitioner had refused and neglected the maintenance of the respondent and her child. The respondent had been compelled to apply for maintenance for her son against the petitioner. The respondent had been treated with cruelty and she had rightly reported crime under Sections 498-A, 323 of the IPC against the petitioner tot he local police on 3.9.2007. The petitioner had been withdrawing from the society of the respondent without any rhyme and reason. He had been occasionally visiting his residence in Metropole annexe. The respondent had nothing to do with Ajay Negi. The petitioner was not entitled to dissolution of his marriage on the ground of cruelty.

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

1. Whether the respondent has treated the petitioner with cruelty? OPP

2. Whether the respondent has developed intimacy with one Sh. Ajay Negi, as alleged? OPP.

3. Relief.

5. On an appraisal of evidence adduced before the learned District Judge, the latter allowed the apposite petition.

6. In the Hindu Marriage Petition, the petitioner concerted, to establish (i) of his legally wedded wife encumbering him with cruelty, whereupon, he made a further endeavour to beget dissolution of his marital ties with her. The mental cruelty (ies) ascribed by the petitioner vis-a-vis his wife, is grooved in hers being indifferent vis-a-vis his parents also hers misbehaving with the petitioner's parents. He avers in his petition that upon his mother visiting Shimla, on 8.4.2007, for obtaining treatment at IGMC, Shimla, for alleviating her heart problem, his spouse quarreling besides assaulting her, sequeling befallment of a heart attack upon her, leading to hers being admitted at IGMC, Shimla. He avers that, one, Chiranji Lal Sharma, neighbour of the petitioner, had accompanied him, to IGMC, Shimla, whereat he admitted his mother. However, he avers that the respondent remained indifferent, to the hospitalization of his mother AND never visited her, at the aforesaid hospital. The petitioner avers in the petition, that, his spouse lodged a false report in Police Station, Sadar Shimla on 3.9.2007, embodying therein offences constituted under Sections 498-A, 323 of the IPC. Furthermore, the petitioner avers, of, his spouse subsequent to theirs contracting marriage, hence developing intimacy with one Ajay Negi, latter whereof, being, in the month of March, 2007, also in the month of April, 2007, hence noticed by him, to be in his homestead in the company of his spouse. He proceeds to aver that, upon, his detecting the aforesaid Ajay Negi, in the company of his spouse, at his homestead, thereupon, the aforesaid Ajay Negi, fleeing therefrom (ii) also on his taking exception(s) qua his presence in his homestead, also his confronting therewith, his spouse, begetting the sequel of his spouse quarreling besides physically manhandling him. The lodging of the FIR against the

petitioner and his parents by the respondent/appellant herein, at Police Station Sadar, Shimla, constituting therein offences under Sections 498-A and 323 of the IPC, remains uncontroverted. Also Ex. PY-2, exhibit whereof, is a verdict pronounced by the learned Judicial Magistrate 1st Class (IV), Shimla, upon case No. 30-2 of 2011/07, unveils, of the learned trial Court pronouncing an order of acquittal upon the charges levelled against the petitioner and his parents. The aforesaid order has attained conclusivity. The effect of a binding and conclusive verdict being pronounced by the learned Judicial Magistrate 1st Class, Shimla, whereby, he acquitted the petitioner and his parents, for, charges constituted under Section 498-A and 323 of the IPC, (iii) is, of thereupon, the respondent/appellant herein by levelling false allegations against the petitioner besides his parents, hence , entailing the petitioner's psyche with severe mental agony, consequence whereof, is of the appellant herein/respondent besetting grave mental cruelty upon the petitioner/respondent herein.

7. Furthermore, the averred unwanted besides undesirable visits, of, one Ajay Negi to the homestead, of the petitioner/respondent herein and his being thereat found in the company of the appellant herein/respondent, thereupon too, a severe mental torture standing encumbered, upon, the respondent herein, stand(s) testified by the petitioner/respondent herein. Jayoti Kumari Sharma, the appellant herein/respondent, during, the course of her cross-examination, (i) whereat she stood confronted, with the aforesaid visits of Ajay Negi, to the petitioner's homestead, (ii) also upon hers being suggested, of, hers holding intimacy with him, rather took to deny the aforesaid suggestions, (iii) yet with hers acquiescing, to a further suggestion put to her by the counsel for the respondent herein/petitioner, of, the latter confronting her qua the nature of hers holding a relationship with him also hers acquiescing to a suggestion put to her, of his protesting against his visiting her, at his homestead, rather fosters an inference of (iv) any prior thereto denial, of, Jayoti Kumari Sharma of hers being unacquainted with Ajay Negi being ridden with falsity; (v) thereupon, hers stealthily camouflaging the nature of the relationship, she held with one Ajay Negi; (vi) corollary whereof, is, of her husband for want of a tangible sound explication being purveyed by his spouse, in respect of her relationship with one Ajay Negi, his being left with a sufficient room to suspect the nature of her relationship with Ajay Negi, (vi) thereupon, his mind being beset with mental turmoil also with concomitant cruelty.

8. Be that as it may, the aforesaid inferences, do, with aplomb constrain this Court, of Sashi Pal, husband of Jayoti Kumari Sharma, by adducing cogent evidence, his efficaciously discharging the onus cast upon him qua the issue appertaining, to his spouse encumbering him with mental cruelty. It is averred in the petition, of, the marital estrangement inter se him and his spouse, commencing in the month of September, 2007, whereafter, theirs living separately, since then upto now; (i) whereupon, he contends that their prolonged separation (ii) or their marital estrangement, (iii) begetting the inference of their marital ties being irretrievably broken down, thereupon, its dissolution, being warranted, as aptly done by the learned District Judge, Shimla. The appositely proven legal para meters, for making apt conclusion(s) with respect, to irretrievable break down of marriage and refusal(s) to severe it, by an apposite decree being rendered, aggravating the agonies of the martial parties, are, encapsulated in a verdict of the Hon'ble Apex Court reported in a caste titled as ***Samar Ghosh versus Jaya Ghosh, (2007)4 SCC 511,*** the relevant paragraph No.101 whereof stands extracted hereinafter:-

> "101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.
>
> (i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.
>
> (ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot

reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty." (pp.546-547)

9. Jayoti Sharma, the legally wedded spouse, of Shashi Pal Sharma, is averred in the apposite petition, to, on 20.03.2010, forcibly occupying the official quarters allotted, to her husband. In respect thereto, her husband rendered, a testification. (i) The testification, in respect thereto, rendered by one Shashi Pal , would not be sufficient, for its being construable to carry any probative worth, for, clinching affirmative findings qua the aforesaid facet, (ii) especially with Jayoti Sharma, his spouse, during, the course of hers being subjected to cross-examination by her husband's counsel, denying the apt suggestion, of, hers occupying the official quarters allotted to her husband, (iii) also hence would render frail the aforesaid rendered testification of her husband. However, when she, in her testification, embodied in her examination-in-chief, (iv)

makes a disclosure, of, hers staying at the official quarters allotted to her husband, rather does foster an inference of her husband proving the factum of hers staying thereat besides his also proving of his staying elsewhere, whereupon, the immediately prior thereto drawn inference hence wane(s). However, even if, Jayoti Sharma is staying at the official quarters allotted to her husband, it would not ipso facto, render a firm conclusion, of her husband, not, thereat staying along with her. Nonetheless, with the respondent, in her, reply to the apposite petition, contending of her husband withdrawing himself, from her society and his only paying occasional visits to her at the quarters allotted to him at Metropole, Shimla, (v) rather firmly rests, a clinching conclusion, of Jayoti Sharma acquiescing to the factum of prolonged martial estrangement(s) inter se her vis-a-vis her husband commencing since 3.09.2007 AND lasting upto now. The inordinate prolonged bittered estrangement inter se the parties at contest, does, in consonance with the afore extracted apt portion of the verdict(s), recorded by the Hon'ble Apex Court, beget an inference, of, their marital ties being irretrievably broken down, severance whereof being hence an utmost legal necessity. Furthermore, with the averments borne, in the petition, of the petitioner's spouse being indifferent vis-a-vis his parents also hers not carrying any shred of emotion, whereas, for its survival, an institution of marriage is enjoined to be anvilled upon martial affection(s) AND good will, (vi) contrarily, with emotions inter se them being evidently demolished, predominantly apparent, from, upon the petitioner's mother suffering a heart attack on 8.4.2007, whereupon, she stood admitted at IGMC, Shimla, whereto she was carried by the petitioner and by one Shri Chiranji Lal Sharma, whereat the petitioner's spouse evidently omitted to visit her, factum whereof is testified by the petitioner besides is testified by Chiranji Lal Sharma. (vii) Moreover, with testifications qua the aforesaid facet, rendered conjointly by Shashi Pal Sharma and by one Chiranji Lal Sharma, remaining unerodded of their probative vigour, despite, theirs standing subjected to an ordeal of rigorous cross-examination, by the counsel for the appellant herein, begets an inference of the (viii) aforesaid conclusion(s), being in tandem with the verdict recorded by the Hon'ble Apex Court in Samar Ghosh's case (supra),(ix) also when the aforesaid Shashi Pal led cogent evidence in proof, of his marital ties with his legally wedded spouse, being emotionally starved besides nowat being emotionally barren, thereupon, also all the aforesaid proven facts, fall squarely in consonance with the apposite legal parameters, borne in Smar Ghosh's case (supra), for thereupon constraining this Court, to annul their marital tie(s), it being irretrievably broken down.

10. The learned Senior Counsel appearing, for the appellant herein, has drawn the attention of this Court, to the averment borne in paragraph 3, of the apposite petition, embodying the fact, of, both martial partners, cohabiting as husband and wife, at Shimla, also a male issue being born out of their wedlock on 6th February, 2008, (i) whereupon, he contends, of the averments borne in paragraph 10 of the petition, of, since 3.9.2007, upto now both the marital partners living apart, being ipso facto rendered spurious. The mere factum, of a male child being born to the marital partners, on, 6th February, 2008, would not constrain, this Court to accept the aforesaid submission, as the timing of the birth of male child (ii) is beyond the time of theirs permanently alienating themselves from their respective marital status(es), (iii) rather upon 9 months being counted in reverse therefrom, is, the apt recoknable time for imputing veracity, to the averment existing in the petition, of since September 2007, both the married partners living apart. Upon counting in reverse 9 months from 6.2.2008, thereupon, the spouse of one Shashi Pal Sharma, hence is to be concluded to conceive some few months prior to September, 2007. Thereupon, this Court is enabled to firmly conclude, that, despite a male child being born subsequent thereto, to the spouse of Shashi Pal Sharma, his birth thereat, not negating the aforesaid inference, of, his spouse Jayoti Shama alienating herself from his company since the month of September, 2007 and the alienation(s) continuing upto now..

11. This Court with vigour besides with utmost fortified vigour, is coaxed to conclude that the relevant parameters, encapsulated, in the aforesaid extracted paragraphs of the verdict rendered by the Hon'ble Apex Court in Samar Ghosh's case (supra), standing invincibly satiated, by Shashi Pal Sharma, thereupon, the further concomitant sequel is of this Court being

further enabled to conclude, of the marital ties inter se the parties at contest, being irretrievably broken down, also to conclude of annulment of their marital status(es) being an utmost necessity.

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

13. 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.

Raj Kumar .....Petitioner/Accused.

Versus

Himachal Pradesh State Co-operative Marketing and Consumers Federation Ltd, Shimla and others .....Respondents.

Criminal Revision No. 410 of 2015
Reserved on: 14.11.2017
Date of Decision : 23rd November, 2017

Negotiable Instruments Act, 1881- Section 138- Accused had issued a cheque for a sum of Rs.21,65,072/- as purchase price of liquor supplied by the respondent- the cheque was dishonoured due to insufficient funds- accused was tried and convicted by the Trial Court- appeal filed in Appellate Court was dismissed- **Held**- that contention of the accused that complaint has not been filed by a competent persons stands rebutted from the resolution of the respondent federation lying on record - other requirements of Section 138 of NI Act have been fully complied with – there is presumption under Section 139 of NI Act regarding cheque having been issued for consideration- accused had not rebutted the presumption- Trial Court has rightly convicted the accused- appeal is rightly dismissed- revision stands dismissed. (Para-9 to 11)

For the Petitioner: Mr. Sanjeev Suri, Advocate
For the Respondents No.1 & 2: Mr. Neeraj Gupta, Advocate
For Respondent No.3: Mr. Vivek Singh Attri, Addl. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant criminal revision is directed against the impugned judgment rendered by the learned Additional Sessions Judge-I, Solan, H.P, on 11.8.2015 in Cr. Appeal No. 03-S/10 of 2012, whereby, the latter affirmed the findings of conviction recorded by the learned Judicial Magistrate 1st Class, Kasuali, Court No.II, District Solan, H.P. in Criminal Complaint No. 99/3 of 2007/02. However, it reduced the sentence of imprisonment from two years to nine months, yet the sentence with respect to imposition of fine, by the learned trial Court was affirmed by the learned Addl. Sessions Jude.

2. Brief facts of the case are that in the year 2001-02, the petitioner/accused approached the respondents for supplying liquor on credit basis to him. On the basis of request so made, the respondents supplied liquor to the application of the value of Rs.21,65,072/- only. To discharge the aforesaid liability, the appellant issued cheque dated 21st September, 2002 in a

sum of Rs.21,65,072/- drawn against his account maintained with State Bank of Patiala, Branch Solan, District Solan, H.P. in favour of the complainant. The complainant(s) presented the aforementioned cheque with their banker namely Punjab National Bank, Parwanoo, within the period of its validity for collection of amount. However, the banker of the appellant vide its memo dated 26.9.2002, returned the cheque to their banker and thereby it was informed that due to insufficient funds in the account of the appellant, the cheque could not be honoured. The banker vide its memo dated 1.10.2002 returned the cheque as well as the aforementioned memo and thereby he was apprised of the aforementioned factual position. On receipt of the aforementioned information, the complainant(s) served upon the accused/petitioner a legal notice dated 10.10.2002, sent by way of registered letters and under postal certificate and thereby he was apprised of the factum of dishonouring of the cheque by his banker and he was further called upon to make the cheque payment within the stipulated period. The registered letter sent on his home address was returned with remarks that appellant was out of station, whereas, notice sent on the address of Solan, was returned with remarks that the appellant had left the aforementioned address without his further address of contact. However, the notice sent vide UPC did not receive back and as such was presumed to have been served upon him in due course of time. In view of the nature of the reports made, the service was deemed to have been effected upon him. The accused/petitioner failed to pay the cheque amount within the stipulated period. Hence the complaint.

3. The learned trial Magistrate after taking cognizance of the offence punishable under Section 138 of the Negotiable Instructions Act, 1881 (hereinafter referred to as the Act), put notice of accusation to him, for his committing an offence punishable under Section 138 of the Act to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the complainant(s) examined one witness. On closure of complainants evidence, the statement of the accused, under Section 313 of the Code of Criminal Procedure, was recorded, in which he pleaded innocence and no evidence was led in defence by him.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the accused/appellant. In an appeal preferred therefrom by the accused/petitioner, before the learned Additional Sessions Judge, the latter affirmed the findings of conviction recorded by the learned trial Court. However, it reduced the sentence of imprisonment, from, two years to 9 months, whereas, the sentence in respect of imposition of fine, was maintained and affirmed by it.

6. The accused/petitioner is aggrieved by the judgment of conviction recorded by the learned trial Court and affirmed by the learned Additional Sessions Judge. The learned defence counsel has concertedly and vigorously contended qua the findings of conviction recorded by the learned trial Court and affirmed by the learned Additional Sessions Judge, not, standing based on a proper appreciation of the evidence on record, rather, theirs being sequelled by gross mis-appreciation and non appreciation of the material on record. Hence, he contends qua the findings of conviction being reversed by this Court in the exercise of its revisional jurisdiction and theirs being replaced by findings of acquittal.

7. On the other hand, the learned counsel appearing for the complainants has with considerable force and vigour, contended qua the findings of conviction recorded by the learned trial Court and affirmed by the learned Additional Sessions Judge, standing based, on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather meriting vindication.

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

9. The learned counsel appearing, for the petitioner/accused has, upon anvil of clause (a) of Section 142 of the Act, vigorously contended, of, with evident non satiation of the statutory ingredients borne therein, thereupon, the learned Magistrate concerned was barred to

take cognizance upon the apposite complaint. Also hence, the impugned rendition is rendered vitiated. Provisions of Section 142 of the Act read as under:-

> "[142 Cognizance of offences. —Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)—
>
> (a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;
>
> (b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138:
>
> [Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.]
>
> (c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138.]"

In making the aforesaid submission, he alludes to Ex. CW1/A, the apposite dishonoured negotiable instrument, (i) pertinently, of, it being issued vis-a-vis Him Fed Bottling Plant, wherefrom, he contends that the complaint, was institutable by the Manager of Him Fed Bottling Plant, rather than by one Sh. Ramesh Bhaik, who, inaptly under Ex. CW1/B, exhibit whereof is a copy of a resolution passed by the complainant, authorising, Mr. Ramesh Bahik to present the complaint or to testify in respect of the contents borne therein, was hence bestowed with the authorisation(s), given (a) his name not occurring in Ex.CW1/A, (b) nor his being its holder in due course. However the aforesaid submission is repelled, for the reasons, (a) the learned defence counsel while holding the complainant's witness to cross-examination, his not purveying apposite suggestions to him, for, hence invalidating the apposite resolution borne in Ex. CW1/B, whereunder, the complainant authorised one Ramesh Bhaik, to, institute a complaint and also to testify in respect of the recitals borne therein; (b) no suggestion being put by the learned defence counsel to the complainants' witness that the payee of Ex.CW1/A, nomenclatured therein, as Him Fed Bottling Plant not being an ancillary or a subsidiary entity of the complainant(s), rather it being an entity distinct, from, the entity of the complainant; (c) no suggestion being put to the complainants' witness, of, the complainant(s) being, not, the holder in due course, of EX.CW1/A. Since, the aforesaid most pertinent suggestions, warranted theirs being purveyed vis-a-vis the prosecution witness, reiteratedly with also theirs holding echoings (i) of, the complainant being, not, legally construable to be the holder in due course of Ex.CW1/A, (ii) especially AND arising from, want of its holding control, over its liquor bottling plant, wherefrom the supply(ies) of liquor bottles, were made, by the complainant vis-a-vis the accused, (iii)renders the aforesaid submission to be not bedrocked upon any hard evidentiary strata. Consequently, this Court, cannot accept, the submission made by the learned counsel, appearing for the petitioner/convict, that for purported non satiation of the ingredients borne in clause (b) of Section 142 of the Act, thereupon, the learned trial Magistrate being barred to take cognizance upon the apposite complaint nor this Court hence recording any rendition in affirmation of the findings of the conviction returned upon the accused.

10. Furthermore, the learned counsel appearing for the petitioner/accused, on anvil of the provisions borne in Section 141 of the Act, provisions whereof read as under:-

> "[**141 Offences by companies**. — (1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

> Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:
>
> [Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.]
>
> (2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly."

has contended (i) that given one Raj Kumar being designated in the apposite complaint to be the proprietor/partner of M/s Thakur and Company, arrayed as co-accused No.1, with its bearing the designation, of, Thakur and Company, Wine Merchants, Hospital Road Solan, thereupon, (ii) the complainants' acquiescing qua co-accused No.1 being construable to be a "company" registered under the Companies' Act, with a further sequel of the mandate borne in sub-section (1) of Section 141 of the Act, (iii) whereupon, qua offences alleged to be committed by a "company", the complainant(s) is/are enjoined, to hold vivid reflections of one Raj Kumar arrayed as accused No.2, being responsible for the conduct and business, of, one Thakur and Company, Wine Merchants, Hospital Road Solan, (iv) whereas, the aforesaid recitals, not, finding occurrence in the apposite complaint, render it to be mis-constituted with a further sequel, of its entailing dismissal. However, the aforesaid submission is also rejected (v) given the learned counsel appearing for the petitioner/convict, not, bearing in mind the fact that in the apposite complaint, one Raj Kumar, who is arrayed therein as co-accused No.2, being reflected, as Proprietor/Partner of the Thakur and Company, Wine Merchants, Hospital Road Solan, wherefrom, (vi) it is apt to conclude, of, co-accused No.1, who, though stands designated in the apposite complaint, as, M/s Thakur and Company, Wine Merchants, Hospital Road Solan, rather hence being a partnership firm, (vii) especially with accused No.2 being reflected to be its Proprietor/Partner, nomenclaturing wherewhom, is ipso facto personificatory of it being a partnership firm, (viii) especially with accused No.1 being reflected in the apposite complaint to be Thakur and Company, thereupon, co-accused No.2 enjoined his reflection therein as its Director or Managing Director rather than its Proprietor or Partner, (ix) consequently, the reflections in the apposite complaint, of co-accused No.2, to be the Proprietor or Partner (of Thakur and Company, Wine Merchants, Hospital Road Solan, (x) constrains a conclusion of the mere description of accused No.1, as Thakur and Company, Wine Merchants, Hospital Road Solan, being not amenable to any inference, of it being construable to be a company registered under the Companies Act, nor it is sagacious to thereupon make any conclusion that hence, thereupon, the complainant(s) was/were enjoined, to, in the apposite complaint, hence, make candid recitals, of accused No.2 being responsible for the act, conduct and business of accused No.1. In aftermath, the lack of aforesaid recitals, in consonance with the statutory ingredients embedded in sub-section (1) of Section 141 of the Act, in the apposite complaint, (xi) do not render the apposite complaint being construed to be mis-constituted nor any inference is arousable qua thereupon, the verdicts pronounced thereon being vitiated. Reinforced vigour to the aforesaid inference is marshalled from the factum (xii) of no therewith best documentary evidence comprised in the registration certificate, of, accused No.1, as a Company, being adduced into evidence, by accused No.2 nor his counsel while subjecting the complainants' witness to cross-examination, making any suggestion to him, qua upon non occurrence, in the complaint, of the statutory ingredients, of the afore

extracted provisions of the Act, thereupon, it being hence mis-constituted, (xiii) preeminently also with the accused in proceedings, drawn, under Section 313 of the Cr.P.C. not therein making any echoings in tandem with the espousal(s) made herebefore, render the aforesaid espousal, being not based upon any hard evidentiary material, (xiv) predominantly also with one Raj Kumar appending his signatures, on, Ex.CW1/A, as proprietor or accused No.1.

11. The learned counsel appearing for the petitioner/convict submits, of, both the learned Courts below, inaptly drawing the statutory presumption, embodied in Section 139 of the Act, merely, on anvil of the complainant being the holder of Ex.CW1/A, whereas, the aforesaid presumption was rebuttable also stood firmly rebutted. Provisions of Section 139 of the Act read as under:-

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

He submits that their existed no evident commercial transaction inter se the complainants and the accused nor the amount borne in Ex. CW1/A, was a legally recoverable debt. In the aforesaid regard, he draws the attention of this Court, to an admission occurring in the cross-examination of CW-1, of Him Fed, not, possessing any document, in respect of its supplying liquor bottles vis-a-vis the accused. However, any reliance upon the aforesaid admission is also mis-placed, (i) especially upon its conjuctive reading with Ex.CW1/B, exhibit whereof comprises a resolution rendered by the complainants' upon CW-1, whereby, he stood authorised to prosecute the complaint, (ii) besides its reading in coagulation with the afore referred inferences, of, the complainant being holder of the cheque in due course, (iii) rather than its payee, payee whereof is Him Fed Bottling Plant, industrial unit whereof, is for reasons aforestated, a subsidiary of the complainant, rather begetting inference, of, (a) with CW-1 evidently, not, being the Manager or the Cashier/Accountant, of, the Him Fed Bottling Plant, whereover , the complainant evidently held its control, its being its subsidiary, (b) thereupon, his making any admission, of the controlling entity, of, an ancillary apt industrial unit, obviously, not, holding the relevant documents, suggestive of sale(s) of liquor bottles being made by Him Fed Bottling Plant vis-a-vis the accused hence not repelling the statutory provisions embodied in Section 139 of the Act, (c) given the befitting documentary evidence being held by the Accountant(s) or the General Manager of Him Fed Bottling Plant, an ancillary unit of the complainants, (d), wherefrom it enjoined its emanation, (e) than from the principal entity, (e) however, the accused not ensuring the adduction into evidence, of the aforesaid best documentary evidence, constrains an adverse inference against him, that upon its production, it would render unsustainable their defence. Reiteratedly, the isolated admission, occurring in the cross-examination CW-1, is insignificant, for carrying forward the submission of the learned counsel, for his hence rebutting the statutory presumption occurring in Section 139 f the Act.

12. For the foregoing reasons, I find no merit in the instant petition and it is dismissed accordingly. In sequel, the findings of conviction recorded by both the learned Courts below are affirmed and maintained. However, since the complainant has also a legal remedy, to recover the cheque amount by instituting a civil suit, against the petitioner/accused, hence, the quantum of fine amount as imposed upon the convict/accused, appears to be grossly harsh and exorbitant. Consequently, the concurrently imposed sentence of fine upon the convict, comprised in a sum of Rs.40 lacs, is modified in a sum of Rs. 5 lacs, in default whereof he shall undergo simple imprisonment, for a period of three months. However, the substantive sentence of 9 months imprisonment imposed upon the convict by the learned Addl. Sessions Judge-I, Solan is maintained and affirmed. Records be sent back forthwith.

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

Smt. Reena Devi .....Appellant.
Versus
Parmod Kumar .....Respondent.

FAO No. 433 of 2016
Reserved on : 20.11.2017.
Decided on : 23rd November, 2017.

Hindu Marriage Act, 1955- Section 13- Divorce and Dissertation by petitioner- Marriage between petitioner and respondent solemnized on 12.11.2011- respondent wife withdrew from the company of petitioner without his will and against his consent and without any reasonable cause- Trial Court annulled marriage after appreciation of the evidence on record- petitioner contracted second marriage before expiry of period of limitation for filing appeal against the verdict of trial Court- **Held**- that respondent took a false ground for justifying withdrawal from the martial company of harassment that she was ousted from the matrimonial home in the month of July, 2012- **Further held-** that it is clear from the oral evidence on record that respondent had no reasonable cause to leave the company of husband and withdrew cohabiting with respondent without his consent and against his will and, as such, deserted the petitioner and also subjected him to mental cruelty- **Further held**- relying upon ***Suman Kapur versus Sudhir Kapur, AIR 2009 SC 589*** that petitioner/respondent is entitled to compensate to the tune of Rs.1,00,000/- to meet the ends of justice in view of petitioner having contracted second marriage before expiry of period of limitation- Trial Court has rightly annulled the marriage- no merits in appeal- appeal dismissed. (Para-6 to 9)

Case referred:
Suman Kapur versus Sudhir Kapur, AIR 2009 SC 589

For the Appellant: Mr. R.K. Sharma, Senior Advocate with Mr. Mohan Singh, Advocate.
For the Respondent : Mr. Nimsh Gupta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed against the pronouncement recorded by the learned District Judge, Chamba, on 30.6.2016 in H.M.A. Petition No. 98 of 2014 whereby, he dissolved the marital ties inter se the appellant herein with the respondent herein.

2. The brief facts of the case are that the respondent (hereinafter called as the petitioner) was married to the appellant (hereinafter called as the respondent) on 12th November, 2011, according to the Hindu rites and ceremonies. Out of this wedlock no issue has been born. The respondent is working as JBT teacher and is posted at Government Primary School Bathri, whereas the petitioner is working as Senior Assistant in the office of BEO, Banikhet. After marriage their relations remained cordial for about one month and thereafter the behaviour of the respondent towards him and his family changed. She used to avoid to do house hold works. After one month of marriage, she started living in the house of her parents at village Sangrain. In the month of May 2012, she was transferred to Govt. Primary School, Bathri, their relations become more strained as the respondent started holding the petitioner responsible for her transfer. Even after the transfer, the respondent continued to live with her parents and used to travel from Balera to Bathri and from Bathri to Balera daily. He visited the parental house of respondent so many times to bring her back but she remained in his house for about ten days

and thereafter on the end of June, 2012, she left his house without any reason or cause. In July, 2012, the petitioner, his mother and other relatives tried their best to reconcile and persuaded the respondent to come back to her martrimonial house but she refused. Thereafter on 25.11.2012, his mother, uncle Om Parkash, borhter-in-law Ashwani Kumar along with Susheel Kumar, Vishwanath and Vikey Kumar again visited the house of respondent to bring her back but the respondent refused to join the society of petitioner under the influence of her parents. The respondent without any sufficient or reasonable cause and with a view to break the matrimonial relations, has withdrawn from the society of the petitioner and deserted him and deprived him from the matrimonial obligations without any just reason. He also averred that the respondent has also taken all her ornaments and other valuable articles with her.

3. The petition for divorce instituted by the petitioner before the learned District Judge, Shimla, stood contested by the respondent, by hers instituting a reply thereto, wherein, she controverted all the allegations constituted against her in the apposite petition. He has denied that her behaviour was not property, rather the petitioner is not treating her in proper manner. She is still ready to join the company of the petitioner. She has denied that the mother of the petitioner and his relative tried to reconcile the matter and she refused. Rather, the petitioner along with his associates one Vishvanath came to her school on 9.11.2012 and demanded Mangalsutra and insisted her to give divorce. She has alleged that the petitioner has made her life miserable and it was not possible for her to live with him in dignified manner. She alleged that the petitioner himself has withdrawn his petition and the allegations levelled in that reply were correct, therefore, the petition be dismissed.

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

1. Whether the respondent has deserted the petitioner for the last two years preceding the presentation of the present petition, as alleged?OPP.

2. Whether respondent has also treated the petitioner with cruelty, as alleged? OPP.

3. Whether the petition is not maintainable as alleged?OPR.

4. Relief.

5. On an appraisal of evidence adduced before the learned District Judge, the latter allowed the apposite petition.

6. Marriage inter se the petitioner and the respondent one Reena Devi was solemnized on 12.11.2011. However no issue is born from their wedlock. The petitioner sought dissolution of his marital ties with one Reena Devi, on the score of the latter (i) without his will and against his consent alienating herself from his martial company, alienation whereof commencing from June 2012 and its continuing upto now, (ii) despite repeated endeavours of the petitioner Pramod Kumar, to retrieve her to his matrimonial company, his spouse not relenting, (iii) thereupon, he avers that with his spouse without any reasonable cause also without his consent and against his wishes abandoning his company, (iv) hence, he makes a concomitant therewith averment, of, his spouse, deserting him besides encumbering his psyche with mental pain and suffering. Consequently, on the afore referred averments, he seeks dissolution of his marital ties with his spouse. In proof of the averments, cast in the apposite petition, he tendered in his examination-in-chief, his affidavit borne in Ex.PW1/A. His testimony is corroborated by PW-2 and by PW-3. The testimonies rendered by the afore referred witnesses AND comprised in their respective examinations-in-chief, do acquire an aura of solemnity, given the echoings made therein by them, holding harmony vis-a-vis the grounds reared in the Hindu Marriage Petition AND theirs being not ripped of their veracity, even during, the ordeal of theirs held to a rigorous cross-examination. Contrarily, the rebuttal evidence adduced by respondent Reena Devi, for hers belying the averments cast in the apposite petition, especially the one, of hers being ousted from her matrimonial home in the month of July, 2012 also the testimony, in consonance therewith, rendered by RW-2, is rather wanting in sanctity, given it being discardable, it being

beyond pleadings. Consequently, it is to be held (i) of respondent Reena Devi, contriving, a false ground for alienating herself from the matrimonial company of her husband, (ii) thereupon, hers holding no reasonable cause to alienate herself from the matrimonial company of her husband, (ii) rather hers without his consent and against his will not cohabiting with him. In sequel, it is held, of, Reena Devi deserting the petitioner besides encumbering him with mental cruelty.

7. At this stage, it is imperative, to, deal with the uncontroverted factum of the petitioner Pramod Kumar, in the interregnum since the rendition of an apposite verdict, upon, the Hindu Marriage Petition AND the institution of an appeal therefrom, by Reena Devi (i) besides before expiry of the prescribed period of limitation, for an appeal being filed against the verdict of learned District Judge, (ii) his contracting a marriage. For settling a firm finding upon validity thereof, a, verdict rendered by the Hon'ble Apex Court in a case titled as ***Suman Kapur versus Sudhir Kapur, AIR 2009 SC 589,*** the relevant paragraph(s) No.47 and 48 whereof stand extracted hereinafter, is of utmost relevance:-

> "47. Since, we are confirming the decree of divorce on the ground of mental cruelty as held by both the courts, i.e. the trial Court as well as by the High Court, no relief can be granted so far as the reversal of decree of the courts below is concerned. At the same time, however, in our opinion, the respondent-husband should not have re-married before the expiry of period stipulated for filling Special Leave to Appeal in this Court by the wife.
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> 48. It is true that filing of appeal under Article 136 of the Constitution is not a right of the party. It is the discretion conferred on this Court to grant leave to the applicant to file appeal in appropriate cases. But, since the Constitution allows a party to approach this Court within a period of ninety days from an order passed by the High Court, we are of the view that no precipitate action could have been taken by the respondent-husband by creating the situation of fait accompli. Considering the matter in its entirety, though we are neither allowing the appeal nor setting aside the decree of divorce granted by the trial Court and confirmed by the appellate Court in favour of respondent-husband, on the facts and in the circumstances of the case, in our opinion, ends of justice would be met if we direct the respondent-husband to pay an amount of Rs. Five lakhs to the appellant-wife. The said payment will be made on or before 31st December, 2008.
>
> (pp.599-600)

wherein, it is mandated that (i) the aforesaid errant conduct of a party vis-a-vis whom, an, affirmative verdict is pronounced upon the apposite Hindu Marriage Petition, though, warrants disapprobation also its presenting the Appellate Court with a *fait accompli, (ii)* yet the Hon'ble Apex Court, given its prior thereto validating the decree impugned before it, (iii) hence, did not pronounce upon the validity, of, the litigant concerned vis-a-vis whom the apposite affirmative decree stood pronounced, proceeding to, in the interregnum since the apposite verdict being pronounced, till an appeal being preferred therefrom also his, despite the time prescribed for filing an appeal, not expiring, hence contracting marriage, (iv) rather for the errant conduct, of the litigant concerned, the Hon'ble Apex Court awarded compensation in a sum of Rs.5 lacs, vis-a-vis the aggrieved. However, since, there is a distinctivity inter se the economic status of the parties hereat vis-a-vis the litigating parties in the aforesaid verdict rendered by the Hon'ble Apex Court, thereupon this Court deems it fit, to award vis-a-vis appellant Reena Devi, compensation of Rs.1,00,000/- (Rs. One lacs only), dehors its not invalidating the petitioner's contracting a second marriage.

8. 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 on record. While rendering the findings, the learned trial Court has not excluded germane and apposite material from consideration.

9. For the foregoing reasons, there is no merit in the instant appeal which is accordingly dismissed. The impugned judgment and decree is maintained and affirmed. However,

Pramod Kumar, respondent is directed to, within two months from today, pay a sum of Rs.1,00,000/- (Rs. One lac only) as compensation to Smt. Reena Devi. All pending applications also stand disposed of. Records be sent back forthwith.

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

Seema Kumari .....Appellant.
Versus
Pradeep Kumar & others ....Respondents.

FAO No. 372 of 2008.
Reserved on : 15.11.2017.
Decided on : 23rd November, 2017.

Hindu Marriage Act, 1955- Section 13- Nullity of marriage and divorce- Premarital illicit relation of wife- ten weeks old pregnancy from respondent No.3 at the time of marriage- the records maintained in the Hospital qua hospitalization of the respondent wife after 15 days of the marriage where from it was revealed that wife had ten weeks old pregnancy- Learned Trial Court allowed the petition of divorce- the contention that hospital record does not bear signatures of the wife and as such same does not connect with the respondent wife is rejected- wife had herself admitted that she had terminated her pregnancy at Ghanahatti and failed to disclose the specific time when she conceived- wife also did not adduce any medical evidence to prove that she had conceived after cohabiting with petitioner only- Trial Court has rightly annulled the marriage- no merits in appeal- appeal dismissed. (Para-8 to 10)

For the Appellant: Mr. B.B. Vaid, Advocate.
For the Respondents : Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed against the pronouncement recorded by the learned Addl. District Judge, Shimla, on 24.04.2008 in H.M.A. Petition No. 2-S/3 of 2006 whereby, he declared the marriage inter se the appellant herein, with one Pradeep Kumar respondent No.1 herein to be a nullity. Being aggrieved therefrom, the appellant herein has instituted the instant appeal before this Court, for hers hence begetting its reversal.

2. The brief facts of the case are that the appellant (hereinafter called as the respondent) was married to respondent No.1, Pradeep Kumar, (hereinafter called as the petitioner) on 010th October, 2005, according to the Hindu rites and ceremonies at Kathgarh in District Nawanshahar, Punjab. Respondent No.2 is father of respondent No.1, while respondent No.3 was the middle man in the marriage. After the marriage, the parties to the marriage started living at Ghanahati. On 23rd October, Seema Kumari complained of some pain in abdomen. Smt. Jagiro Devi, the grandmother of the petitioner, who is a midwife, examined her and expressed a view such pain was on account of pregnancy. She further advised that Seema Kumari be taken to hospital for medical examination. Seema Kumari was taken to Deen Dayal Upadhya, Hospital, Shimla, where the doctor found her to be carrying 10 weeks pregnancy. The petitioner was stunned at this revelation as he had married to Seema Kumari only 15 days back. When she was brought back from the hospital, she revealed that she was having illicit relations with one Sabi son of Kashmiri Lal, respondent No.3. A meeting was then held on 26.10.2005. Respondent No.2, his wife and respondent NO.3 visited the house of the petitioner. The incident was narrated

to them. Besides the petitioner, his wife, grand mother, many other relatives were present. IN presence of all, Seema Kumari disclosed that she had premarital illicit relations with Sabi and she had conceived through him. Respondent No.2 and his wife stayed back, while other relatives dispersed. They stayed for another two days and during this period tried to pursued the petitioner to keep Seem Kumari, as his wife, to which the petitioner did not agree. Seema Kumari then left the petitioner's house along with her parents on 28.10.2005. The petitioner had not knowledge that Seema Kumari was pregnant by some other persona at the time of marriage. Hence the petition.

3. The petition for divorce instituted by the petitioner herein before the learned Additional District Judge, Shimla, stood contested by respondents, by theirs instituting a reply thereto, wherein, the marriage inter se the parties admitted. It ws denied that the petitioner ever complained of any pain in abdomen or that she was examined by grandmother of the petitioner. It was also denied that she was taken to the hospital or that the doctor found that she was pregnant. She also denied that she revealed to the petitioner that she was having sexual relations before marriage with Sabi. She also denied that any Panchayat in the presence of the relatives from both sides was held. She denied that she left the petitioner's house on 26.10.2005. On the other hand, it is pleaded that, Seema Kumari lived in the house of the petitioner till 28.10.2005, on which day she was compelled to leave the house of the petitioner. It was also denied that Seema Kumar was pregnant at the time of marriage. However, it is pleaded that after the marriage, she became pregnant, but the petitioner and his family members got the pregnancy terminated at Ganahatti.

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

1. Whether respondent No.1 was pregnant at the time of solemnization of her marriage on 10.10.2005 with petitioner? OPP

2. Whether the petition has not been filed properly in view of the forms verified?

3. Whether the petition has not been filed in accordance with Hindu Marriage Act, as alleged? OPR.

4. Relief.

5. On an appraisal of evidence adduced before the learned District Judge, the latter allowed the apposite petition.

6. In proof of Seema Kumari, appellant herein, prior to hers solemnizing marriage with one Pradeep Kumar, the petitioner, (i) hers hence carrying a 2 ½ months pregnancy, the petitioner relied upon Ex.PW4/A, exhibit whereof is prepared by one Dr. Beant Singh, who, however, being not alive, at the apposite stage of its tendering(s) into evidence, (ii) thereupon, for proving it, one Dr. Ramesh Kumar, stepped into the witnesses, given his being well conversant with the signatures and handwritings of Dr. Beant Singh. (iii) Abstract of OPD register, borne in Ex.PW4/B, has also been in an alike manner proven by PW-4 Dr. Ramesh Kumar. The learned Additional District Judge, Shimla, construed them, to be credible, hence, concluded that the ground reared, in the petition, by the petitioner, of his spouse one Seema Kumari carrying, at the time of hers solemnizing with him, 2 ½ months' pregnancy, being hence proven. Thereupon, obviously, he concluded, of, with the aforesaid trite factum being withheld besides suppressed by one Seema Kumari vis-a-vis Pradeep Kumar, the petitioner, hence, the marriage solemnised inter se both, being construable to be a nullity.

7. The learned counsel appearing for the appellant has contended with vigour, that placings of reliance upon the aforesaid exhibits being neither proper nor apt, as thereon, do not exist the signatures of one Seema Kumari, hence rendering her to be delinked from the aforesaid exhibits, besides (i) the concomitant conclusion formed by the learned Additional District Judge, Shimla, that hence the petitioner proving the espoused ground, of Seema Kumari, at the time of

hers solemnizing marriage with him, hers carrying 2 ½ months' pregnancy, being also an erroneous inference.

8. A reading of the aforesaid exhibits, does unveil, of, though the name of one Seema Kumari, finding occurrence therein, (i) yet evidently her signature(s), do not exist, upon either of the aforesaid exhibits, (ii) yet the non existence, of the signatures, of one Seema Kumari, upon the aforesaid exhibits, does not, constrain an inference, of, the identity of Seema Kumari remaining unconnected therewith. The reason, for forming the aforesaid conclusion, is nursed, (iii) from the fact of the petitioner's witnesses, testifying, in unison, of, on 25.10.2005, the petitioner, his father Surat Ram and his daughter-in-law, Kamlesh Devi, carrying Seema, to Deen Dayal Upadhya, Hospital Shimla, for hers being medically examined thereat AND of hers standing thereat examined, by one Dr. Beant Singh. The consistently rendered testifications, by PWs qua the aforesaid fact AND as comprised in their respective examinations-in-chief, were, concerted to be shred of their efficacy, by the counsel for Seema Kumari, by his holding them to a rigorous cross-examination, yet when in course thereof, each of the petitioner's witnesses remained unscathed, consequently, their testifications qua the aforesaid fact, hence gather credence. Furthermore, the petitioner's witnesses, in their respective examinations-in-chief, consistently deposed, of all the respondents and others visiting Shimla, on, 26.10.2005 AND thereat inter se confabulations, amongst all concerned, occurring at the house of the petitioner, (iv) whereat, elicitations being concerted to be made, from Seema Devi, qua the person from whom she conceived, in sequel, whereto she disclosed the name, of, one Sabi son of Kashmiri. The afore rendered testifications, borne, in the respective examinations-in-chief, of the petitioner's witnesses, were also concerted to be shred of their tenacity, by the counsel, for Seema Kumari, by his holding them to cross-examination, yet in course whereof, no elicitations emanated, for hence undermining the vigour of the afore referred testifications, occurring their respective examinations-in-chief, hence, the aforesaid testifications acquire credence.

9. Be that as it may, even if assumingly, the aforestated consistent testification(s) rendered qua the afore referred facts, do not carry any credence, nonetheless, the effort of Seema Devi, to delink her identity, from, the one borne in Ex.PW4/A and Ex.PW4/B, is per se illusory, (i) given an admission occurring in her testification, borne, in her cross-examination, of the foetus carried in her womb, being aborted, at Ganahati, whereafter, she has not been able to disclose, with certainty qua whether the abortion occurring in the year 2005 or in the year 2006. The effect of the aforesaid admission occurring in the cross-examination of RW-1 AND her want, to with specificity make a disclosure, of, the foetus carried in her womb, being, conceived prior to or subsequent to hers solemnising marriage with the petitioner, Pradeep Kumar, renders open an inference of, hers, hence wavering qua the specific time, whereat she conceived. In case, she had in her testification, assigned the precise and specific time, whereat she conceived also the time of her conception, specifically appertaining only, to the stage when she could be construed to conceive only from her wedlock, with one Pradeep Kumar, thereupon her marriage with Pradeep Kumar was not amenable to dissolution. Whereas, her vague nebulous statement qua the aforesaid factum besides hers not, adducing any medical record, personifying that in sequel, to, hers cohabiting with one Pradeep Kumar, hers hence conceiving, rather constrains a conclusion that hence the aforesaid admission(s), linking her identity with Ex.PW4 and with Ex.PW4/B, dehors her signatures being not appended thereon.

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 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.

State of H.P. & another .....Appellants.
Versus
Bhagat Ram .....Respondent.

RFA No. 1 of 2009 along with RFA No. 2 of 2009, 3 of 2009, 4 of 2009 and 5 of 2009.
Reserved on : 10.11.2017.
Date of Decision:23rd November, 2017.

Land Acquisition Act, 1894- Section 18- Held - that lands of which sale deeds are considered for determining the market value of the lands sought to be acquired must have proximity in time to the issuance of necessary notification for the acquisition of the concerned land and must also have proximity in the location vis-à-vis the lands brought under acquisition- further held that Learned Reference Court has rightly appreciated the evidence on record- no merits in appeal- appeal dismissed. (Para-3 to 5)

For the Appellant(s): Mr. R.S. Thakur, Addl. A.G.
For the respondent(s): Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

All these appeals are being disposed of by a common judgment, given theirs arising from a common Award rendered by the learned Addl. District Judge-II, Kangra at Dharamshala, in reference petitions respectively instituted before him, by the landowners, under Section 18 of the Land Acquisition Act, 1894 (hereinafter referred as the Act), whereby, they assailed the award(s) rendered by the Land Acquisition Collector concerned.

2. The relevant para meters, for, making a valid determination of the market value(s), of, the lands brought to acquisition, are, discernable from the apposite sale deeds, satisfying the twin legal canons (i) of proximity in time angle inter se their execution vis-a-vis the issuance of the apposite notification, and; (ii) proximity in location angle inter se the land(s) borne in the relevant sale exemplar(s) vis-a-vis the lands brought to acquisition.

3. The learned Reference Court, had, in determining compensation amount vis-a-vis the land(s) brought to acquisition, placed reliance upon Ex.PW1/A. Consequently, it is to be determined, whether imputation of reliance thereon, was valid or not, validity of reliance thereon, is to be gauged, from the factum, of, the petitioners' satiating the twin legal para meters (i) of execution of Ex.PW3/A occurring in contemporaneity vis-a-vis the issuance of the apposite notification. For determining whether the aforesaid principle, of law, begets satiation, an allusion to the trite factum, of, the apposite notification being issued on 10.10.1995, whereas, Ex.PW3/A, standing executing prior thereto, though hence obviously renders Ex. PW3/A to be a pre-notification sale exemplar; (ii) yet with its execution occurring prior to the issuance of the apposite notification, whereas only in years subsequent thereto besides with passage of time increase(s) in the market value occurring, may thereupon, render it to be, hence, satisfying parameter, of, its execution holding a close contemporaneity vis-a-vis the apposite notification. (iii) It may hence satiate the parameter of its execution holding proximity in time angle vis-a-vis the apposite notification. Nonetheless, the other parameter, for, facilitating, imputation of firm reliance, upon, Ex.PW3/A is comprised in its also satisfying, the other para meter of proximity in location angle, arising from lands borne therein, evidently occurring in close proximity vis-a-vis the lands brought to acquisition. However, with PW-3, who tendered into evidence Ex.PW3/A, underscoring, in his examination-in-chief, of, the lands borne therein, being located remotely

from the national highway, whereas, the land(s) brought to acquisition being located in proximity thereto, (iv) hence fillips an inference, of, the market value of lands borne therein, may be, being reckonable for determining just and fair compensation vis-a-vis the land(s) brought to acquisition, given (a) land(s) borne therein, standing, located improximately from the national highway, for construction whereof the lands of the landowners were brought to acquisition, latter lands whereof, rather occur in proximity thereto; (b) the remoteness of location of lands borne in Ex.PW3/A, from the National Highway, in proximity whereof rather the acquired lands occur, would render the market value of land(s) embodied therein, to be holding a lesser market value vis-a-vis the lands brought to acquisition, (c) given the latter lands, being testified by PW-3 in his examination-in-chief, to be occurring in proximity vis-a-vis the national highway, whereat, reiteratedly obviously, they would rear a higher market value, than the market value reared by land(s) borne in Ex.PW3/A, given theirs being located remotely from the national highway. Consequently, Ex.PW3/A also satiates the further legal parameter, of, the lands borne therein being, for the aforesaid reasons, constituting an apt reckonable indice, for determining compensation with respect, to the land(s) brought to acquisition.

4. What adds acceleration to the aforesaid inference, is, grooved in the fact, of, despite the aforesaid underscorings, occurring in the testification of PW-3, comprised, in his examination-in-chief, yet theirs being not concerted to be belittled, of their efficacy, by the learned District Attorney, by his adducing cogent evidence, (i) thereupon, the afore occurring testification is enjoined to be imputed solemnity. Moreover, with PW-3, in his cross-examination negativing the suggestion put to him by the learned DA, that given the imminence of acquisition of lands borne in Ex.PW3/A, the sale consideration(s) in respect thereto being rigged, (ii) for hence capatalizing an apt therewith inference, rather renders open an inference that (a) the land(s) brought to acquisition, fetching, a higher price, given its occurrence, in proximity to the national highway, than the land(s) borne in Ex.PW3/A, necessarily even when it has not been shown, that any sale exemplar appertaining to the mohal concerned occurred, in the relevant year, (i) thereupon, the mere factum of lands borne in Ex.PW3/A being located in a Mohal, distinct from the mohal whereat the lands brought to acquisition, are located, may not be significant, for not placing reliance thereon. Predominantly also, with the State of H.P. while relying upon Ex.RW2/A, sale exemplar whereof, appertains to the mohal, whereat, the lands brought to acquisition, stand located, hence constraining this Court, to place reliance thereon, yet their endeavour is frustrated, (iii) by the factum of RW-2, not, proving the factum of the land(s) borne therein, occurring in close proximity vis-a-vis the lands brought to acquisition, (iv) nor any firm documentary evidence is adduced by the State of H.P., that, the lands comprised therein stand located in the vicinity of the lands brought to acquisition, (v) hence reliance thereon being imperative, than reliance upon Ex.PW3/A. In aftermath disimputation of reliance by the learned Reference Court vis-a-vis Ex. RW2/A, is apt, whereas, its placing reliance upon Ex.PW3/A, for, determining just and fair compensation vis-a-vis the lands of the landowners brought to acquisition, is, both apt as well as tenable.

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

6 In view of above discussion, there is no merit in the present appeals and they are dismissed accordingly. In sequel, the impugned common award rendered by the learned Reference Court is affirmed and maintained. 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.

Vijay Kumar and others .....Appellants.
Versus
State of H.P. ....Respondent.

Cr. Appeal No. 243 of 2006.
Reserved on : 15th November, 2017.
Date of Decision: 23rd November, 2017.

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act,1989- Section 3(1)(v)- Indian Penal Code, 1860- Section 457- Accused persons harassed the complainant for his being from scheduled caste and forcibly dispossessed him from the shop in his possession owned by the accused persons- **Held**- that failure of the complainant to mention the names of the witnesses in the FIR who apprised him about the incident of dispossession, which had definitely not taken place in his presence and also failure to mention the material facts of the complaint in his pleadings of the civil suit pertaining to same incident created doubt about the correctness of his allegations- thus, prosecution has failed to prove charges against accused persons- conviction set aside- appeal allowed. (Para-12 to 14)

For the Appellants: Mr. Ajay Kumar, Senior Advocate with Mr. Dheeraj Vashist, Advocate.
For the Respondent: Mr. Vivek Singh Attri, Addl. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed against the judgment rendered on 29.07.2006 by the learned Sessions Judge, Hamirpur, H.P. in Sessions trial No.11 of 2005, whereby, the learned trial Judge convicted accused Vijay Kumar and accused Saneh Lata for theirs committing offences punishable under Section 3(1)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, and under Section 457 of the IPC, whereas, he convicted accused Kishori Lal and accused Husan Kumar for theirs committing an offence punishable under Section 457 of the IPC. Consequently, accused Vijay Kumar and accused Saneh Lata are sentenced to undergo rigorous imprisonment for a period of two years each and to pay a fine of Rs.8000/- each, for commission of an offence punishable under Section 3(1)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. In default of payment of fine, they were sentenced to undergo simple imprisonment for a period of one year each. Further accused Vijay Kumar, Saneh Lata, Kishori Lal and Husan Kumar are sentenced to undergo rigorous imprisonment, for a period of three years each and to pay a fine of Rs.10,000/- each, for theirs committing an offence punishable under Section 457 of the IPC. In default of payment of fine amount, all the convicts are further sentenced to undergo simple imprisonment for a period of one year each. All the sentences were ordered to run concurrently.

2. Briefly stated the facts of the case are that complainant Om Parkash moved a complaint to the Superintendent of Police, Hamirpur, H.P. to initiate criminal proceedings against the accused persons disclosing therein that he is a member of scheduled caste and was running a shop of photography at Nadaun in a rented shop, shop whereof owned by accused Saneh Lata, since 1984 on payment of rent of Rs.300/- per month. On 13.9.2003, he received a letter from accused Vijay Kumar, wherein, he was addressed by his caste and threatened that the shop in question would be got vacated. Sensing some foul play, he rushed to the court and filed a suit for injunction against Vijay Kumar and Saneh Lata. In the said suit, they were directed by the court not to dispossess him from the shop forcibly. On 19.9.2003, summons of the aforesaid civil suit

were duly served upon Vijay Kumar and Saneh Lata, but on the same night, at about 1.30 a.m., accused Vijay Kumar tried to break the lock of the shop, but PW-1, receiving information of the said illegal design, rang up to PW-17 Sh. Mandan Lal, the then Dy. S.P, and requested him to do something to protect his property. On instructions of PW-17, the police of P.S. Nadaun, visited the shop in question, however, accused Vijay Kumar along with 5-6 persons ran away from the site. ON 20.9.20-03, he moved an application qua the said incident in Police Station, Nadaun, but no action was taken by the police against the accused persons. On 21.9.2003, the shop in question was opened by him only for some time, because of Sunday, but at about 9.00 pm, when he was away from his shop at his residence, he came to know that accused Vijay Kumar and Saneh Lata along with 8-10 persons, including accused Kashmiri Lal and Husan Kumar, in connivance with each other broke the lock and threw his belongings on the road. He rushed to the police station and lodged the report. On the instructions of Station House Officer the then MHC started reducing his statement in writing but when he disclosed that Rs.13,000/- in cash and two video Cameras, two Cameras and Cameras of still photography were missing and his forcible dispossession amounted to atrocities on scheduled castes, the SHO, Hari Paul Saini instructed the MHC not to record FIR and refused to register the case. The SHO asked him to visit the police station on the following day and report the matter to Dy. S.P., Hamirpur, who would visit the police station, but on the following day, Dy. S.P. did not visit the police station. The local police including SHO, Hari Paul Saini were hand in gloves with accused Vijay Kumar and Saneh Lata and with their connivance, the accused committed the said offences and on the basis of said averments, the complainant prayed for action. The S.P. vide endorsement Ex.PW17/A referred the said complaint to PW-17 Dy. S.P., Headquarter to personally enquire into the matter and report. PW-17 Madan Lal accordingly enquired into the matter and submitted his report Ex.PW17/B. Vide his inquiry report, PW-17 found that accused Vijay Kumar and accused Saneh Lata harassed PW-1 on the basis of scheduled caste and forcibly dispossessed him therefrom the shop. On the basis of said inquiry report, the Superintendent of Police vide order dated 22.1.2003, ordered the registration of the FIR in Police Station, Nadaun and after such registration of the case directed Mohinder Singh, Dy. S.P. , Sub Division Barsar to carry investigation of the case, as a result of which FIR Ex.pw1/L of 22.10.2003 came to be recorded in Police Station, Nadaun and investigation ensued.

3. On conclusion of investigation(s), into the offence(s), 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. Accused Vijay Kumar and accused Saneh Lata, stood charged by the learned trial Court, for theirs committing offences punishable under Sections 3(1)(v) and 3(2)(v) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act and Sections 457, 380 and 427 of the IPC read with Section 34 of the IPC, whereas, accused Kashmiri Lal and accused Husan Kumar stood charged, by the learned trial Court, for theirs committing offences punishable under Sections 457, 380 and 427 of the IPC read with Section 34 of the IPC. In proof of its case, the prosecution examined 17 witnesses. On conclusion of recording of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the learned trial Court, wherein, they claimed innocence and pleaded false implication in the case. In their defence, the accused examined three witnesses besides placed reliance upon various documents.

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

6. The appellants/convicts stand aggrieved by the judgment of conviction recorded against him by the learned trial Court. The learned counsel appearing for the appellants/convicts has concertedly and vigorously contended qua the findings of conviction recorded by the learned trial Court, being not, based on a proper appreciation, by it, of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by it, of the material on record. Hence, he contends qua the findings of conviction warranting reversal by

this Court in the exercise of its appellate jurisdiction and theirs standing replaced by findings of acquittal.

7. On the other hand, the learned Additional Advocate General has with considerable force and vigour, contended qua the findings of conviction recorded by the learned trial Court 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. Uncontrovertedly, accused Saneh Lata inducted complainant Om Prakash, as a tenant in the premises owned by her, premises whereof stand located at Nadaun, District Himirpur. The induction of Om Prakash as a tenant occurred in the year 1984. The rent per mensem as contracted inter se both is comprised in a sum of Rs.300/-.

10. Apparently, each of the accused are respectively charged, in respect of an incident which occurred, on 21.09.2003, (i) whereat the accused are alleged, to, with theirs holding a common intention, for, unlawfully depriving, the complainant, from his evident possession of the shop in question, hence, break open its lock whereafter, they are alleged to throw his belongings onto the road. However, the occurrence of 21.09.2003, did not take place in the presence of the complainant, rather when he was away from his shop, the alleged charged occurrence took place also in respect thereto, he, obviously stood apprised by some persons. However, in the complaint, the name(s) of the person(s), who apprised him, of the alleged charged occurrence, remains unrecited. Also the names, of, those persons, who testified in court in respect, of, the offences, in respect whereof the accused stood charged, and stood convicted also reiteratedly remained visibly unmentioned in the apposite FIR borne in Ex.PW1/L. However, the learned Sessions judge, Hamirpur, did not purvey any apposite therewith leverage vis-a-vis the defence, (i) merely, on the ground, of, the FIR being not enjoined, to, embody encyclopedic details, of, the entire incident nor it being enjoined to carry, the names of all the prosecution witnesses concerned. However, the aforesaid reason assigned by the learned Sessions Judge, for irrevering the factum of the FIR, not, echoing the names of the prosecution witnesses, appears t be a specious reason given (a) even if, the learned Sessions Judge, has aptly concluded, of, the FIR being not enjoined, to disclose encyclopedic details, of the entire genesis of the occurrence also when minimal detraction(s) therefrom by the PWs concerned, are permissible, (b) yet when the recitals occurring in Ex.PW1/E, appertain to an incident of 21.09.2003, incident whereof was not personally witnessed by the complainant, rather in respect thereto, he was purveyed information by certain persons, (c) thereupon, he was enjoined, to echo in the apposite FIR, the names of all those persons, who had purveyed him information qua the offences, in respect whereof, the accused stood charged besides convicted, (d) especially when the occurrence, in, the FIR, of, names of those persons, who apprised the complainant qua the commission of the charged offences by the accused, was imperative, for (e) hence ridding the apposite recitals borne in the apposite FIR, from any infirmity, of theirs being inadmissible in evidence, theirs comprising hear say evidence, (f) also for rendering them capacitated to testify in respect thereto. Consequently, when the names of the persons, who revealed the charged incident vis-a-vis the accused remained unrecited in the apposite FIR, thereupon, the testification(s) rendered by the apposite PWs concerned, for hence lending proof vis-a-vis the charge framed against the accused, (g) is hence contrarily amenable, to, an inference of hence their testimonies being discardable, given theirs emanating from invented besides concocted witnesses, (h) rather than the learned Sessions Judge, merely, for reason, of, the FIR being not enjoined, to, disclose encyclopedic details of the genesis of the occurrence, hence imputing credence vis-a-vis their respective testimonies. In aftermath, the learned Sessions Judge, in imputing creditworthiness, to the testifications of the prosecution witnesses, whose names remained undisclosed in the FIR, garners an inference, (i) of the prosecution, merely, for untenably sustaining the charge against the accused, its fabricating evidence against the accused, (j) also thereupon the entire genesis of the prosecution version comprised in the apposite FIR, being ridden with a pervasive vice of falsity, (k) rendering its

contents to be unbelievable also rendering testifications in consonance therewith deposed by PWs to stand imbued with an alike stain.

11. The learned Sessions Judge has disimputed credence to Ex. Dx, exhibit whereof stood tendered into evidence by the accused, during the course, of proceedings, drawn under Section 313, Cr.P.C. At the time of its tendering into evidence by the accused, no, protest emanated from the prosecution, qua its adduction into evidence by the accused nor the authenticity, of the signatures of the complainant as occur thereon, stood disputed. In sequel thereto, it was imperative for the learned Sessions Judge, to, draw a conclusion, qua even if Ex. Dx, was a photo copy of the original besides when it emanated from the custody of the accused, of, (a) it being proven in accordance with law, especially when embossing of exhibition mark thereon, hence, occurred in the presence of the prosecutor concerned. (b) Moreover, disimputation of credence to Ex. Dx, despite, occurrence of unveilings therein, of, possession of the disputed premises standing delivered by the complainant, on 14.09.2003 to accused Saneh Lata, (c) whereupon, rather the allegations constituted in complaint borne in Ex. PW1/E, qua the relevant occurrence purportedly taking place subsequent thereto, whereat the complainant stood forcibly dispossessed from the shop in question by the accused, hence obviously lose their tenacity. However, the learned Sessions Judge concerned, in disimputing credence thereto, has referred to certain rent receipts comprised in Exts. PW1/F to Ex.PW1/J, for his hence, making conclusions of thereupon the recitals borne therein, of co-accused Saneh Lata waiving rent, in respect of the disputed premises, being falsified. Even if, the rent receipts are personificatory, of, rent being liquidated by the complainant vis-a-vis accused Saneh Lata, nonetheless, on anvil thereto, it was not apt, for the learned Sessions Judge concerned, to, rid the recitals borne in Ex. Dx, of their apposite truth, (i) unless evidence stood adduced by the complainant, comprised in apposite receipts appertaining from 1984 upto the date of filing of the FIR, with revelations therein, of, throughout since then upto now, his liquidating the rent vis-a-vis the suit premises. Contrarily, non adduction thereof, did not purvey any leverage, to, the learned Sessions Judge concerned, to, on anvil of only certain rent receipts appertaining to a minimal period, hence, conclude qua thereupon the recitals occurring therein, of co-accused Saneh Lata, waiving the entire rent vis-a-vis the shop in question, not warranting any imputation of credence thereon.

12. Furthermore, the factum of falsity, gripping the incident of 21.09.2003 is also borne, from, the factum of the complainant, in his suit instituted before the learned Civil Court concerned, suit whereof bears Civil Suit No.245 of 2003, making bald, uncertain and imprecise allegations, of the accused on 21.09.2003, taking forcible possession of the suit premises, (i) wherein also the complainant Om Prakash, has not, made any echoings of the aforesaid occurrence taking place, in his absence, whereas, his being apprised in respect thereto by some persons, (ii) whereas the aforesaid factum of the relevant occurrence, of 21.09.2003 taking place in his absence also his being apprised by certain persons, carries elucidation, in the apposite FIR, (iii) sequel, whereof is, of, with this Court hereinabove concluding, of, non mentioning, of the names of those persons, who witnessed the occurrence, by the complainant in the apposite FIR, rendering any testifications in respect thereto articulated by the prosecution witnesses concerned, to be infirm, when read in entwinement with non occurrence of any echoings in tandem therewith also in the apposite suit, (iii) thereupon constrains a conclusion, of, the complainant contriving, the incident of 21.09.2003, merely, for falsely implicating the accused.

13. Since, the learned Sessions Judge, has recorded finding of acquittal, upon the accused, for offences punishable under Sections 380 and 427 of the IPC, besides when the complainant, has omitted to plead in his apposite suit, of his belongings occurring inside his shop being thrown on the road nor with his therein averring of cash worth Rs.13000/- being stolen, (i) thereupon, the conclusions of acquittal, drawn, in respect thereto, by the learned Sessions Judge concerned, are rendered to be drawn aptly, (ii) also the non echoings therein of the aforesaid facts, foments an inference of their withholdings in the apposite suit, whereas theirs occurring in the apposite FIR, renders them to be construable to be a sequel of contrivance deployed by the prosecution.

14. Be that as it may, DW-1 had proven Ex.PW1/B, supurdari nama, also occurrence of his signatures thereon were hence proven by him. He has deposed qua its preparation occurring on 14.09.2003, hence, in contemporaneity to the preparation of Ex.Dx. Thereupon, both the exhibits enjoin imputation of credence, rendering open room for an inference, of the incident of 21.09.2003 being contrived AND possession of the shop in question being delivered earlier thereto by the complainant vis-a-vis accused Saneh Lata. Since, DW-1 was subjected to the ordeal of an exacting cross-examination, in course whereof DW-1 remained unscathed, thereupon, imputation of credence thereon was imperative, (i) whereas, in the learned Sessions Judge disimputing credence, to EX.PW1/B, (ii) merely, on anvil of the learned defence counsel, putting suggestions to PW-16, of its preparation occurring on 21.09.2003, has hence mis-appraised, its probative vigour, (iii) given, even if, suggestion(s) contrary, to the evident preparation of Ex.PW1/B, stood, purveyed by the learned defence counsel, while cross-examining PW-16, any suggestion in detraction thereto, did not warrant leveraging of any inference, qua hence the preparation of Ex.PW1/B evidently reflected therein, to be occurring on 21.09.2003, being hence not proven.

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

16. Consequently, the instant appeal is allowed and the impugned judgment is quashed and set aside. The accused is acquitted of the offences charged. Fine amount, if any, deposited by the accused before the learned trial Court be forthwith refunded to them. Records be sent back henceforth.

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

State of Himachal Pradesh ...Petitioner.
Versus
Kamal Thakur ...Respondent.

Cr. Revision No. 303 of 2017
Reserved on: 22.11.2017
Date of decision: 24th November, 2017.

Code of Criminal Procedure, 1973- Section 397 and 401- Revision- Juvenile Justice (Care and Protection of Children) Act, 2000 (Section 4 & 5) or Juvenile Justice (Care and Protection of Children) Act, 2015 (Section 2 and 7)- Principal Magistrate of the Juvenile Justice Board decided a matter singly - **Held** - bad in the eyes of law, the order passed by the Principal Magistrate was *coram non judis* and thus null and void; both as per the Juvenile Justice Act, 2000 or the newly Amended 2015 Act. Order of the Principal Magistrate quashed and set aside. (Para-5 to 16)

Case referred:
Hasham Abbas Sayyad vs. Usman Abbas Sayyad and others, AIR 2007 (SC) 1077

For the Petitioner Mr. Pushpinder Jaswal, Dy. A.G. with Mr. Rajat Chauhan, Law Officer.
For the Respondent Mr. Parkash Chand, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The State has assailed the order of acquittal passed by the Principal Magistrate, Juvenile Justice Board, Shimla on 29.12.2016 in Criminal Case No. 36-02 of 2015 whereby she acquitted the juvenile under Sections 454, 380 IPC.

2. Even though the judgment has been assailed on merits, however, the moot question is as to whether the Principal Magistrate while sitting singly could have finally decided/disposed of the case. The case was instituted on 7.11.2015 when the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short 'Act of 2000') was in operation.

3. Section 2 (c) defines Board in the following terms:

"(c) "Board" means a Juvenile Justice Board constituted under Section 4."

4. Section 2(l) of the Act of 2000 reads thus:

"juvenile in conflict with law" means a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence."

5. Only sub-section (2) of Section 4 is relevant for the determination of the instant lis and reads thus:

"(2). A Board shall consist of a Metropolitan Magistrate or a Judicial Magistrate of the first class, as the case may be, and two social workers of whom at least one shall be a woman, forming a Bench and every such Bench shall have the powers conferred by the Code of Criminal Procedure, 1973, on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of the first class and the Magistrate on the Board shall be designated as the Principal Magistrate."

6. Thus, it is clear that a Juvenile Justice Board is to be three members Board consisting of a Metropolitan Magistrate or a Judicial Magistrate of the first class, as the case may be, and two social workers of whom at least one shall be a woman, forming a Bench and every such Bench have been vested with the powers conferred by the Code of Criminal Procedure, on a Metropolitan Magistrate or, as the case may be, or a Judicial Magistrate of the first class and the Magistrate on the Board is to be designated as the Principal Magistrate.

7. As regards the procedure etc. to be followed by the Board, the same is provided in Section 5 and sub section (3) thereof reads as under:

"3". A Board may act notwithstanding the absence of any member of the Board, and no order made by the Board shall be invalid by reason only of the absence of any member during any stage of proceedings:

Provided that there shall be at least two members including the principal Magistrate present at the time of final disposal of the case."

8. It is not in dispute that the case was decided at the time when the Act of 2000 was repealed and the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short Act of 2015) had come into force.

9. It would be noticed that even under this Act, the Board has been defined in Section 2 (10) in the following terms:

"(10). "Board" means a Juvenile Justice Board constituted under Section 4."

10. Section 2 (13) of the Act of 2015, reads thus:

"child in conflict with law" means a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence.

11. It would further be noticed that even though there are some changes in the qualifications of the Members of the Board. However, the composition remains the same and such Board is to comprise of three Members as provided in sub-section (2) of Section 4, which reads thus:

> *"(2). A Board shall consist of a Metropolitan Magistrate or a Judicial Magistrate of First Class not being Chief Metropolitan Magistrate or Chief Judicial Magistrate (hereinafter referred to as Principal Magistrate) with at least three years experience and two social workers selected in such manner as may be prescribed, of whom at least one shall be a woman, forming a Bench and every such Bench shall have the powers conferred by the Code of Criminal Procedure, 1973, on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of First Class."*

12. Likewise, the procedure in relation to the Board has been provided under Section 7 of the Act of 2015 and sub section (3) whereof is *pari-materia* with sub section (3) of Section 5 of the Act of 2000 and reads thus:

> *"(3). A Board may act notwithstanding the absence of any member of the Board, and no order passed by the Board shall be invalid by the reason only of the absence of any member during any stage of proceedings:*
>
> *PROVIDED that there shall be atleast two members including the Principal Magistrate present at the time of final disposal of the case or in making an order under sub-section (3) of Section 18."*

13. At this stage, the Court is not going into the thicket of the controversy as to which of the Acts would govern the proceedings. However, in view of the legal provisions extracted above, it is abundantly clear that under both the Acts, the cases of "juvenile in conflict with law" and "child in conflict with law", as the case may be, can be disposed of finally only by at least two members including the Principal Magistrate present at the time of disposal of such case. No individual Member including the Principal Magistrate and no two Members excluding the Principal Magistrate can finally dispose of the case.

14. The Principal Magistrate could not have finally disposed of the case in contravention of the provisions of the Act(s) supra and, therefore, the order passed by it is *coram non judis* and being nullity is void, ab initio.

15. It is well settled and needs no authority that "*where a Court takes upon* itself to *exercise* a *jurisdiction* it has *not possessed its decision amounts* to *nothing*". Consequently, any order passed by the Court having no jurisdiction is *non est* and its invalidity can be set up when it is sought to be enforced or is acted upon as a foundation for a right, even at the stage of execution or in collateral proceedings. Any order passed by such authority is *coram non judis*.

16. This aspect of the matter has been considered by the Hon'ble Supreme Court in ***Hasham Abbas Sayyad*** vs. ***Usman Abbas Sayyad and others***, AIR 2007 (SC) 1077, wherein it was held as under:

> "[21] The core question is as to whether an order passed by a person lacking inherent jurisdiction would be a nullity. It will be so. The principles of estoppel, waiver and acquiescence or even res judicata which are procedural in nature would have no application in a case where an order has been passed by the Tribunal/Court which has no authority in that behalf. Any order passed by a court without jurisdiction would be coram non judice being a nullity, the same ordinarily should not be given effect to.
>
> [22] This aspect of the matter has recently been considered by this Court in Harshad Chiman Lal Modi V/s. DLF Universal Ltd. and Another, 2005 7 SCC 791, in the following terms :
>
> "We are unable to uphold the contention. The jurisdiction of a court may be classified into several categories. The important categories are (i)

> Territorial or local jurisdiction; (ii) Pecuniary jurisdiction; and (iii) Jurisdiction over the subject matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject matter, however, is totally distinct and stands on a different footing. Where a court has no jurisdiction over the subject matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is nullity."
>
> See also Zila Sahakari Kendrya Bank Maryadit v. Shahjadi Begum & Ors., 2006 (9) SCALE 675 and Shahbad Co-op.Sugar Mills Ltd. v. Special Secretary to Govt. of Haryana & Ors. 2006 (11) SCALE 674 para 29]
>
> [23] We may, however hasten to add that a distinction must be made between a decree passed by a court which has no territorial or pecuniary jurisdiction in the light of Sec. 21 of the Code of Civil Procedure; and a decree passed by a court having no jurisdiction in regard to the subject matter of the suit. Whereas in the former case, the appellate court may not interfere with the decree unless prejudice is shown, ordinarily the second category of the cases would be interfered with."

17. Consequently, the Criminal Revision is allowed and the impugned order passed by the Principal Magistrate, Juvenile Justice Board, Shimla on 29.12.2016 in Criminal Case No.36-02 of 2015 is *coram non judis* and is accordingly quashed and set aside. The case is remanded to the Juvenile Justice Board, Shimla for deciding the case afresh in accordance with law after hearing both the parties.

18. The parties are directed to appear before the Juvenile Justice Board, Shimla on 11.12.2017. Registry is directed to send the records of the case back to the concerned Court so as to reach well before the next date of hearing.

19. The Registrar General is directed to circulate a copy of this judgment to all the Juvenile Justice Boards in the State.

20. The appeal is disposed of in the aforesaid terms, leaving the parties to bear their own costs.

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

Mohan Lal .....Appellant
Versus
Ramesh Chand .....Respondent

RSA No. 470 of 2007
Reserved on: 15.11.2017
Decided on: 25.11.2017

Regular Second Appeal- Suit under Section 38 and 39 of the Specific Relief Act for perpetual and prohibitory injunction- Plaintiff sought a restraint order against the defendant from digging the foundations, raising construction and blocking the path in the suit land- plaintiff also sought a decree for mandatory injunction in the alternative, for restoration of the suit land to its original position- defendant inter alia averred that the suit land was Abadi deh- As per the defendant, the plaintiff was not a co-sharer in the suit land- house was being constructed on the

old foundation and there was no path in existence- The Learned Trial Court had dismissed the suit- The Learned First Appellate Court however reversed the findings and decreed the suit- hence the Regular Second Appeal- **Held**- that in case of easement by way of prescription where parties jointly owned and possessed, the suit land, being a *Deodi* (threshold or entrance to the compound), which is main entrance- no co-sharers can raise any type of construction to block the same- consequently, findings of the learned 1st Appellate Court were upheld. (Para-20)

For the appellant Mr. R.K. Sharma, Sr. Advocate with Ms. Anita Parmar, Advocate.
For the respondent : Mr. Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present regular second appeal is maintained by the appellant, who was the defendant before the learned Trial Court (hereinafter to be called as "the defendant"), laying challenge to the judgment and decree, dated 31.07.2007, passed by learned District Judge, Kangra at Dharamshala, in Civil Appeal No. 30-G/XIII/2005, whereby judgment and decree, dated 31.01.2005, passed by the learned Civil Judge (Jr. Division), Court No. 2, Dehra, District Kangra, H.P., in Civil Suit No. 137 of 2000, was set aside.

2. Briefly, the facts, which are necessary for determination and adjudication of the present appeal, are that the respondent, who was the plaintiff before the learned Trial Court (hereinafter to be called as "the plaintiff") instituted a suit against the defendant, under Sections 38 & 39 of the Specific Relief Act for perpetual and prohibitory injunction. He prayed that the defendant be restrained from digging foundations, raising construction and changing nature of the land, shown in site plan, marked ABCDEFGH and also from blocking the path, as shown in pink colour, in the site plan, comprised in Khata No. 158 min, Khatauni No. 164 min, Khasra No. 384, measuring 0-07-29 hectares, as described in the copy of Jamabandi for the year 1997-98, situated in Mohal and Mauza Kohasan, Tehsil Dehra, District Kangra, H.P. (hereinafter to the called as "the suit land"). The plaintiff has also claimed a decree for mandatory injunction, directing the defendant to restore the land to its original position by demolishing the structure, if the defendant succeeded in raising construction over the said portion of the land.

3. By filing written statement, the defendant resisted and contested the suit of the plaintiff and raised preliminary objections qua maintainability and estoppel. On merits, the defendant has admitted the suit land to be *Abadi Deh*, however he termed rest of the averments made in the plaint to be incorrect. As per the defendant, the plaintiff is not a co-sharer in the suit land nor does any path passes through the suit land. He has contended that his house is in existence over the suit land, thus he has every right to raise construction thereupon. He has further contended that the foundation of his house in the suit land has been laid down prior to the filing of the present suit, without there being any objection on the part of the plaintiff. As per the defendant, the suit land is *Abadi land*, which was old *Abadi* of the defendant, on which the new foundation has been raised by him. Lastly, the defendant prayed for dismissal of the suit.

4. The learned Trial Court on 20.12.2001 framed the following issues for determination and adjudication:

"1. Whether plaintiff is entitled for permanent injunction, as prayed for? OPP

2. Whether plaintiff is entitled for mandatory injunction, as prayed for? OPP

3. Whether plaintiff has no locus standi to file present suit? OPD

4. Whether plaintiff is estopped by his act and conduct from filing the present suit? OPD

5. Whether suit is bad for better particulars? OPD

6. Relief."

5. After deciding issues No. 1 to 5 in negative, the suit of the plaintiff was dismissed. Subsequently, the plaintiff maintained an appeal before the learned first Appellate Court, which was allowed. Hence the present regular second appeal, which was admitted for hearing on the following substantial questions of law:

"1. Whether the learned first Appellate Court has not committed grave error in completely ignoring the evidence and report of the Local Commissioner-PW-2?

2. Whether the plaintiff's suit was not liable to be dismissed as there was incomplete description of the property?"

6. Learned Senior Counsel appearing on behalf of the appellant has argued that the judgment and decree, passed by the learned first Appellate Court is perverse and without appreciating the facts, which have come on record and the same is required to be set aside. On the other hand learned Counsel for the respondent has argued that the judgment and decree, passed by the learned lower Appellate Court is as per law and needs no interference.

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

8. The plaintiff in order to prove his case, appeared in the witness box as PW-1 and placed on record *Jamabandi*, Ext. P-1, which shows that the suit land is recorded as *Abadi Deh*. He has also placed on record copy of *Sajra Nasab* for the year 1997-98, showing pedigree table. Further the plaintiff has placed on record site plan, Ext. PW-8/A, showing area ABCDEFGH, qua which the present suit has been filed. He deposed that the parties have their residential houses in the *Abadi Deh* land, which is joint. As per the plaintiff, from the *Deodi*, as shown in the site plan, there is a passage and qua this passage, the ancestors of the parties had entered into a compromise. He has deposed that besides this passage, there is no other passage to their house and if the defendant succeeds in raising his house over this passage, the passage to their house would be closed. In his cross-examination, he specifically stated that they have inherited the *Abadi 'Lal Lakir'* land of Babu Ram. However, he cannot produce any document pertaining to land inherited from his father Gian Chand. He has deposed that he purchased the suit land and *Abadi* land from Vishwanath about 6-7 years ago. He has further deposed that heirs of Babu Ram have inherited his property, however he cannot produce any document regarding their inheritance.

9. Sh. Lalit Uppal, Advocate (appointed by the Court to inspect the suit land), has appeared in witness box as PW-2 and proved on record inspection report, Ext. PW-2/A and statements of the parties and witnesses, Ext. PW-2/B, Ext PW-2/C and Ext. PW-2/D. As per inspection report, Ext. PW-2/A, construction of four rooms and fresh foundations upto two layers of stones were found at the spot. In his cross-examination, he deposed that on the foundation, no passage was found.

10. Sh. Krishan Kumar, has appeared in the witness box as PW-8 and deposed that he has prepared site plan, Ext. PW-8/A. However, he admitted that he has not shown length of the passage on the map. He has further admitted that on the vacant land, shown in the site map, there were foundations of the defendant, however he denied that in order to prejudice the case of the defendant, he has intentionally not shown the foundations in the site plan.

11. PW-3, Sh. Gurdas Ram, by filing his proof affidavit, under Section 18, Rule 4 CPC, supported the case of the plaintiff. In his cross-examination, he admitted that the plaintiff has not inherited the land from his father, however he has purchased it from Vishwanath about 6-7 years ago. He has deposed that ½ portion of the plaintiff's house falls in the *Abadi* land and ½ of it falls in the land purchased from Vishwanath. This witness has admitted that adjacent to the plaintiff's land, there is *'Gohar'*. He has further admitted that on *Abadi* land of Babu Ram,

defendant Mohan Lal is in possession and he has houses on both sides of the courtyard. He has also admitted that he and other residents of the area pass through the *'Gohar'* and then go to the plaintiff's place.

12. PW-4, Jyoti Prakash (brother of the defendant), has also supported the case of the plaintiff and in his cross-examination, he admitted that he has no share over the passage of the suit land. He has deposed that Gian Dev (father of the plaintiff) has not inherited any of the land owned by the family and Ramesh and suresh have also not inherited anything. He has admitted that he and his brother had purchased the *Abadi* and other land of Gian Dev. He has further admitted that where defendant had laid foundations, there was old house and *'Deodi'* of Babu Ram.

13. PW-5, Om Prakash (other brother of the defendant), in his cross-examination, has admitted that he is having civil litigation with the defendant. He has further admitted that his father had exchanged *Abadi* at Dehra. PW-6. Priya Vrat, in his cross-examination, deposed contrary to plaintiff's deposition and denied that Gian Dev did not inherit any land from Babu Ram and Ramesh and Suresh also did not inherit anything from their father. PW-7, Amar Nath, in his cross-examination, has admitted the right of defendant, Mohan Lal over the land, on which, he has dug up the foundations.

14. Conversely, defendant, Mohan Lal, has stepped into the witness box as DW-1 and in his cross-examination, he admitted that *'Lal Lakir'* has been inherited by Babu Ram and Jagat Ram from Kirpa Ram, but Gian Dev has not inherited any property from Babu Ram. He denied that *'Lal Lakir'* was inherited by Vishwanath from Jagat Ram, however he has stated that Vishwanath, son of Jagat Ram was also owner of Khasra No 384, i.e. the suit land. He has further denied that the plaintiff and his brother had purchased all the share of Vishwanath, including the suit land, recorded as *'Lal Lakir'*. He has also denied that there is no alternative passage to go to the house of the plaintiff, however he has stated that there is a different passage. He has further denied that in May, 2000, he dug foundations over the land from where, there is a passage leading to the house of the plaintiff.

15. DW-2, Prem Sagar, in his cross-examination, has admitted that the suit land is ancestral property of both the parties. He has further admitted that when one goes forward from *'Deodi'*, then the land, where the defendant had dug foundations comes and then there is courtyard of the defendant, then there is a house of the plaintiff, however he has stated that the plaintiff had purchased a separate passage for his house. He denied that if the defendant will raise house over the suit land, the passage to the house of the plaintiff would be closed.

16. DW-3, Prithi Chand, has deposed that at the time of digging foundations, no one has objected and at that time there was no passage from the suit land. In his cross-examination, he admitted that both plaintiff and defendant pass through *'Deodi'* to go their houses. He has further admitted that if house is raised on disputed passage, passage to the house of the plaintiff would be closed.

17. The learned trial Court has taken *Deodi* as part of the house, in fact *Deodi* is passage, which the learned trial Court has failed to appreciate and findings recorded to this effect are perverse. The plaintiff has asserted that the land shown vide letters ABCDEFGH in spot map, Ext. PW-8/A is vacant land, upon which earlier there was a *Deodi*, i.e. entrance to the houses or *Abadi*, situated in the suit land, now the *Deodi* has collapsed and through the same place, the path leads to his house. He has further asserted that the defendant has started raising construction over the same and if he continued to raise construction, it would block the path. Whereas, the defendant in his affidavit, Ext. DW-1/A and while appearing as DW-1, has deposed that the plaintiff has no concern with the land shown by letters ABCDEFGH, in the spot map, Ext. PW-8/A. He has further deposed that on the said land, there was an old house of his father Babu Ram, which has collapsed and in both sides of vacant land, there are houses.

18. In view of the entries made in the copy of *Sajra Nasab,* it has been established that Kirpa had three sons, namely Babu Ram, Jagta and Ganga Ram, whereas Gian Dev had two

sons, namely Ramesh Chand and Suresh. Defendant, Mohan Lal has admitted that Vishwanath, father of PW-6, Priyavrat, was the brother of his father Babu Ram and Vishwanath was succeeded by PW-6, Priyavrat. He has also admitted that the suit land was inherited by Babu Ram and Jyoti Ram from their father Kirpa Ram, which proves that the suit land was owned by Babu Ram and Jagat Ram. Babu Ram succeeded by his sons and Jagat Ram was succeeded by Vishwanath. From the evidence on record, it stands fully established that the suit land is joint *inter se* the parties to the suit and other co-sharers, i.e. brothers of the defendant and Vishwanath. The defendant could not prove or led any evidence that the suit land has been partitioned between the parties.

19. This Court in ***Kewal Krishan & another vs. Amrit Lal*** has enumerated the rights of co-sharers, which are as under:

> ***"(a) A co-owner/co-sharer has an interest/right in the whole property, i.e., in every inch of it.***
>
> ***(b) Possession of joint property by one co-owner/co sharer, is in the eye of law, possession of all even if all, except one are actually out of possession.***
>
> ***(c) A mere occupation of a larger portion or even of an entire joint property by one co-sharer/co-owner does not amount to ouster of the other, as the possession of one is deemed to be on behalf of all. This is subject to an exception when there is complete and conclusive ouster of a co-owner/co-sharer by another, but in order to negative the presumption of joint possession on behalf of all, on the ground of such ouster, the possession of a co-owner/co –sharer must not only be exclusive but also hostile to the knowledge of the other, i.e., when a co-owner openly asserts his own title and denies that of the other.***
>
> ***(d) Lapse of time does not extinguish the right of the co owner/co-sharer ,who has been out of possession of the joint property ,except in the event of abandonment.***
>
> ***(e) Every co-owner/co-sharer has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners /co-sharers.***
>
> ***(f) Where a co-owner/co-sharer is in possession of***
>
> ***separate parcels under an arrangement/consent by the other co-owners/co-sharer , it is not open to any co-sharer/co-owner to disturb the arrangement without the consent of others, except by way of partition.***
>
> ***(g) Whenever there is severance of title and the parties have a long possession on the parcels of joint land ,as far as possible, the partition is required to be made in a manner that party in occupation, as far as possible, be adjusted in that portion or part of that.***
>
> ***(h) Co-sharers/co-owners are expected to respect the right of others even when they are in settled possession on specific portion of the land in a manner that the easementary rights of the others are not obstructed.***
>
> ***(i) The co-sharers/co-owners are required to respect the sentiments of each other to maintain peace among themselves. This is not only a legal, but a moral duty as well, which is required to be follow ed by the co sharers/co-owners and should be recognized as a right while adjudicating the rights of the parties, as the ultimate goal of the administration of justice is to maintain peace in the society, especially among the co-sharers/co-owners.***
>
> ***(j) The eldest co-sharer/co-owner is duty bound to come forward and settle the dispute inter se any two or more co-sharers/co-owners after mediating. This is not only his duty as a co-sharer/co-owner being elder,***

but also his moral duty to spare some time, experience, mental faculties and the respect he command to mediate dispute(s) among the co sharers/co-owners in order to achieve peace. The Courts can also make use of such process by taking help from the elder co-sharer/co-owner by asking him to mediate the matter, so that the peace is achieved among the co-shares/co-owners and ultimately in the society."

20. From the evidence on record, it is clear that the plaintiff had purchased the share of *Abadi Deh* from Vishwanath and has become the joint owner of the suit land with the defendant and other co-sharers. However, the learned trial Court has taken a view that the plaintiff is claiming a path and as there is an alternative path, he cannot claim the same. However the learned first Appellate Court has rightly held that the plaintiff was not claiming path in the form of easement of necessity, but it was by way of prescription. It stands established that vacant land shown by letters ABCDEFGH is jointly owned and possessed by the parties and *Deodi* (threshold) which is main entrance, goes to the houses of all the co-sharers and no co-sharer can raise any type of construction over the suit land to block the path in question of other co-sharer in any manner. Accordingly, substantial question of law No. 1 is answered holding that the learned first Appellate Court has committed no error and the evidence on record, including the documents were properly appreciated, as it has been amply proved on record that the defendant is trying to raise construction on the Deodi. The learned first Appellate Courts has correctly appreciated the report of Local Commissioner and other evidence, as has come on record to its right perspective. Substantial question of law No. 2 is answered holding that the suit of the plaintiff was with all the necessary description of the property and he has also proved on record his case, so the findings recorded by the learned first Appellate Court are after appreciating the facts, which have come on record and the law has been applied correctly.

21. The net result of the above discussion is that the instant appeal, sans merits, deserves dismissal and is accordingly dismissed. However, in view of peculiar facts and circumstances of the case, the parties are left to bear their own costs.

22. Pending miscellaneous application(s), if any, also stand(s) disposed of.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Satyam Educational Society, Puhara and another .....Petitioners.

Vs.

State of Himachal Pradesh .....Respondent.

CWP No. 850 of 2017
Reserved on: 25.11.2017
Date of Decision: 27.11.2017

Constitution of India, 1950- Article 14 and 226- **Civil Writ Petition-** Petitioner running a Nursing College – having been refused NOC/permission to start GNM Course- grievance of the petitioner was that the cabinet had approved NOC only in case of colleges at serial No.1 and 3 for running the said course and though, its name figured at serial No.2 and was duly recommended alongwith other two by the Directorate level Evaluation Committee headed by the Director, Medical Education- still NOC not granted – writ petition filed- **Held**- policy decisions or a cabinet decisions are generally beyond the scope of judicial review but if parameters of Article 14 of the Constitution of India are infringed and decision is not backed by cogent material, or action is arbitrary, the Courts can interfere. (Para-17 and 18)

Constitution of India, 1950- Article 14- **Civil Writ Petition-** Reasoning is the sole of the decision, whether administrative, policy decision, cabinet decision or a judicial decision- reasons have to be assigned to justify its decision- absence of reasons renders the decision arbitrary and violative of Article 14 of the Constitution- on facts held that since there was no reason assigned for refusing the grant of NOC – order dated 17.2.2017 quashed and the matter was directed to place before the cabinet for re-consideration. (Para -20 to 23)

Cases referred:

Asif Hameed and others Vs. State of Jammu and Kashmir and others, 1989 Supp.(2) Supreme Court Cases 364

Union of India and others Vs. Dinesh Engineering Corporation and another, (2001) 8 Supreme Court Cases 491

State of Orissa and others Vs. Gopinath Dash and others, (2005) 13 Supreme Court Cases 495

Bhubaneswar Development Authority and another Vs. Adikanda Biswal and others, (2012) 11 Supreme Court Cases 731

Parisons Agrotech Private Limited and another Vs. Union of India and others, (2015) 9 Supreme Court Cases 657

Centre for Public Interest Litigation Vs. Union of India and others, (2016) 6 Supreme Court Cases 408

State of Himachal Pradesh and others Vs. Himachal Pradesh Nizi Vyavsayik Prishikshan Kendra Sangh, (2011) 6 Supreme Court Cases 597

For the petitioners:	Mr. R.K. Bawa, Senior Advocate, with Mr. Jeevesh Sharma, Advocate.
For the respondent:	M/s. Anup Rattan and Romesh Verma, Additional Advocate Generals, with Mr. J.K. Verma, Dy. A.G.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

By way of this writ petition, the petitioners have prayed for the following reliefs:

"(a) To set aside and quash the orders, dated 17.02.2017 as contained at Annexure P-4 supra whereby the respondent-State has not granted the NOC/permission in favour of the petitioners to start GNM course with intake of 40 seats;

(b) To direct the respondent-State to issue NOC/permission in favour of the petitioners to start GNM course with intake of 40 seats;

(c) To call for the records of the case for the kind perusal of this Hon'ble Court;

(d) Any other relief(s) as may be deemed just and proper keeping in view the facts and circumstances of this case may also kindly be granted in favour of the petitioners, in the interest of justice."

2. Petitioner No. 1, which is running a Nursing College in the name and style of *Satyam College of Nursing* at Village Lanjot, P.O. Basnoor, Tehsil Shahpur, District Kangra, applied for grant of No Objection Certificate (hereinafter referred to as "NOC")/permission to start General Nursing and Midwifery course (hereinafter referred to as "GNM Course") with an intake of 40 students. Its case was placed for consideration of Council of Ministers for issuance of NOC vide Memorandum, dated 16.02.2017, copy of which is appended at page No. 19 of the paper-book. As per the said Memorandum, details of the applicants, who were found eligible for issuance of NOC to start Nursing courses in terms of constructed area and hospital attachments, were provided in para 2.2 thereof, which reads as under:

S.N.	Name of the applicant	Constructed area (sq. ft.)		Hospitals For Attachment	Course proposed
		Earlier	After re-inspection		
1.	Batt Educational Society, Vill. Bonkhari Mod. PO Bathri, Tehsil Dalhousie, Distt. Chamba	39220	98294	Private Hospitals with 240 beds	1. GNM 40 Seats. 2. B.Sc. Nursing 40 seats
2.	Satyam College of Nursing, Lanjot, Tehsil Shahpur, Distt. Kangra.	40323	57000 sq. Ft.+ 10,000 sq. Ft. propose-d area (67,000)	Private Hospitals with 255 beds	GNM 40 seats. (The institute is functional with 40 B.Sc. Nursing seats.
3.	Swakar School/College of Nursing Sarkaghat, Distt. Mandi.	42090	+17200 sq. ft. proposed area (49290)	Already attached with Govt. Hospitals.	B.Sc. Nursing, 30 seats by reducing NOCs. of GNM and ANM from existing 40 to 30 each.

Name of the petitioner-Nursing College was duly reflected in the details of the applicants, who were so found eligible for issuance of NOC at Sr. No. 2.

3. Grievance of the petitioners is that NOC was not issued in favour of the petitioner-Institute, as is evident from Annexure P-4, dated 20.02.2017, vide which, the petitioners were communicated that in its meeting held on 17.02.2017, the Cabinet had approved NOC only in the case of Sr. No. 1 and Sr. No. 3, meaning thereby that NOC was not approved in favour of College figuring at Sr. No. 2, i.e., the petitioner-Institute. The same stands assailed by way of present writ petition, *inter alia*, on the grounds that the case of the petitioner-Institute stood recommended after its evaluation by the Directorate level Evaluation Committee headed by the Director, Medical Education, despite this, No Objection Certificate stood refused to the petitioners without assigning any reason whatsoever. As per the petitioner-Institute, it stands discriminated as far as grant of NOC is concerned, because when all three Institutes which find mention in the Memorandum were duly recommended by the appropriate authority for the issuance of NOC to the Cabinet, then the act of Cabinet of considering only the case of two, out of the three applicants and arbitrarily ignoring the case of third applicant, i.e., the present petitioners by not granting NOC in its favour, is an act of colourable exercise of powers as well as discrimination.

4. In its reply, respondent-State while refuting the allegations of the petitioner-Institute has stated that there was no merit in the contention of the petitioner, because the case of the petitioner was duly put up before the Cabinet and the Cabinet in its wisdom decided not to issue NOC to start GNM Nursing course in favour of the petitioner-Institute. Nothing has been mentioned in the reply as to why the case of the petitioners for grant of NOC did not find favour with the Cabinet.

5. In its rejoinder, the petitioners while retreating its case, as has been put forth in the petition, controverted the averments to the contrary made in the reply.

6. We have heard Mr. R.K. Bawa, learned Senior Counsel for the petitioners as well as Mr. Anup Rattan, learned Additional Advocate General on behalf of the State. The original record of the case also stands produced by the learned Additional Advocate General.

7. A perusal of the records demonstrate that Memorandum, dated 16.02.2017, was placed for consideration of the Cabinet, which was held on 17.02.2017. The Memorandum so placed before the Cabinet qua grant of NOC in favour of the applicants Nursing Institutes stood decided as under:

"Option No. 1 approved only in case of Sr. No. 1 & 3."

8. On record, there is nothing from which it can be inferred, as to what deliberations took place in the Cabinet leading to the non-grant of NOC in favour of petitioner-Institute or leading to the grant of issuance of NOC with regard to Institutes which were at Sr. Nos. 1 and 3 in the said Memorandum.

9. Therefore, in these circumstances, the moot issue which is for consideration before us is as to whether the Cabinet in its wisdom could have had not approved the issuance of No Objection Certificate in favour of the petitioner-Institute without assigning any reason whatsoever, especially in view of the fact that the Memorandum, which was placed before it in this regard contained recommendations for the issuance of NOC in favour of the petitioner-Institute.

10. Before we deliberate on the issue, we may state that this Court is not oblivious to the fact that wisdom of the Cabinet as to why a particular decision has been taken by it, is not open to judicial review, save and except if that wisdom does not pass the touchstone of Article 14 of the Constitution of India. We may also clarify at this stage itself that this Court is not going into the wisdom of the Cabinet as to why NOCs. were granted in favour of the Institutes which found mentioned at Sr. Nos. 1 and 3 of the Memorandum, which was so placed before the Cabinet. The sole issue, which we shall be deciding is as to whether in the matter of the recommendations for issuance of NOC in favour of the petitioner-Institute, could the Cabinet have had refused the same without assigning any reason.

11. A three Judge Bench of the Hon'ble Supreme Court in ***Asif Hameed and others*** Vs. ***State of Jammu and Kashmir and others***, 1989 Supp.(2) Supreme Court Cases 364 has held that when a State action is challenged, the function of the Court is to examine the action in accordance with law and to determine whether the legislature or the executive has acted within the powers and functions assigned under the Constitution and if not, the Court must strike down the action. The Hon'ble Supreme Court has further held that while doing so, the Court must remain within its self-imposed limits and the Court sits in judgment on the action of a coordinate branch of the Government. The Hon'ble Supreme Court has further held that while exercising power of judicial review of administrative action, the Court is not an appellate authority and the Constitution does not permit the Court to direct or advise the executive in matters of policy or to sermonize qua any matter which under the Constitution lies within the sphere of legislature or executive, provided these authorities do not transgress their constitutional limits or statutory powers.

12. The Hon'ble Supreme Court in ***Union of India and others*** Vs. ***Dinesh Engineering Corporation and another***, (2001) 8 Supreme Court Cases 491 has held that any decision, be it a simple administrative decision or a policy decision, if taken without considering the relevant facts, can only be termed as an arbitrary decision. If it is so, then be it a policy decision or otherwise, it will be violative of the mandate of Article 14 of the Constitution of India.

13. Again, the Hon'ble Supreme Court in ***State of Orissa and others*** Vs. ***Gopinath Dash and others***, (2005) 13 Supreme Court Cases 495 has reiterated that the scope of judicial enquiry is confined to the question whether the decision taken by the Government is against any

statutory provisions or it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution.

14. The Hon'ble Supreme Court in ***Bhubaneswar Development Authority and another*** Vs. ***Adikanda Biswal and others***, (2012) 11 Supreme Court Cases 731 has held that the judicial review is not an appeal from a decision, but a review of the manner in which the decision is made and the Court sits in judgment only on the correctness of the decision-making process and not on the correctness of the decision itself and the Court confines itself to the question of legality and is concerned only with, whether the decision-making authority exceeded its power, committed an error of law, committed a breach of the rules of natural justice, reached an unreasaonable decision or abused its powers.

15. In ***Parisons Agrotech Private Limited and another*** Vs. ***Union of India and others,*** (2015) 9 Supreme Court Cases 657, the Hon'ble Supreme Court again while dealing with the scope of judicial review in a matter of policy decision held that no doubt, the writ Court has adequate power of judicial review in respect of such decisions. However, one it is found that there is sufficient material for taking a particular policy decision, bringing it within the four corners of Article 14 of the Constitution, power of judicial review would not extend to determining the correctness of such a policy decision or to indulge into the exercise of finding out whether there could be more appropriate or better alternatives.

16. A three Judge Bench of the Hon'ble Supreme Court in **Centre for Public Interest Litigation** Vs. **Union of India and others**, (2016) 6 Supreme Court Cases 408 again held that a policy decision taken by the Government which is not arbitrary or not based on irreverent considerations or malafide or against any statutory provisions, should not be interfered by the Courts in exercise of power of judicial review. However, Supreme Court further held that minimal interference is called for by the Courts, in exercise of judicial review of a Government policy when the said policy is the outcome of deliberations of the technical experts in the fields inasmuch as Courts are not well equipped to fathom into such domain which is left to the discretion of the execution.

17. Thus, it is evident from the law cited above that be it a policy decision or a Cabinet decision, the same is not beyond the scope of judicial review, so exercised by this Court in exercise of powers conferred upon it under Article 226 of the Constitution of India, however, the power has to be exercised with great restraint and interference can be there only if parameters of Article 14 of the Constitution of India are infringed and decision is not backed by cogent material or the same is arbitrary and is opposed to the provisions of the Constitution.

18. We respectfully abide with the law laid down by the Hon'ble Supreme Court that the policy decision must be left to the Government as it alone can adopt which policy should be adopted after considering all the points from different angles and in the matter of policy decisions or exercise of discretion by the Government should not be interfered as long as infringement of fundamental right is not shown.

19. Coming to the facts of the present case, a perusal of the impugned order as well as the records of the case demonstrate that there is no material on record from which it could be interfered as to what weighed with the Cabinet while not finding favour with the recommendations so as to grant NOC in favour of the petitioner. The entire record is silent. There is neither any reasoning available on record nor any deliberation of the Cabinet available on record in this regard.

20. Article 14 of the Constitution of India strikes at arbitrariness. Reasoning is the soul of a decision, be it an administrative decision, a policy decision, a Cabinet decision or a judicial decision. Why a particular conclusion has been arrived at by the Executive or the Cabinet should be borne out from the records. In our considered view, the discretion conferred upon the executive or the Cabinet to take a decision cannot be so arbitrary that it confers upon them a right to take a decision without assigning any reasoning. When the Memorandum so placed before the Cabinet contained recommendations for grant of NOC in favour of the petitioner-

Institute, then in our considered view, least that was expected from the Cabinet while not agreeing with the said recommendations was to assign minimum reasoning to justify its decision. Absence of reasons so assigned in this regard renders the decision so taken by the Cabinet, as has been conveyed to the petitioner vide Annexure P-4 as arbitrary and thus, violative of Article 14 of the Constitution of India.

21. At this stage, we may also refer to the judgment of the Hon'ble Supreme Court in ***State of Himachal Pradesh and others*** Vs. ***Himachal Pradesh Nizi Vyavsayik Prishikshan Kendra Sangh***, (2011) 6 Supreme Court Cases 597 relied upon by the learned Additional Advocate General. In the said judgment, the Hon'ble Supreme Court has held as under:

> *"17. We have already adverted to the relief prayed for by the respondent-association in the said writ petition. Admittedly, there is no prayer for quashing of even earlier Cabinet decision or order of the government. The conclusion of the High Court quashing the Cabinet decision dated 18.07.2009 and as a consequence issuing several directions is unacceptable and contrary to the well established principles. First of all, there was no prayer for quashing of any decision of the State Government much less the subsequent Cabinet decision dated 18.07.2009. If the High Court was interested in going into the said decision that too after reserving the judgment on 03.07.2009, it is but appropriate to reopen the case, permit the petitioner's association to amend the relief portion, afford adequate opportunity to the State to put-forth their stand for modifying this "policy" curtailing certain courses under SCVT.Admittedly, the High Court has not resorted to such recourse and simply quashed the decision of the Cabinet dated 18.07.2009 and issued various directions which are impermissible.*
>
> *18. As rightly pointed out by Mr. Altaf Ahmed, without any arguments having been heard, without there being any question raised by any party as to the validity of the Cabinet decision dated 18.07.2009 and without the same being in question, or any relief sought for in the writ petition, the High Court has gone into the said decision of the Cabinet having taken place after the judgment was reserved. The decision of the Cabinet generally ought not to be interfered with in judicial review so lightly as has been done in the present case.The quashing of the Cabinet decision without analyzing the pros and cons in the manner seeks to restrict the State's constitutional authority and powers to frame policy especially in such vital areas like imparting technical education is not acceptable."*

22. Coming to the present case, we have already quoted the relief clause, perusal of which clearly demonstrates that the decision of the Cabinet, as was conveyed to the petitioners, stands assailed in the relief clause and its quashing has been sought by the petitioners. Therefore, in our considered view, while respectfully agreeing with the preposition of law laid down by the Hon'ble Supreme Court in abovementioned case, the ratio so laid down therein is not applicable in the facts of the present case.

23. In view of above, this writ petition is allowed. Annexure P-4 is quashed and set aside to the extent it does not assign any reason as to why the case of the petitioner-Institute was not considered for grant of No Objection Certificate. However, we are not interfering with the decision of the Cabinet whereby it granted No Objection Certificates in favour of applicants No. 1 and 3, which find mention in Memorandum, dated 16.02.2017. Respondent-State is directed to place the matter for consideration of grant of No Objection Certificate for running GNM course with an intake of 40 students in favour of the petitioner-Institute again before the Cabinet forthwith for taking an appropriate decision in this regard. It is clarified that in case the Cabinet does not concur with the recommendations so made in favour of the petitioner-Institute, then the decision of the Cabinet should be backed with at least minimum reasoning. Petition stands disposed of accordingly, so also miscellaneous application(s), if any. No order as to costs.

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

M/s Stovekraft India ....Appellant.

Versus

Commissioner of Income Tax ....Respondent.

ITA Nos.20 to 24, 31 to 37 of 2015; 1,6,7, 9,10,14,15,20,23,24,25,27,35,44,45,50, 61, 62,69, 70 of 2016; and 2,3,5,7,8,17, 19, 20,21,22,25 & 26 of 2017

Reserved on: November 14, 2017

Date of Decision : November 28, 2017

Income Tax Act, 1961- Section 80-IC- The question involved was whether undertakings or enterprises established after 7th January, 2003 who carried out "substantial expansion" within the specified window period i.e. 7.1.2003 to 1.4.2012 would be entitled to deduction on profits @ 100%- the Assessing Officer having disallowed the claim of the assessee of granting the deduction @ 100%, for having undertaken "substantial expansion" between the aforesaid time and the same having been affirmed by the Appellate Authority and the Tribunal came to be challenged by the aforesaid appeals- **High Court held**- that in view of provisions of Section 80-IC, (2)(B)(ii) specifically provided that in respect of the State of Himachal Pradesh that the unit which has begun or begins to manufacture or produce any article or thing, specified in the 14th Schedule or commences any operation and "undertake substantial expansion" during the said period, then by the virtue of sub Section (3) it shall be entitled to deduction @ 100%.

(Para-18 to 20)

Income Tax Act, 1961- Section 80-IC- "Initial Assessment Year" and "Substantial Expansion"- The relation thereof explained, further held that the legislature has consciously extended the benefit of "initial assessment year" to a unit that completed a substantial expansion – thus, held that substantial expansion undertaken during the period 7.1.2003 to 1.4.2012 was valid and legal- the units were entitled to 100% deduction on profits. (Para-22 to 25)

Income Tax Act, 1961- Section 80-IC- Further held- that appeals were consequently allowed and the order passed by Assessing Officer, The Appellate Authority and the Tribunal were quashed and set aside holding inter alia that undertakings or enterprises which were established and became operational and functional prior to 7.1.2003 and have undertaken the substantial expansion between 7.1.2003 and 1.4.2012 shall be entitled to the benefit of Section 80-IC, for the period for which they were not entitled to the benefit of deduction under Section 80-IB and that units that commenced production after 7.1.2003 and carried out substantial expansion prior to 1.4.2012 would be entitled to the benefit of deduction under Section 80-IC. (Para-50 to 55)

Cases referred:

Padinjarekkara Agencies Ltd. vs. State of Kerala, (2008) 3 SCC 597

The Indian Aluminium Co. Ltd. vs. The C.I.T., West Bengal, Calcutta, (1972) 2 SCC 150

Star Industries vs. Commissioner of Customs (Imports), Raigad, (2016) 2 SCC 362

Eveready Industries India Limited vs. State of Karanataka, (2016) 12 SCC 551

State of Haryana and others vs. Bharti Teletech Limited, (2014) 3 SCC 556

Orissa State Warehousing Corporation v. Commissioner of Income Tax, (1999) 4 SCC 197

DLF Qutab Enclave Complex Educational Charitable Trust v. State of Haryana and others, (2003) 5 SCC 622

Commissioner of Income Tax v. J.H. Gotla, (1985) 4 SCC 343

State of W.B. v. Kesoram Indjustries Ltd. and others, (2004) 10 SCC 201

Bajaj Tempo Ltd., Bombay v. Commissioner of Income Tax, Bombay City-III, Bombay, (1992) 3 SCC 78
Bhim Singh, Maharao of Kota v. Commissioner of Income Tax, Rajasthan-II, Jaipur, (2017)1 SCC 554
Southern Motors v. State of Karnataka and others, (2017) 3 SCC 467

For the Appellants	:	Mr. Bishwajit Bhattacharyya, Senior Advocate, with Mr. Gaurav Jain, Mr. Vishal Mohan, Mr. C.N. Singh, Mr. Rakesh Kumar Thakur, Mr. Gaurav Sharma, and Mr. Anuj Nag, Advocates.
For the Respondents	:	Mr. Vinay Kuthiala, Senior Advocate, with Ms Vandana Kuthiala & Mr. Diwan Singh Negi, Advocates.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

The moot issue involved in these appeals, *inter alia*, is as to whether an "undertaking or an enterprise" (hereinafter referred to as the Unit), established after 7th January, 2003, carrying out "substantial expansion" within the specified window period, i.e. between 7.1.2003 and 1.4.2012, would be entitled to deduction on profits @ 100%, under Section 80-IC of the Income Tax Act. Also, if so, then for what period.

2. Since it is a legal issue, by consent, only brief facts of ITA No.20 of 2015, titled as *M/s Stovekraft India v. Commissioner of Income Tax,* are being referred to.

3. Appellant M/s Stovekraft India (hereinafter referred to as the assessee) started its business activity/ came into operation with effect from 6.1.2005 and treating the Financial Year 2005-2006 (Assessment Year 2006-2007), as initial assessment year, claimed deduction on profits @ 100% under Section 80-IC of the Income Tax Act, 1961 (hereinafter referred to as the Act). Sometime in the Financial Year 2009-2010, the assessee carried out "substantial expansion" of the "Unit" and by treating the said Financial Year to be the "initial assessment year", further claimed deduction @ 100%, instead of 25%, under Section 80-IC of the Act.

4. We need not deal with the factual aspect any further, save and except that the assessee's contention of further claim of deduction @ 100% with effect from Financial Year 2009-2010 after undertaking "substantial expansion", so carried out in the year 2009-2010, did not find favour with the Assessing Officer, who vide order dated 23.12.2013 (Annexure A-1)(Page-29), disallowed the claim, holding the assessee entitled to deductions not @ 100% but on reduced basis @ 25%, as provided under Section 80-IC.

5. Significantly, the said Authority framed the following questions for its adjudication:

"a. What is Substantial Expansion? (Page-31)

b. Who all can carry out Substantial Expansion? (Page-31)

c. What is Initial Assessment Year?"(Page-33)

6. For answering as to what is "substantial expansion", the Authority referred to and relied upon the definition clause [8(ix)] of Section 80-IC.

7. While answering Question (b), seeking support of Circular No.7 of 2003, Notification No.49/2003, issued by the Central Excise Department and Notification dated 8.1.2003 that of Government of India, Ministry of Commerce and Industry (Department of Industrial Policy and Promotion) and circulars of the parent department, the Authority concluded that only such of those units, existing prior to incorporation of Section 80-IC in the statute, i.e. 7.1.2003, could undertake substantial expansion and units established subsequent to the said

date being termed as "new industrial units" were ineligible for exemption under Section 80-IC, even though they may have carried out any expansion, substantial or otherwise.

8. In answering Question (c), by referring to and relying upon clause (v) of sub-section (8) of Section 80-IC, the Authority concluded by holding that, for the purpose of claiming benefits under Section 80-IC, the assessee can have only one 'initial assessment year'.

9. Vide order dated 14.8.2014 (Page-43), the Commissioner of Income Tax (Appeals), Shimla, Himachal Pradesh (hereinafter referred to as the Appellate Authority), concurred with the findings of the Assessing Officer.

10. The Income Tax Appellate Tribunal vide order dated 27.5.2015 (Annexure A-3, Page 60) not only affirmed such findings but also supplemented the reasons, by holding that the assessee's claim being allowed would only render the provisions of sub-section (6) of Section 80-IC of the Act to be otiose.

11. Assessee lays challenge to such findings, by filing the present appeal, under Section 260A of the Act, which stands admitted on the following substantial questions of law:

"i) Whether on the facts and in the circumstances of the case, the Tribunal erred in law in holding that benefit of deduction under Section 80IC @100% of profit was not available to units set up after 7.1.2003, on undertaking substantial expansion from the year of completion of substantial expansion?

ii) Whether on the facts and in the circumstances of the case, the Tribunal erred in law in holding that units set up after 7.1.2003 would not be entitled to enlarged deduction under Section 80IC of the Act @100% of profit, even on undertaking substantial expansion within the specified period?

iii) Whether on the facts and in the circumstances of the case, the Tribunal erred in disallowing the benefit of substantial expansion under Section 80IC to the units that came into existence after 7.1.2003 by stating that initial assessment year cannot be re-fixed for such units?

iv) Whether on the facts and in the circumstances of the case, the Tribunal erred in law in not following the decision of the coordinate benches of the Tribunal, without referring the matter to the larger bench?"

12. At this juncture, we deem it appropriate to deal with the relevant statutory provisions.

13. Chapter-VI-A, Part-C of the Act deals with deductions in respect of certain income.

14. Section 80-IA was inserted by the Finance (No.2) Act, 1991, with effect from 1.4.1991. By virtue of said Section, the gross total income (profits and gains) of an assessee derived from any business of an industrial undertaking, so specified therein, was entitled to certain deductions for a period commencing from 1.4.1993.

15. With effect from 1.4.2000, the said provision was bifurcated with the insertion of another Section, i.e. 80-IB, dealing with "certain industrial undertakings other than infrastructure development undertakings". What is relevant is that by virtue of sub-section (4) of this newly inserted Section, in the case of an industrial undertaking established in an industrially backward State, specified in the Eighth Schedule, was entitled to deduction to the extent of 100% of the profits and gains derived from such industrial undertaking for five assessment years beginning from the initial assessment year, and thereafter @ 25%, subject to the total period of deduction not exceeding ten consecutive assessment years.

16. Thereafter, the Legislators, in their wisdom, enacted a special provision, in respect of "units" established in certain special category States. Thus, Section 80-IC came to be

inserted by virtue of Finance Act, 2003, applicable with effect from 1.4.2004. At this point, it be only noticed that correspondingly certain provisions of Section 80-IB were also amended/repealed. Deductions under the said Section were discontinued for the Assessment Years commencing from 1.4.2004. (Sub-section (4) of Section 80-IB)

17. For the purpose of ready reference, and proper understanding of the issue, we deem it appropriate to reproduce the relevant clauses of Section 80-IC, itself, which read as under:

> "80IC. Special provisions in respect of certain undertakings or enterprises in certain special category States :- (1) Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (2), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains, as specified in sub-section (3).
>
> (2) This section applies to any undertaking or enterprise,-
>
> .....
>
> (b) which has **begun** or **begins** to manufacture or produce any article or thing, specified in the Fourteenth Schedule or commences any operation specified in that Schedule, or which manufactures or produces any article or thing, specified in the Fourteenth Schedule or commences any operation specified in that Schedule **and** undertakes substantial expansion during the period beginning-
>
> (i) on the 23rd day of December, 2002 and ending before the 1st day of April, [2007], in the State of Sikkim; or
>
> (ii) **on the 7th day of January, 2003 and ending before the 1st day of April, 2012, in the State of Himachal Pradesh** or the State of Uttaranchal; or
>
> (iii) on the 24th day of December, 1997 and ending before the 1st day of April, 2007, in any of the North-Eastern States.
>
> (3) The deduction referred to in sub-section (1) shall be –
>
> (i) in the case of any undertaking or enterprise referred to in sub-clauses (i) and (iii) of clause (a) or sub-clauses (i) and (iii) of clause (b), of sub-section (2), one hundred per cent of such profits and gains for ten assessment years commencing with the initial assessment year;
>
> (ii) in the case of any undertaking or enterprise referred to in sub-clause (ii) of clause (a) or sub-clause (ii) of clause (b), of sub-section (2), one hundred per cent of such profits and gains for five assessment years commencing with the initial assessment year and thereafter, twenty-five per cent (or thirty per cent where the assessee is a company) of the profits and gains.
>
> (4) This section applies to any undertaking or enterprise which fulfils all the following conditions, namely:
>
> (i) it is not formed by splitting up, or the reconstruction, of a business already in existence:
>
> **Provided** that this condition shall not apply in respect of an undertaking which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such undertaking as is referred to in section 33B, in the circumstances and within the period specified in that section;
>
> (ii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose.

Explanation :The provisions of Explanations 1 and 2 to sub-section (3) of section 80-IA shall apply for the purposes of clause (ii) of this sub-section as they apply for the purposes of clause (ii) of that sub-section.

(5) Notwithstanding anything contained in any other provision of this Act, in computing the total income of the assessee, no deduction shall be allowed under any other section contained in Chapter VIA or in section 10A or section 10B, in relation to the profits and gains of the undertaking or enterprise.

(6) Notwithstanding anything contained in this Act, no deduction shall be allowed to any undertaking or enterprise under this section, where the total period of deduction inclusive of the period of deduction under this section, or under the second proviso to sub-section (4) of section 80-IB or under section 10C, as the case may be, exceeds ten assessment years.

(7) The provisions contained in sub-section (5) and sub-sections (7) to (12) of section 80-IA shall, so far as may be, apply to the eligible undertaking or enterprise under this section.

(8) For the purposes of this section,-

.....

(v) "**initial assessment year**" means the assessment year relevant to the previous year in which the undertaking or the enterprise begins to manufacture or produce articles or things, or commences operation or completes substantial expansion;

.....

(vii) "North-Eastern States" means the States of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura;

.....

(ix) "**substantial expansion**" means increase in the investment in the plant and machinery by at least fifty per cent of the book value of plant and machinery (before taking depreciation in any year), as on the first day of the previous year in which the substantial expansion is undertaken;"(Emphasis supplied)

18. The Section applies to an undertaking or an enterprise. What is an "undertaking" or an "enterprise" (already referred to as Unit) is not defined under the Section/Act and we need not dwell thereupon, for it is not an issue before us. However, what is of importance is the stipulation under sub-clause (ii) of clause (b) of sub-section 2 of Section 80-IC, insofar as State of Himachal Pradesh is concerned. If between 7.1.2003 and 1.4.2012, a "Unit" has "begun" or "begins" to manufacture or produce any article or thing, specified in the Fourteenth Schedule or commences any operation "and undertakes substantial expansion" during the said period, then by virtue of sub-section (3), it shall be entitled to deduction at the rate of 100% of profits and gains for five assessment years, commencing from "initial assessment year" and thereafter at the rate of 25% of the profits and gains. The only restriction being that such substantial expansion is not formed by splitting up, or reconstruction, of the business already in existence. At this stage, we may note under sub-section (6) of Section 80-IC, there is a cap with regard to the total period for which a "Unit" is entitled to such deduction.

19. Sub-section (1) of Section 80-IC entitles a unit for deduction; sub-section (2) lays down eligibility criteria; sub-section (3) specifies the extent of entitlement. Sub-section (3), in turn, is controlled by sub-section (8), in case of substantial expansion of a unit.

20. Language of the statute is clear, simple and unambiguous. To our mind, there cannot be any two views or interpretations about the same. If an undertaking or an enterprise ("Unit"), which has "begun" or "begins" to manufacture/produce/commence operation of any article or thing specified in the Fourteenth Schedule and carries out/undertakes substantial

expansion during the prescribed period, then it is entitled to the benefits of deduction for such percentage, as is provided under sub-section (3) of Section 80-IC.

21. Can there be more than one "initial assessment year", as the authorities below have held it not to be so? Clause (v) of sub-section (8) of Section 80-IC, defines what is an "initial assessment year". It is only for the purpose of this Section. Now, "initial assessment year" has been held to mean the assessment year relevant to the previous year in which the "Unit" begins to manufacture or produce article or thing or commences operation or completes substantial expansion. Significantly, the Act does not stipulate that only units established prior to 7.1.2003 shall be entitled to the benefits under Section 80-IC. The definition of "initial assessment year" is disjunctive and not conjunctive. The initial assessment year has to be subsequent to the year in which the "Unit" completes substantial expansion or commences manufacturing etc., as the case may be.

22. A bare look at Explanation (b) of Section 80-IB (11C) and Section 80-IB(14)(c) would reflect that, earlier [till Section 80-IC was inserted w.e.f. 1.4.2004], "substantial expansion" was not included in the definition of "initial assessment year". Earlier definition had used words "starts functioning", "company is approved", "commences production", "begins business", "starts operating", "begins to provide services". But Section 80-IC (8)(v) changed wordings [of "initial assessment year"] to "begins to manufacture", "commences operation", or "completes substantial expansion". Thus, legislature consciously extended the benefit of "initial assessment year" to a unit that completed substantial expansion.

23. This is absolutely in conjunction and harmony with clause (b) of sub-section (2) of Section 80-IC, which postulates two things – (a) an undertaking or an enterprise has "begun", it is in the past tense or (b) "begins", which is in presenti. Significantly, what is important is the word "and" prefixed to the words "undertakes substantial expansion" during the period 7.1.2003 to 1.4.2012.

24. Words "commencing with the initial Assessment Year" are relevant. It is the trigger point for entitling the unit, subject to the fulfillment of its eligibility for deduction @ 100%, for had it not been so, there was no purpose or object of having inserted the said words in the Section. If the intent was only to give 100% deduction for the first five years and thereafter at the rate of 25% for next five years, the Legislatures would not have inserted the said words. They would have plainly said, 'for the first initial five years a unit would be entitled to deduction at the rate of 100% and for the remaining five years at the rate of 25%'.

25. Thus, the question, which further arises for consideration, is as to whether, it is open for a "Unit" to claim deduction for a period of ten years @ 100% or not. To our mind, it is legally permissible. The statute provides for the same.

26. Significantly, Section does not restrict grant of deduction @ 100% only for a period of five years. It does not provide that deduction(s) have to be in one stretch or in continuity, ending or succeeding with each Financial Year/Initial Financial Year. It does not state that ten assessment years have to be in continuity. All that it provides for is that no deduction shall be allowed to a "Unit", either under Section 80-IC or 80-IB or 10-C, for a period exceeding ten assessment years. This Section does not curtail the percentage of exemption, to which a "Unit" may be entitled for a period of ten assessment years.

27. Also, in our considered view, "substantial expansion" can be on more than one occasion. Meaning of expression "substantial expansion" is defined in clause [8(ix)] of Section 80-IC and with each such endeavour, if the assessee fulfills the criteria then there cannot be any prohibition with regard thereto. For what is important, in our considered view, is not the number of expansions, but the period within which such expansions can be carried out within the window period [7.1.2003 to 1.4.2012], and it is here we find the words "begun" or "begins" and "undertakes substantial expansion" during the said period, as stipulated under clause (b) sub-section 2 of Section 80-IC, to be of significance. The only rider imposed is by virtue of sub-section

(6) of Section 80-IA, which caps the deduction with respect to Assessment Years to which a unit is entitled to.

28. Of course, one thing is certain. Also, we are clear that under no circumstances, an assessee can claim deductions, be it under Section 80-IC, 80-IB or 10-C of the Act, for a period exceeding ten years, as is sought to be urged by some of the assessees.

29. What was the intent and the object sought to be achieved by the Legislature by inserting the new Section. To our mind, it was to promote and enhance activities envisaged under the Fourteenth Schedule, which could also be by carrying out substantial expansion of the "Unit". It is to give incentives to "Units" for setting up or expanding in special category States.

30. It is a settled principle of law that exigibility to tax is different from the concept of exemption/ concession. [*Padinjarekkara Agencies Ltd. vs. State of Kerala,* (2008) 3 SCC 597 (Two Judges)]

31. It is also a settled principle of law that doubt, if any, in the construction of provisions of a taxing statute must be resolved in favour of the assessee. [*The Indian Aluminium Co. Ltd. vs. The C.I.T., West Bengal, Calcutta,* (1972) 2 SCC 150 (Five Judges); *Star Industries vs. Commissioner of Customs (Imports), Raigad,* (2016) 2 SCC 362 (Two Judges); and *Eveready Industries India Limited vs. State of Karanataka,* (2016) 12 SCC 551 (Two Judges)].

32. It is also a settled principle of law that exemption being an exception has to be respected regard being had to its nature and purpose. [*State of Haryana and others vs. Bharti Teletech Limited,* (2014) 3 SCC 556 (Three Judges)].

33. While arguing that Fiscal Statute has to be interpreted on the basis of the language used therein, Mr. Kuthiala, learned Senior Counsel, invites our attention to the decision rendered by the Apex Court in *Orissa State Warehousing Corporation v. Commissioner of Income Tax,* (1999) 4 SCC 197. There cannot be any dispute with regard to such proposition, but however, with profit, we may reproduce the observations made by the Apex Court on the issue, as under:

> "40. In fine thus, a fiscal statute shall have to be interpreted on the basis of the language used therein and not de hors the same. No words ought to be added and only the language used ought to be considered so as to ascertain the proper meaning and intent of the legislation. The Court is to ascribe natural and ordinary meaning to the words used by the legislature and the Court ought not, under any circumstances, to substitute its own impression and ideas in place of the legislative intent as is available from a plain reading of the statutory provisions."

34. Mr. Kuthiala further invites our attention to the principle of law laid down by the Apex Court in *DLF Qutab Enclave Complex Educational Charitable Trust v. State of Haryana and others,* (2003) 5 SCC 622. We notice the Court to have observed as under:

> "50. Basic rule of interpretation of statute is that the court shall not go beyond the statute unless it is absolutely necessary so to do. Rule of "purposive construction" would be resorted to only when the statute to observe or when read literally it leads to manifest injustice or absurdity."

35. The Court was dealing with the provisions of laws relating to urban development, unlike the taxing statute, in relation to which the Apex Court, in another Report, has held that equity and taxation are often strangers and if construction results in equity rather than injustice, then such construction should be preferred to the literal construction. (*Commissioner of Income Tax v. J.H. Gotla,* (1985) 4 SCC 343).

36. Further, Mr. Kuthiala invites our attention to another Report, which we find profitable to reproduce the following observations made by the Apex Court in *State of W.B. v. Kesoram Indjustries Ltd. and others,* (2004) 10 SCC 201:

"138. It is well settled that it is for the legislature to draft a piece of legislation by making the choicest selection of words so as to give expression to its intention. The ordinary rule of interpretation is that the words used by the legislature shall be given such meaning as the legislature has chosen to in absence thereof the words would be given such meaning as they are susceptible of in ordinary parlance, maybe, by having recourse to dictionaries. However, still, the interpretation is the exclusive privilege of the legislation avoiding absurdity, unreasonableness, incongruity and conflict. As is with the words used so is with the language employed in drafting a piece of legislation....."

37. In *Bajaj* Tempo *Ltd., Bombay v. Commissioner of Income Tax, Bombay City-III, Bombay,* (1992) 3 SCC 78, the Apex Court observed that:

"A provision in a taxing statute granting incentives for promoting growth and development should be construed liberally. Since a provision intended for promoting economic growth has to be interpreted liberally, the restriction on it, too, has to be construed so as to advance the objective of the section and not to frustrate it. It is necessary to resort to a construction which is reasonable and purposive to make the provision meaningful."(Emphasis supplied)

38. In *Bhim Singh, Maharao of Kota v. Commissioner of Income Tax, Rajasthan-II, Jaipur,* (2017)1 SCC 554, the Apex Court observed:

"It is a settled rule of interpretation that if two statutes dealing with the same subject use different language then it is not permissible to apply the language of one statute to other while interpreting such statutes. Similarly, once the assessee is able to fulfil the conditions specified in the section for claiming exemption under the Act then provisions dealing with grant of exemption should be construed liberally because the exemptions are for the benefit of assessee."

(Emphasis supplied)

39. In *Southern Motors v. State of Karnataka and others,* (2017) 3 SCC 467, the Apex Court observed:

"Further, if the taxpayer is within the plain terms of the exemption it cannot be denied its benefit by calling in aid any supposed intention of the exempting authority. If such intention can be gathered from the construction of the words of the notification or by necessary implication therefrom, the matter is different but that is not the case here."

31. .....*The task of interpretation of a statutory enactment is not a mechanical task. It is more than a mere reading of mathematical formulae because few words possess the precision of mathematical symbols. It is an attempt to discover the intent of the legislature from the language used by it and it must always be remembered that language is at best an imperfect instrument for the expression of human thought and as pointed out by Lord Denning, it would be idle to expect every statutory provision to be "drafted with divine prescience and perfect clarity." We can do no better than repeat the famous words of Judge Learned Hand when he laid:*

" .....it is true that the words used, even in their literal sense, are the primary and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning""(Emphasis laid by underlining the portion)

40. In our considered view, circulars are no more than external aids in interpretation of a statute. Insofar as interpreting the statute is concerned, we are not obliged to even look into the same, for language of the Section is simple, clear and unambiguous.

41. We may notice that the Act does not create distinction between the old units, i.e the units which stand established prior to 7.1.2003 (the cutoff date), and the new units established thereafter.

42. Artificial distinction sought to be inserted by the Revenue, in our considered view, only results into discrimination. The object, intent and purpose of enactment of the Section in question is only to provide incentive for economic development, industrialization and enhanced employment opportunities. The continued benefit of deduction at higher rates is available only to such of those units, which fulfill such object by carrying out "substantial expansion".

43. While supporting the view taken by the authorities below, Revenue seeks reliance upon the provisions of sub-clauses (i) & (iii) of clause (b) of sub-section (2) of Section 80-IC, which provide for benefit of deduction @ 100% for ten assessment years. We do not comprehend as to how would that make any difference. This provision deals with the establishments established within the State of Sikkim or North Eastern States of India.

44. In our considered view, though Section 80-IC deals with certain special category States, but however, the Legislators in their wisdom drew distinction and classified the State of Sikkim and other North Eastern States in one and State like Himachal Pradesh in another category. Taking into consideration the peculiar attending circumstances of the State of Sikkim and other North Eastern States, these States would constitute a class in itself, which classification is based on intelligible differentia and cannot be compared with other States, like the State of Himachal Pradesh. Thus, a unit established in the North Eastern States after 7.1.2003, regardless whether it carries out substantial expansion or not, is entitled to deduction @ 100% for ten assessment years, unlike the State of Himachal Pradesh, wherein a "Unit" established after 7.1.2003 will have to undertake substantial expansion before 1.4.2012, for further claiming deduction @ 100% for next five years, subject to over all cap of ten years.

45. Section 80-IC(3)(ii) [for Himachal Pradesh] stipulates that deduction shall be @ 100% for five years commencing with "initial assessment year" and thereafter @ 25%. "Initial assessment year", as per Section 80-IC (8)(v) means, year in which the unit begins/commences to manufacture/produce or completes "substantial expansion" [As per Section 80-IC(8)(ix)].

46. The moment "substantial expansion" is completed as per Section 80-IC (8)(ix), the statutory definition of "initial assessment year" [Section 80-IC(8)(v)] comes into play. And consequently, Section 80-IC(3)(ii) entitles the unit to 100% deduction for five years commencing with completion of "substantial expansion", subject to maximum of ten years as per Section 80-IC(6).

47. A unit that started operating/existed before 7.1.2003 was entitled to 100% deduction for first five years under Section 80-IB(4). If this unit completes substantial expansion during the window period (7.1.2003 to 31.3.2012), it would be eligible for 100% deduction again for another five years under Section 80-IC(3)(ii), subject to ceiling of ten years as stipulated under Section 80-IC(6).

48. Applying the aforesaid interpretation, we find there can be different fact situations, some of which, we have tried to illustrate; (i) a "Unit" established prior to 7.1.2003, claiming deduction under Section 80-IB, post insertion of Section 80-IC carries out substantial expansion, would be entitled to deduction only under Section 80-IC, at the admissible percentage, for the remaining period, which in any case when combined, cannot exceed ten years, (ii) just as in the case of the present assessee, a unit established after 7.1.2003, carries out substantial expansion only in the 8th year of its establishment, for the first five years would have already claimed deduction @ 100%; for the 6th and 7th years @ 25%, and then for the period post

substantial expansion, in our considered view, the initial year of assessment being in the 8th year, would be entitled for deduction @ 100%, subject to the cap of ten assessment years, (iii) the assessee establishes a unit after January 2003, say in the year 2005-06 and claims deduction under Section 80-IC for the first time in the assessment year 2006-2007 @ 100% of its profits. Thereafter, substantially expands the Unit in the year 2009-10, relevant to Assessment Year 2010-11 can claim deduction @ 100% for next five years subject to the cap of ten assessment years, (iv) an existing unit not claiming any deduction under Section 80-IA, 80-IB or 80-IC substantially expands in the year 2003 and claims deduction under Section 80-IC first time in Assessment Year 2004-2005 and then substantially expands in the year 2007-2008, can claim deduction @ 100% w.e.f. Assessment Year 2008-2009 for next five years, (v) the assessee sets up its unit in the year 2000-2001, claiming deduction under Section 80-IB till the Assessment Year 2003-2004 and thereafter under Section 80-IC as per law. Carrying out Substantial expansion in the Assessment Year 2004-2005, now claims deduction @ 100% w.e.f. Assessment Year 2004-05 again substantially expands in the Assessment Year 2008-2009 can claim 100% deduction w.e.f. 2008-2009, (vi) the assessee sets up a unit in the year 2005-2006 and does not undergo substantial expansion at all can claim deduction under Section 80-IC.

49. In view of above discussion, we do not find the impugned orders to be sustainable in law.

50. Facts are not in dispute. The assessee established its "Unit" after 7.1.2003. In fact, it was established in the Financial Year 2005-2006, and since then, in terms of Section 80-IC, claimed and was allowed deduction @ 100% for five years and thereafter at the rate of 25%.

51. Sometime in the year 2008, assessee carried out certain expansions, which it termed to be "substantial expansion". The fact that such expansion is in fact "substantial expansion", in terms of clause (ix) of sub-section (8) of Section 80-IC, cannot be disputed, for there is increase in the investment in the plant and machinery by at least 50% of the Book Value of the plant and machinery than the first day of the previous year in which such investment was made. Eligibility of benefits to the unit under Section 80-IC is not in dispute.

52. Both the Assessing Officer as well as the Appellate Authority(s)/Tribunal erred in not appreciating as to what was the intent and purpose of insertion of Section 80 IC.

53. In fact, we find that the conclusions arrived at by the Assessing Officer as well as the Appellate Authority/ Tribunal are not based on correct appreciation and interpretation of the statutory provisions. While arriving at their respective conclusions, in interpreting Section 80 IC, they have relied upon Notifications under the Central Excise Laws as well as Ministry of Commerce and Industry (Department of Industrial Policy and Promotion), Government of India and Department of Income Tax. While doing so, the said authorities erred in not appreciating that Section 80 IC of the Act is a self contained and a complete code in itself, which, for the purpose of its interpretation, did not require assistance of any Notification(s), much less that of other Department.

54. In fact, we find the said Authorities to have erred in creating an artificial distinction between the "Units" set up before 7.1.2003 and after 7.1.2003 while holding that such of the "Units", which were set up after 7.1.2003, were not entitled to deduction @ 100% even if they undertook substantial expansion between the period 7.1.2003 and 1.4.2012. The distinction created by the said Authorities is not borne out from the provisions of Section 80 IC. In other words, there is no prohibition that a Unit set up after 7.1.2003, having claimed deduction for first five years, cannot again claim deduction at such percentage within the prescribed period after undertaking substantial expansion**.** This we say so with a sense of conviction. Plain reading of the Statute demonstrates that there is no such bar in the statute as stands held by the authorities below. We further find that in fact both the authorities have misconstrued the definition of "Initial Assessment Year". The Assessment Officer as well as the Appellate Authority have held that there cannot be two "Initial Assessment Years" between 07.01.2003 and

01.04.2012, which conclusion, in our considered view, is totally perverse. We reiterate that Sub clause (v) of Sub section (8) of Section 80 IC itself contemplates more than one "Initial Assessment Years". The said Clause envisages that for a "Unit", which begins to manufacture or produce any article or things or commences operation, the Initial Assessment Year means Assessment Year relevant to the previous year, in which, it begins to manufacture and produce article or thing or commences operation and for a "Unit", which completes substantial expansion, Initial Assessment Year means Assessment Year relevant to the previous year, in which it completes substantial expansion. This very important aspect of the matter has been completely overlooked by the Assessment Officer as well as the Appellate Authority. Therefore, the conclusion arrived at by all the authorities below, that new industrial Units cannot carry out substantial expansion to claim benefits envisaged under Section 80 IC is perverse and not sustainable in law.

55. Thus, in view of the above discussion, these appeals are allowed and orders passed by the Assessment Officer as well as the Appellate Authority and the Tribunal, in the case of each one of the assessees, are quashed and set aside, holding as under:

(a) Such of those undertakings or enterprises which were established, became operational and functional prior to 7.1.2003 and have undertaken substantial expansion between 7.1.2003 upto 1.4.2012, should be entitled to benefit of Section 80-IC of the Act, for the period for which they were not entitled to the benefit of deduction under Section 80-IB.

(b) Such of those units which have commenced production after 7.1.2003 and carried out substantial expansion prior to 1.4.2012, would also be entitled to benefit of deduction at different rates of percentage stipulated under Section 80-IC.

(c) Substantial expansion cannot be confined to one expansion. As long as requirement of Section 80-IC(8)(ix) is met, there can be number of multiple substantial expansions.

(d) Correspondingly, there can be more than one initial Assessment Years.

(e) Within the window period of 7.1.20013 upto 1.4.2012, an undertaking or an enterprise can be entitled to deduction @ 100% for a period of more than five years.

(f) All this, of course, is subject to a cap of ten years. [Section 80-IC(6)].

(g) Units claiming deduction under Section 80-IC shall not be entitled to deduction under any other Section, contained in Chapter VI-A or Section 10A or 10B of the Act [Section 80-IB(5)].

56. Substantial questions of law are answered accordingly.

57. No other point is urged.

58. On facts, we may clarify that the Revenue has not disputed, (a) the units having carried out substantial expansion within the definition of the Section, (b) their entitlement and extent of deduction would be dependent upon interpretation of the relevant provisions.

59. As such, we direct that with respect to each one of the appellants, the Assessing Officer shall carry out fresh assessment and pass appropriate orders on the returns filed by each one of the assessees.

Pending application(s), if any, stand disposed of.

****

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

Jai Parkash Power Ventures Ltd. now known as Himachal Baspa Company Power Limited
...Petitioner

Versus

State of H.P. & Anr. ...Respondents

Arb.C. No. 93 of 2016
Reserved on: 01.11.2017
Decided on: 29.11.2017

Arbitration and Conciliation Act, 1996- Section 34- Scope and ambit of Section 34 reiterated- Courts cannot proceed to comparatively adjudicate merits of the decision- Court can only see as to whether the award was in conflict with the Public Policy or not. (Para-38 and 39)

Arbitration and Conciliation Act, 1996- Section 34- Challenge with respect to the non-following of procedure, if not objected, and the parties appear before the Arbitral Tribunal without any demur – parties estopped from laying challenge to the award on this count. (Para-40 and 41)

Arbitration and Conciliation Act, 1996- Section 34- Award challenged on the ground that it was not passed by the majority- **Held** - that if the Arbitral award is signed by all the members and all the arbitrators have joined in the deliberations, it cannot be said that the award has not been passed by the majority and even as per Section 31 of the Act the signatures of the majority of the members of the Arbitral Tribunal shall be sufficient for holding that proceedings were conducted unanimously. (Para-43 to 52)

Arbitration and Conciliation Act, 1996- Section 34- Indian Evidence Act- Sections 91 and 92- Further Held- that provisions of Evidence Act have not been made applicable to the Arbitral proceedings and therefore, the bar created under Sections 91 and 92 of the Indian Evidence Act do not apply to the Arbitral Proceedings. (Para-55)

Arbitration and Conciliation Act, 1996- Section 34- Award against public policy reiterated that if no objections are raised during the Arbitration proceedings- parties cannot challenge the procedure adopted by the Tribunal under the provisions of Section 34 of the Act- **Further held**- that the proceedings under Section 34 of the Act is in the nature of objections to the Arbitral award and as such evidence cannot be re-appreciated. (Para-80 to 82)

Cases referred:

Raghubir Pandey and another vs. Kaiilesar Pandey and others, 1945 AIR(Pat) 140
Ramtaran Das vs. Adhar Chandra Das and others, 1953 AIR(Cal) 64
Johara Bibi and others vs. Mohammad Sadak Thambi Marakayar and others, 1951 AIR(Mad) 99
Chanderbhan vs. Ganpatrai and sons 1944 Cal. 127
Aboobkaker Latif vs. Reception Committee, 1937 Bim. 410, 416
Bengal Jute Mill vs. Lal Chand, 1963 Cal. D.B. 405
Roop Kumar vs. Mohan Thedani (2003) 6 SCC 595
Bihar State Electricity Board vs. M/s Green Rubber, AIR 1990 SC 699
Jharkhand Power Corporation Ltd. vs. ASP Sealing Products Ltd. 2009 (9) SCC 701
Grasim Industries & others vs. Aggarwal Steel, AIR 2010 SCC 291 (Supp.),
Atul Krishna Bose vs. Zahed Mandal, 1941 Cal 102 (103 Sec 91)
Brahama Nand vs. Roshni Devi, 1989 HP Page 11
Lalit Mohan Gosh vs. The Gopali Chuck Coal Company (1911-12) 16 Cwn 55
Sunil Kumar Roy vs. Bhwara Kankanee Colories Limited
Aboobaker Latif vs. Reception Committee, 1937 Bombay Page 411 and 414
FCI vs. Chandu Constructions (2007) 4 SCC 697

K.P. Poulose vs. State of Kerala (1975) 2 SCC 236 (239)
Associate Builders vs. Delhi Development Authority (2015) 3 SCC 49
Sikkim Subba Associates vs. State of Sikkim, 2001 (5) SCC 629
Bishundeo Narain & another vs. Seogeni Rai & others, AIR (38) 1951 SC 280
Ladli Parshad Jaiswal vs. The Karnal Distillery Co., Ltd. & others, AIR 1963 SC 1279
Subhash Chandra Das vs. Ganga Parsad Das, AIR 1967 SC 878
Varanasaya Sanskrit Vishwavidalaya vs. Dr. Raj Kishore Tripathi, AIR 1977 SC 615
United Bank of India vs. Naresh Kumar, 1996 (6) SCC 660

For the petitioner:	Mr. R.L. Sood, Sr. Advocate with Mr. Sunil Mohan Goel and Mr. Ashish Jamalta, Advocates.
For the respondents:	Mr. Neeraj K. Sharma, Advocate, for respondent No. 1. Mr. J.S. Bhogal, Sr. Advocate, with Mr. Suneet Goel, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge

This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short the Act) against the award dated 20.05.2016.

2. Brief facts necessary for the adjudication of this petition are that an Implementation Agreement (Annexure C-2) was entered into on 01.10.1992 between the petitioner Company with the government of Himachal Pradesh (Respondent No. 1 herein) for the implementation of 300 MW Baspa Hydro Electric Project, Stage-II (for short 'Project'), in District Kinnaur Himachal Pradesh.

3. As per this Implementation Agreement (for short the 'Agreement'), the petitioner being a generating Company was granted right to establish, own, operate and maintain this project subject to the approval of the Central Electricity Authority, including transmission system upto Jhakri Sub Station of Nathpa Jhakri Hydro Electric Project and permission to generate and sell power from the above mentioned project for an initial period of 40 years from the date of commissioning of project extendable for further period of 20 years.

4. As per Clauses 6 and 7 of the agreement, the government was to acquire land for the company, such private lands within the state of Himachal Pradesh as may be required by the Company for the construction, operation and maintenance of the project.

5. Clause 38 contained an arbitration clause wherein it was provided that all disputes or differences out of or relating to or in connection with the agreement, which could not be settled amicably by the parties were to be referred to and settle by arbitration.

6. Consequent upon the signing of the agreement, a meeting was held in the office of Chairman of Himachal Pradesh State Electricity Board (for short 'HPSEB') (Respondent No. 2) on 11.12.1992, wherein, as per para-3 of the record of discussion, it was mentioned that:

"*It was pointed out that the case for transfer of 48 bighas of land in possession of Himachal Pradesh State Electricity Board to the claimant company had been submitted to the Government for approval and it was decided that 48 bighas of land in possession of HPSEB may be transferred to the petitioner Company w.e.f. 01.01.1993 on lease basis*."

7. As per record of discussion, the rate of lease and other formalities were to be worked out with respondent No. 1 and the rate of lease was to be applicable from the date when possession of the land would be handed over to the petitioner.

8. That pursuant to the above, the Chief Engineer (Projects), HPSEB vide his letter No. CEP/PBT-13/285/92-17974-75 dated 31.3.1993 (Annexure C-4) and letter No. CEP/PBT-13-

285-93-7451 dated 14.10.1993 (Annexure C-5) informed that the lease charges shall be at the rate of 18% of the market rate per annum. However, since the market rate had not been determined, the petitioner deposited Rs. 50,000/- immediately which were to be adjusted as and when the market rates were determined by the Deputy Commissioner, Kinnaur.

9. Thereafter, a Status Review Committee meeting was held on 25.03.1998 in the office of the Chairman, HPSEB, (Respondent No. 2), which was attended to by the representatives of the claimant Company also. The minutes of the said meeting were circulated by the Chief Engineer (P&M) of the Himachal Pradesh State Electricity Board dated 17.04.1998. Para-3 of the said Minutes of the Meeting reads as under:-

"Land Acquisition:- Shri Aggarwal requested Government of Himachal Pradesh to help in expediting the lease agreement and 48.1 bighas land at Sholtu. In this regard, it was intimated that as the land belongs to the Department of MPP & Power, necessary formalities with regard to the signing of lease agreement will be done by Joint Secretary (Board). The Company is to provide necessary lease papers on standard format to the JS (P) through the concerned Deputy Commissioner."

10. In the meanwhile, the petitioner company which was earlier known as M/s Jaiparkash Industries Ltd. came to be changed to that of M/s Jaiparkash Hydro Power Limited (JHPL)

11. Consequent to the aforesaid meeting, land measuring 48 bighas and 1 biswa i.e. 03-61-57 hectares comprised in Khasra No. 87, 88, 94, 97, 107, 121/1, 195, 197, 199, 200, 201, 202, 203, 204, 205, 209, 210, 211, 211/1, 228, 235, 242, 257, 207, 216, 217 & 218 kitta 27 measuring 3-61-57 hectare in Sholtu, District Kinnaur was handed over to the petitioner Company on 16.01.1993. Later on land measuring 27 bighas 7 biswas (02-04-20 hectares) comprised in Khasra No. 99, 100, 194, 190, 187, 188, 189, 189/1, 229, 230, 231, 232, 233, 236, 283, 185, 109, 110, 112, 141, 89, 70, 76, 78, 84, 85, 220, 225, 248, 244, 240, 239, 237, 184, 243, 241, 238, 247, 83 & 250 kitta 40 measuring 2-04-20 hectare was handed over to the claimant Company on 21.09.1998. Thus, in all, total land measuring 75 bighas 3 biswas (05-65-77 hectares) at Up Muhal, Punang (Sholtu) was handed over to the petitioner Company.

12. Earlier to that land measuring 00-69-75 hectares comprised in Khasra No. 425, 426, 427, 428, 429, 430, 431, 432, 434, 435, 436 & 437 Kitta 12 measuring 0-69-75 hectare at Kuppa, District Kinnaur was also handed over to the petitioner Company on 16.02.1993 by respondent No. 2.

13. According to the petitioner, the aforesaid lands were handed over to the petitioner Company on the terms and conditions to be decided by the Himachal Pradesh Government according to Himachal Pradesh Lease Rules, 1993, for which purpose it had been constantly pursuing the matter with the government and eventually the lease deeds were finalized and signed between respondent No. 2 and the petitioner vide Annexure C-7.

14. As per lease deed so executed, the lease money for the land measuring 03-61-57 hectares in Sholtu was fixed @ Rs. 1241/- per annum on the basis of the rates so fixed by the Deputy Commissioner, Kinnaur. This lease was for a period of 50 years and deemed to have commenced from 16.01.1993. Similarly, lease deed for area measuring 02-04-20 hectares in Punang (Sholtu) was executed for lease money of Rs.47,458/- per annum, on the bases of the rates so fixed by the Deputy commissioner, Kinnaur. This lease deed was for a period of 45 years and was deemed to have commenced from 21.09.1998. As far as, third lease deed of the land at Kuppa is concerned, the lease was for a period of 50 years and was deemed to have commenced from 16.02.1993. However, lease amount for this land was not determined as no rates were intimated by the Deputy Commissioner, Kinnaur at the time of signing of the lease deed and the same was to be intimated subsequently.

15. After signing of the aforesaid lease deed, the petitioner approached respondent No. 2 for grant of 'No Objection Certificate' for mortgaging the land with the financial institutions/banks vide letter dated 04.01.2001. At that stage, it was insisted by respondent No.

2 that the petitioner will have to give an undertaking to permit the respondent No. 2 to revise the lease deed on the ground that the rent had not been fixed by the Deputy Commissioner in case of one out of three lease deeds. Consequent upon the signing of such undertaking the respondent No. 2 issued desired 'No Objection Certificate'.

16. According to the petitioner, as per the undertaking given by it to respondent No. 2 before issuance of 'No Objection Certificate', notification permitting the petitioner to mortgage the land in favour of the financial institutions/banks, revised rates were to be determined by the Electricity Board by 31.03.2001. However, no such rates were determined or fixed by the Board or ever informed to the petitioner Company by respondent No. 2 on or before 31.03.2001. On the contrary, the Chief Engineer (PSP&SO) of the respondent-Board vide his letter dated 07.08.2001 sent draft lease to the petitioner, which according to it, in violation of the terms and conditions and spirit of lease agreement signed on 30.12.2000, which was to hold good for the period mentioned therein. Rates/revised rates which were now assessed and mentioned in the draft lease deeds were extremely on the higher side, exaggerated or without any basis or justification. The computation, calculation and formulation of revised lease deeds and the rates contained therein were done unilaterally and *suo motu* by respondent No. 2 and the petitioner was not at all associated in preparation of the said revised draft lease deeds. The revised draft lease deeds sent by respondent No. 2 provided for the lease rent as mentioned below:-

Sl. No.	**Location**	**Area in Hectare**	**Lease money as per original lease deeds signed on 30.12.2000 on the basis of rates of DC, Kinnaur**	**Amount as per revised lease deeds on the basis of HPSEB's own rates sent on 07.08.2001**
1.	Sholtu (Patch No.1)	03-61-57	Rs. 1241/- p.a	Rs. 2,24,033/- p.a.
2.	Sholtu (Patch No.2)	02-04-20	Rs. 47,458/- p.a.	Rs. 2,48,641/- p.a
3.	Land at Kuppa	00-69-75	Amount not intimated by DC, Kinnaur at the time of signing of lease deeds. It was to be intimated later on.	Rs. 58,270/- p.a.

17. According to the petitioner, written undertaking furnished by it as a principal condition for issuance of 'No Objection Certificate' by respondent No. 2 did not confer upon it any arbitrary right to increase the lease amount upto 180 times on the originally fixed amount and, therefore, in these circumstances, it refused to accept the arbitrary conditions and took up the matter with the Chairman of the respondent-Board, who, in turn, directed the Chief Engineer (PSP) of respondent No. 2 to get the rates fixed as per the Himachal Pradesh Lease Rules, 1993.

18. Accordingly, the Chief Engineer (PSP) addressed a letter to the Deputy Commissioner, Kinnaur dated 24.08.2002, who, in turn, sent the requisite rates vide his letter dated 14.11.2002. However, the petitioner did not receive any information in this behalf from the respondent-Board and, therefore, it independently took exercise to work out the lease rent amount as per calculated rates given by the Deputy Commissioner, Kinnaur. According to the petitioner, the lease rent amount worked out to Rs. 14,73,455/- up to 31.12.2013.

19. In addition to the above said amount of lease, the petitioner also took on rent basis accommodations from respondent No.2, the details whereof are as under:-

a) Four sets of one room each at Sholtu

b) One set of three rooms at Sholtu.

c) Repair shop at Kuppa.

d) Store shed at Kuppa.

20. Respondent No. 2 vide its letter dated 13.08.2003 urged the petitioner to deposit the lease rent of the aforesaid accommodation, which according to the petitioner was found to be higher side and accordingly it made a representation to this effect.

21. The petitioner has drawn a comparative table of the rent worked out by HPSEB and the rent worked out by HPPWD to show that the rates are excessive, which reads thus:-

Sl. No.	**Name of Building**	**Plinth Area in Sqm.**	**Annual Rent as Charged by HPSEB**	**Annual Rent as per HPPWD norms**
1.	Store shed at Kuppa (The building was totally damaged on 31.03.2011 due to land slide during the snowfall.)	126.90	80,867/-	19,195
2.	Repair shop at Kuppa	61.08	72,948/-	9,208/- 15,789/-
3.	Three room one set at Sholtu	70.00	21,550/-	10,794/-
4.	One room four set at Sholtu	134.00	46,164/-	20,970/-

22. However regardless of the representation, respondent No. 2 issued a final notice asking the petitioner to deposit lease rent amounting to Rs. 3,95,40,698/- up to 31.12.2009 vide letter dated 09.09.2010.

23. In response, the petitioner made representation to the Chairman of respondent No. 2 vide letter dated 18.09.2010 for review of the amount as the same was unreasonable. However, without acceding to the request of the petitioner, respondent No. 2 deducted the aforesaid amount of Rs. 3,95,40,698/- from the payment of energy bill of the petitioner for the month of September, 2010 for which according to the petitioner there was no such provisions in the Power Purchase Agreement or the Implementation Agreement.

24. Subsequently, on 14.03.2014, respondent No. 2 again sent a bill of lease rental charges of land and accommodation at Sholtu and Kuppa amounting to Rs.12,49,59,514/- for the period 01.01.2010 to 31.12.2013. This constrained the petitioner to take up the matter with respondent No. 2 and the government on various occasions from time to time. However, respondent-Board did not accede to the said requests and kept on issuing bills for the lease rental charges.

25. This constrained the petitioner to approach this Court by way of petition under Section 9 of the Arbitration and Conciliation Act, 1996 for interim measures of protection. This petition came up for consideration on 10.12.2014 and instead of passing any interim order, the Court proceed to appoint Arbitral Tribunal to adjudicate the dispute between the parties, in view of the Arbitration Clause in the Implementation Agreement.

26. Consequent upon the matter having been referred to the Arbitral Tribunal, the petitioner filed its claim, however, during the pendency of the claim petition, the respondent No. 2 deducted an amount of Rs.12,49,59,514/- as the lease rental from the energy bill, constraining the petitioner to file supplementary claim.

27. The details of the claim including the supplementary claim filed by the petitioner reads thus:-

Claim No. 1 *– Declare the lease rentals as are being asked to be deposited by the respondent No. 2 HPSEBL for the land and accommodation taken on lease to be bad in law, exorbitant, exaggerated*

and not in consonance with the H.P. Lease Rules, 1993 as also H.P. Lease Rules, 2013 and prevailing market rates of the leased land and quash annexure C-19 and also set aside Bill dated 14.03.2014 (Annexure C-17), i.e. bill of lease rent charges of land and accommodation at Sholtu & Kuppa amounting to Rs.12,49,59,514/- from 01.01.2010 to 31.12.2013.

Claim No. 2 *– Declare the act of the respondent No. 2 of fixing the lease rental of the land measuring 3-61-57 hectares comprised in Khasra No. 87, 88, 94, 97, 107, 121/1, 195, 197, 199, 200, 201, 202, 203, 204, 205, 209, 210, 211, 211/1, 228, 235, 242, 257, 207, 216, 217 & 218 Kita 27 and of land measuring 02-04-20 hectares comprised in Khasra No. 99, 100, 194, 190, 187, 188, 189, 189/1, 229, 230, 231, 232, 233, 236, 283, 185, 109, 110, 112, 141, 89, 70, 76, 78, 84, 85, 220, 225, 248, 244, 240, 239, 237, 184, 243, 241, 238, 247, 83 & 250 Kita 40 as arbitrary, without jurisdiction for the reason that the Deputy Commissioner, Kinnaur had already fixed the lease rentals for these pieces of land and the respondent No. 2 HPSEBL had no authority to fix arbitrarily exorbitant rates for these pieces of land leased to the claimant and that too behind the back of the claimant.*

Claim No. 3 *– Direct the respondent No. 2 HPSEBL to refund to the claimant an amount of Rs.3,95,40,698/- which was wrongly and illegally deducted by respondent No. 2 from the energy bills of claimant company for the month of September, 2010 alongwith interest @ 18% per annum.*

Claim No. 4 *– Declare the deduction made from energy bills by respondent No. 2 Board of Rs.12,49,59,514/- as lease rental from 01.01.2010 to 31.03.2013 and communicated to the claimant company, vide letter dated 06.02.2015 as annexure C-21 as arbitrary, illegal and wholly unjustified since the respondent no. 2 is not entitled to the said amount. As such the said deduction by respondent No. 2 Board is bad in law and the claimant company is entitled to be refunded back the said amount of Rs.12,49,59,514/- from the date of recovery/adjustment till the date of actual payment of 18% per annum.*

28. Respondent No. 1 – State of Himachal Pradesh despite service did not put in appearance and was proceeded ex parte vide order dated 18.07.2015, while respondent No. 2 appeared and contested the petition by filing reply wherein it raised various preliminary issues/points to the effect that the statement of claim had not been filed by a competent person on behalf of the petitioner company, therefore, the same was liable to be dismissed. It was stated that the claim petition was hopelessly barred by time and the petitioner was stopped by its own acts, deeds and conduct from filing the present claim petition and that the petitioner did not have any cause of action against respondent No. 2.

29. In addition thereto, a preliminary objection was also taken to the effect that declaration as sought by the petitioner being a specific relief could only be granted by the regular Court and the Tribunal, therefore, had no jurisdiction to try the case on this count.

30. On merit, respondent No. 2 denied that the land, which was transferred by the petitioner, was purchased by the State of Himachal Pradesh on the payment of Rs.2,08,053/- as alleged by the petitioner and it was clarified that the land was in fact purchased by respondent No. 2 itself from the Industry Department for a total consideration of Rs. 5,29,564.65 paise. It was denied that the terms of the lease were to be decided in accordance with the H.P. Lease Rules, 1993 and it was rather clarified that while handing over the land to the claimant, it had been made clear that "Rate of the lease and other formalities can be worked out in consultation with the Government of H.P. as per minutes of meetings dated 11.12.1992 (Annexure C-3)". It was further stated that the lease deed dated 30.12.2000 (Annexure C-7), was followed by an undertaking on the same day i.e. 30.12.2000 (Annexure C-10). It was further stated that after execution of the lease deed the petitioner had sought to secure permission/no objection of respondent No. 2 to mortgage the lease rights with financial institutions, which it would have not done for the meagre value of the land as is being claimed by the petitioner and it is on this count that petitioner had very cleverly not mentioned the amount for which it had mortgaged the lease hold rights with the financial institutions.

31. It was further submitted that even though the possession of two tracts of land had been taken in 1993 and one part in 1998 respectively, yet the petitioner kept on delaying the execution of the lease despite repeated requests from the respondent. The undertaking (Annexure C-10) was given by the petitioner on the same day i.e. 30.12.2000 when the lease deed was signed and in terms thereof, respondent No. 2 was to fix the lease rates by 31.03.2001. However, the said rates were fixed on 31.05.2001 vide annexure R-3. It has been specifically denied that the draft lease deed sent vide letter dated 07.08.2001 was in violation of the terms of the original agreement. In terms of the undertaking executed by the petitioner the rates of the lease were to be fixed by respondent No. 2 in respect of three parcels of land including built up portion. After the rates had been fixed the petitioner did not challenge/question the same at any point of time as the petitioner had failed to pay due and outstanding amount. It was averred that respondent No. 2 in the given circumstances was well within its right to recover the said amount by deducting the same from the energy bills of the petitioner.

32. The petitioner filed rejoinder wherein the contents of the reply were denied and the contents of the petition were reiterated. It was reiterated that the statement of claim had been filed by a competent person. Likewise, the legal pleas as raised by respondent No. 2 in its reply were also denied. It was reiterated that the rates of the lease of the land which was handed over to the petitioner were to be decided in accordance with the Himachal Pradesh Lease Rules, 1993. It was also submitted that the undertaking filed by the petitioner was being read out of context by the replying respondents wherein the intent of the undertaking and the same had been given by the petitioner on the instance of the respondents as 'No Objection Certificate' was issued by it to mortgage the land to financial institutions for achieving financial closure of the project itself explains that the undertaking was to the satisfaction of the respondents. It was further reiterated that the lease amount which had been arrived at by respondent No. 2 were not only on higher side but also arbitrary and even arrived at unilaterally by respondent No. 2 by applying parameters unknown to law.

33. The petitioner also annexed copy of award dated 05.05.2011 in support of his contention that the actual cost of land was only Rs.42,567/- per biswa and not Rs.1,04,000/- per biswa as had been worked out by respondents that too not on the basis of the actual value of Rs. 42,567/- as find mentioned in the award though itself to be the matter of settlement arrived at between owner of the land and HPPCL for whose benefit land was acquired wherein the mutually settled rate of Rs.1,04,000/- per biswa, which in no circumstance can be said to be the actual value which remain at Rs. 42,567/-. The petitioner has further reiterated that respondent No. 2 had no jurisdiction to deduct the lease amount from the energy bills of the petitioner.

34. On the basis of the aforesaid pleadings, the Arbitral Tribunal proceeded to determine the lis wherein only the petitioner led evidence while respondent No. 2 did not chose to lead evidence.

35. After recording evidence of the petitioner and evaluating the same, the learned Tribunal at the time of its final decision formulated the following points for determination:-

1. *Whether the claim as filed on behalf of the claimant company is not by a competent person, if so, what is the effect?*
2. *Whether the relief of declaration as sought by the claimant is not arbitral and the Tribunal has no jurisdiction to adjudicate upon the same?*
3. *Whether the claim is barred by time?*
4. *Whether the claimant is estopped by its act and conduct from filing the present claim?*
5. *Whether the claimant is entitled to the relief as laid under claim No. 1 and claim No. 2?*

6. *Whether respondent No. 2 was justified in deducting the amount of Rs.3,95,40,698/- and Rs.12,49,59,514/- respectively from the energy bills of the claimant company as alleged and if not whether the amounts are liable to be refunded to the claimant?*

36. Points No. 1, 3, 4, 5 and 6 were answered in favour of respondent No. 2 and against the petitioner, whereas point No. 2 was answered in favour of the petitioner and against respondent No. 2.

37. Admittedly, respondent No. 2 has not assailed the finding on point No. 2 and the same has thus attained finality.

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

Scope and ambit of Section 34

38. The scope and ambit of Section 34 of the Act has been considered by a Coordinate Bench of this Court in **Arbitration Case No. 60 of 2015**, titled as ***Sh. Ashok Kumar Thakur versus State of Himachal Pradesh & Anr., decided on 09.03.2016, 2016 (2) SLJ 640 = 2016 (2) ILR HP***, and it was observed as under:-

> *"3. It is settled proposition of law that award can be set aside only within the exceptions stipulated under Section 34, which has to be read in conjunction with Section 5 of the Act, wherein it is provided that no judicial authority shall intervene with the award, save and except as provided in Part – I of the Act, wherein Section 34 also finds place.*
>
> *4. Courts cannot proceed to comparatively adjudicate merits of the decision. What is to be seen is as to whether award is in conflict with the Public Policy of India. Merits are to be looked into only under certain specified circumstances i.e. being against the Public Policy of India, which connotes public good and public interest. Award which is ex facie and patently in violation of the statutory provisions cannot be said to be in public interest.*
>
> *5. In* ***Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd. (2003) 5 SCC 705*** *the Court reiterated the principle laid down in* ***Renusagar Power Co. Ltd. vs. General Electric Co., 1994 Supp (1) SCC 644*** *holding that the award can be set aside if it is contrary to: (a) the fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality, or (d) in addition, if it is patently illegal. However, such illegality must go to the root of the matter and if it is trivial in nature, then it cannot be said to be against public policy. Only such of those awards which, being unfair and unreasonable, shocks the conscious of the court can be interfered with.*
>
> *6. The principles continued to be reiterated by the apex Court in* ***McDermott International Inc. vs. Burn Standard Co. Ltd. (2006) 11 SCC 181*** *and* ***Centrotrade Minerals & Metals Inc. vs. Hindustan Copper Ltd. (2006) 11 SCC 245****.*
>
> *7. Eventually in* ***DDA vs. R. S. Sharma and Co. (2008) 13 SCC 80*** *the Court culled out the following principles:*
>
> "21. From the above decisions, the following principles emerge:
>
> *(a) An award, which is*
>
> *(i) contrary to substantive provisions of law; or*
>
> *(ii) the provisions of the Arbitration and Conciliation Act, 1996; or*
>
> *(iii) against the terms of the respective contract; or*
>
> *(iv) patently illegal; or*

(v) prejudicial to the rights of the parties;

is open to interference by the court under Section 34(2) of the Act.

(b) The award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality.

(c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

(d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India."

8. Recently the apex Court in ***Associate Builders vs. Delhi Development Authority (2015) 3 SCC 49*** *has further explained the meaning of the words "fundamental policy of Indian law"; "the interest of India"; "justice or morality"; and "patently illegal". Fundamental policy of Indian law has been held to include judicial approach, non violation of principles of natural justice and such decisions which are just, fair and reasonable. Conversely such decisions which are perverse or so irrational that no reasonable person would arrive at, are held to be unsustainable in a court of law. The Court observed that:-*

"29. It is clear that the juristic principle of a "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.

30. The audi alteram partem principle which is undoubtedly is a fundamental juristic principle in Indian law is also contained in Sections 18 and 34 (2)(a) (iii) of the Arbitration and Conciliation Act. These sections read as follows:

*"18. Equal treatment of parties. – The parties shall be treated with equality and each party shall be given a full opportunity to present his case. * * *

34. Application for setting aside arbitral*

*award. – (1) * * **

(2) An arbitral award may be set aside by the

court only if –

(a) the party making the application furnishes

proof that –

*** **

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case'"

31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

(i) a finding is based on no evidence, or

(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse."

9. Further, in the very same decision, while relying upon ***Excise and Taxation Officer-cum-Assessing Authority vs. Gopi Nath & Sons, 1992 Supp (2) SCC 312; Kuldeep Singh vs. Commr. of Police, (1999) 2 SCC 10;*** *and* ***P. R. Shah, Shares & Stock Brokers (P) Ltd. vs. B.H.H. Securities (P) Ltd., (2012) 1 SCC 594****, the Court clarified the meaning of the expression 'perverse' so as to include a situation where the Arbitrator proceeds to ignore or exclude relevant material or takes into consideration irrelevant material resulting into findings which are so outrageous, that it defies logic and suffers from the vice of irrationality. What would be "patent illegality" was clarified in the following terms:-*

"42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads:

42.1. (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be a of a trivial nature. This again is really a contravention of Section 28(1)(a) of the Act, which reads as under:

"28. Rules applicable to substance of dispute. – (1) Where the place of arbitration is situated in India –

(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"

42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality – for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.

42.3.(c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

"28. Rules applicable to substance of dispute. –

*(1) - (2) * * **

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.

43. In ***McDermott International Inc. vs. Burn Standard Co. Ltd. (2006) 11 SCC 181****, this Court held as under:*

"112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator

to determine, even if it gives rise to determination of a question of law. [See: ***Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission, (2003) 8 SCC 593 and D.D. Sharma v. Union of India, (2004) 5 SCC 325****].*

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award."

44. In ***MSK Projects (I) (JV) Ltd. v. State of Rajasthan, (2011) 10 SCC 573****, the Court held:*

"17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. [See: ***Gobardhan Das v. Lachhmi Ram, AIR 1954 (SC) 689, Thawardas Pherumal v. Union of India, AIR 1955 (SC) 468, Union of India v. Kishorilal Gupta & Bros., AIR 1959 (SC) 1362, Alopi Parshad & Sons Ltd. v. Union of India, AIR 1960 (SC) 588, Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji, AIR 1965 (SC) 214 and Renusagar Power Co. Ltd. v. General Electric Co., (1984) 4 SCC 679****.]"*

45. In ***Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, (2012) 5 SCC 306****, the Court held:*

"43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in ***SAIL v. Gupta Brother Steel Tubes Ltd., (2009) 10 SCC 63*** *and which has been referred to above. Similar view has been taken later in* ***Sumitomo Heavy Industries Ltd. v. ONGC Ltd., (2010) 11 SCC 296*** *to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.*

*45. This para 43 reads as follows: (****Sumitomo case, (2010) 11 SCC 296, SCC p. 31****3)*

'43. ... The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in ***Kwality Mfg. Corpn. v. Central Warehousing Corpn., (2009) 5 SCC 142*** *the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the*

agreement. If he does so, the decision of the umpire has to be accepted as final and binding.' " "

39. At the outset, it may be observed that even though this Court held marathon hearings but most of the points as raised by the petitioner were never raised before the learned Arbitrator and some of the objections have only been raised for the first time in the oral arguments before the Court.

No procedure followed by Arbitral Tribunal

40. It is vehemently argued by Shri R.L. Sood, Sr. Advocate, duly assisted by Mr. Sunil Mohan Goel, Advocate, that the arbitral award on the face of it, is not sustainable, as the Tribunal has failed to follow any procedure and even the procedure so followed and adopted was never informed to the parties. That apart, even the points of determination were only formulated at the time of arguments.

41. Section 19 of the Act determines the rules of procedure of the Arbitral Tribunal, which reads thus:-

"19. Determination of rules of procedure.- (1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (2 of 1905) or the Indian Evidence Act, 1872 (1 of 1872).

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence."

42. Noticeably, the petitioner right through the entire proceedings never ever objected to the procedure being followed by the Arbitral Tribunal and having participated without any demure is estopped from laying challenge to the award on this count. Moreover, the petitioner has also not been in a position to show any prejudice much less serious prejudice caused to it on account of procedure followed by the Tribunal which in the instant case was that of any civil proceeding.

Award not passed by majority

43. It is then argued by the petitioner that the award passed by the Tribunal cannot be said to be an award by majority as two members out of three members of the Tribunal were only dummies. Even otherwise the petitioner was entitled to the benefit of knowledge, wisdom and experience of all the arbitrators which should have been reflected in the award. He further argued that in absence of any joint deliberation, the mere signing of the award by the two co-arbitrators would not make it an award passed by a majority. In support of such contention, the petitioner has relied upon the following judgments:-

1.Abu Hamid versus Gulam Sarvar, (1918) Cal 865 (866)

2.Sheikh Abdhulla versus MVRS Firm and Sons, 1924 Rangoon 153 (154).

3. Moti versus Sheroo (2009) 6 MHLJ 535

4.Maharashtra State Electricity Distribution Company versus Deltron Electronics, 2016 SCC Online Bom. 9521

5.Maganlal Gangaram vs. Ramaji Bondarji, AIR 1966 Madhya Pradesh 177 D.B.

6. Kuldeep Krishan Sood vs. Gulmohar Tourist Complex, 2012 SCC Online HP 157 DB

7. Maharashtra State Electricity distribution Company Ltd. vs. Deltron Electronics, 2016 SCC Online Bombay 9521

44. Even these contentions are simply without merit for the reason that the award is duly signed by the Principal Arbitrator as also two co-arbitrators. Nowhere have the co-arbitrators or any one of them expressed even the slightest dissent to the award. The joint deliberations between the arbitrators are amply proved from the fact that all the arbitrators have joined in the deliberations and have attended the important meetings in which the crucial questions for decision were deliberated. No doubt one of the arbitrators had not attended or has not signed the proceedings on 20.9.2015, 8.10.2015, 6.12.2015, 17.12.2015 and 15.1.2016 but even on those dates no crucial questions for decision were deliberated upon. The judgments relied upon by the petitioner would only apply in case there had been implied or express dissent or disagreement by any one or both of the co arbitrators with the Principal Arbitrator. In absence of any material to suggest even remotely that there was any dissent, the judgments relied upon by the petitioner are of no avail.

45. All the authorities as relied upon by the learned counsel for the petitioner only deal with the question that all the arbitrators must join, act, deliberate and participate in all the proceedings and must have discussion before making the award. How the ratio laid down in those judgments helps the petitioner is anybody's guess as there is nothing even remotely to suggest that there was no joint deliberation of all the arbitrators before making the award, rather it has specifically come on record that all the arbitrators had participated in the effective hearings.

46. In fact, the Hon'ble Bombay High Court in **Moti's case** (supra) as was relied upon by the learned counsel for the petitioner has gone to the extent of holding that even if there was a failure of one of the arbitrators to sign the arbitral award, the same would not have any effect on the validity of the award. The reason being that when the arbitral proceedings have been conducted by all the arbitrators sitting together as a body and there is a joint participation of all the arbitrators, then one arbitrator cannot stultify the proceedings by inaction, though a majority has agreed upon and signed its award.

47. The learned Division Bench of Bombay High Court has taken note of the judgment of the Patna High Court in **Raghubir Pandey and another vs. Kaiilesar Pandey and others, 1945 AIR(Pat) 140**. In that case, though all the three arbitrators had jointly deliberated upon the matter in controversy, one of the arbitrators had not signed the arbitral award though as a matter of fact, he was in agreement with the view of the majority. The Court rejected the challenge to the validity of the arbitral award holding that the fact that one of the arbitrators had not signed the award would not impinge upon the validity of the award. The Court held thus:-

> *"..... A review of all these cases satisfies me that the true principle upon which the matter is to be decided is to find in a particular case whether all the arbitrators have joined in the deliberation or have attended the important meetings in which the crucial questions for decision were deliberated. If one or more of the arbitrators have not joined in the deliberation, the award is invalid if it is not signed by an arbitrator even though he may choose to sign it later on. Again, if all the arbitrators have joined in the deliberation and there is a distinct provision in the agreement between the parties that the award of the majority will be binding, in that case the failure, deliberate or accidental, of one of the arbitrators to sign the award will not make it invalid....."*

48. The Division Bench further held that signing of the award was not a judicial act but was merely a record of that which had already been done in the judicial exercise of the functions of the arbitrators.

49. Similar observations have been made by the Division Bench of the Hon'ble High Court of Calcutta in Ramtaran Das vs. Adhar Chandra Das and others, 1953 AIR(Cal) 646 and by Division Bench of the Madras High Court in Johara Bibi and others vs. Mohammad Sadak Thambi Marakayar and others, 1951 AIR(Mad) 997, wherein the Court held that the signing of the

award is only a formality once it was demonstrated that the arbitrator who refused to sign the award had taken part in the arbitration proceedings throughout and was a party to the decision.

50. Section 29 of the Arbitration and Conciliation Act, 1996 provides that - unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of its members.

51. Sub Section (1) of Section 31 provides that an arbitral award shall be made in writing and shall be signed by the members of the Arbitral Tribunal. While sub section (2) lays down that the purposes of sub section (1), in arbitral proceedings with more than one arbitrator, the signature of the majority of all members of the Arbitral Tribunal shall be sufficient so long as the reason for any omitted signature is stated.

52. Indubitably in the present case, the award is unanimous and there is no dissent by any of the arbitrators. It has also come on record that the proceedings were conducted by all the arbitrators sitting together as a body and there was a joint participation of all the arbitrators, therefore, none of the judgments as cited by the learned counsel for the petitioner has any application to the fact situation obtaining in the instant case.

Arbitral Tribunal acted against fundamental Policy of Law

53. Learned senior counsel for the petitioner would then vehemently argue that learned Tribunal has erred in law and acted against the declared fundamental policy of law in relying upon the undertaking obtained from the petitioner by respondent No. 2 as the same was in violation of Sections 91 and 92 of the Evidence Act as the lease deed dated 30.12.2000 had been reduced to the form of a document as required under law, the terms whereof were protected and governed by Section 91 of the Indian Evidence Act. As such the undertaking (Annexure C-10) could not have been read in evidence to permit the respondent to revise/increase arbitrarily the lease rental mentioned therein. In any case, the lease rental had to be determined at the then prevailing rates i.e. at the time when possession of the land was handed over by respondent No. 2 to the petitioner.

54. On the other hand, Shri J.S. Bhogal, Senior Counsel, would submit that the undertaking (Annexure C-10) given by the petitioner authorizing the replying respondent to revise/increase the lease rental so executed by the petitioner knowing fully well that the lease rate on the basis of the rate fixed by the Deputy Commissioner, Kinnaur were on the lower side compared to the value of the land leased out to the petitioner. The petitioner was also aware that on account of the fact that there were very few sales in the area, it was not possible for the Deputy Commissioner, Kinnaur to assess the fair volition market rate and on that basis the petitioner had out of its own free will and agreed to have the rate fixed by the answering respondent. The provisions of the Evidence Act relied upon by the petitioner are otherwise not applicable to the arbitration proceedings in terms of Section 19 of the Arbitration and Conciliation Act and, therefore, reliance placed on such provisions by the petitioner is totally misplaced. The learned Tribunal has rightly considered the contention of the petitioner in this regard and thereafter passed the impugned award, which deserves to be upheld.

55. Having regard to Section 1 read with Section 19 of the Arbitration Act, this Court has no difficulty in concluding that the provisions of the Evidence Act have not been made applicable to the arbitral proceedings and, therefore, the bar created under Sections 91 and 92 of the Evidence Act cannot by its own force apply to the arbitration proceedings. Even though the basic principle of judicial determination applied to such proceedings, which would include the principles of natural justice as are required to be followed so as to ensure and maintain fairness and reasonableness of procedure.

56. However, the learned counsel for the petitioner would still maintain that no amount of oral evidence can be permitted to be led by respondent wherein the terms of the lease deed and further that Section 92 prohibits only the bearing of the dispositive operative terms of the document and not the memorandum or recital of facts contained therein. Therefore, Section 92 is a substantive law and not a procedural law and consequently Section 92 of the Evidence Act

will have application even in respect of arbitration proceedings and it was, therefore, not open to the second respondent to place reliance on the so called 'undertakings' furnished by the petitioner.

57. Even though the learned counsel for the petitioner has cited a number of judgments like ***Chanderbhan vs. Ganpatrai and sons 1944 Cal. 127, Aboobkaker Latif vs. Reception Committee, 1937 Bim. 410, 416, Bengal Jute Mill vs. Lal Chand, 1963 Cal. D.B. 405 and Roop Kumar vs. Mohan Thedani (2003) 6 SCC 595***, in support of his contentions with regard to scope and ambit of Sections 91 and 92 of the Evidence Act, however, he has failed to convince this Court as to how the provisions and thereafter the ratio of the judgment would apply to the facts of the instant case, particularly, when it is not the case of the petitioner that it did not execute the undertaking (Annexure C-10) on 30.12.2000 thereby undertaking to pay the lease rental to respondent No. 2 at the rate as would be determined by respondent No. 2 as is evident from clause 1 of the undertaking which reads thus:-

> *"The lessee shall pay the lease rental to Himachal Pradesh State Electricity Board at the rates as shall be determined by the Himachal Pradesh State Electricity Board by 31st March, 2001. Lease rentals shall be payable by lessee for the period commencing from the date of handing over of the possession of land to the lessee."*

58. As has rightly been observed and taken note of by the Tribunal, the petitioner had never questioned the undertaking and the only protest made by it vide its letter dated 18.09.2010 and even thereafter was with regard to levy of compound interest @ 16% per annum as would be evident from perusal of the aforesaid letter. The relevant portion whereof reads thus:-

> "1) Levy of Compound interest @ 16% per annum:
>
> *A copy of Clause 19 of the Implementation Agreement is enclosed herewith as Annexure –"B". The levy of compound interest @ 16% is applicable to the one time payments regarding investigation and infrastructure works of the Project. It is not applicable to recurring payments such as lease rent, the payment of which is to be governed by lease deeds, in which there is no such provision.*
>
> *2) In the discussions of various meeting held with the Committee constituted by HPSEB, we had pointed out that cost of construction of 22 KV Transmission Line from Jeori to Nigulsari, Nigulsari to Nichar and Nichar to Sholtu costing Rs.3,18,277.50 had been included in the cost of the land for working out of lease rent. We have requested this to be deleted. Similarly escalation has also been added on watch and ward establishment charges, which is unreasonable."*

59. Notably, thereafter even in September, 2010, the petitioner did not question the deduction of Rs. 3,95,40,698/- made by respondent No. 2 as is clearly evident from the letter dated 14.12.2010 addressed by the petitioner to respondent, which reads thus**:-**

> *"We are to bring to your kind notice that n amount of Rs.3,95,40,698/- has been deducted from our energy bill for the month of Sept.' 2010. This deduction is not acceptable to us, as the issue of lease rent of HPSEB land and accommodation at Sholtu and Kuppa is under dispute and yet to be finalized.*
>
> *In this connection, a meeting was held with the Chief Engineer (Project-cum-Arb.) and other Officers of HPSEB Ltd. on 12.11.2010. Next meeting is now scheduled to be held on 19th January 2011. The payment for energy bill for the month of Sept.' 2010 has been received by us under protest."*
>
> *Pending final decision of the above issue, we request you to kindly make us the payment of Rs.3,95,40,698/- alongwith up-to-date interest at the earliest.*

60. Even though a faint protest was made by the petitioner vide communication dated 14.12.2010 (Annexure C-16) but no steps were taken by it to assail such recoveries and it is only in the year 2014 when the rentals were increased, the appellant approached the Court by raising initially three claims out of which claim of rent upto the period of September, 2010 being

claims No. 2 and 3 were held to be barred by limitation and as regards claim No. 1 rental w.e.f. 2010 to 2014, it was clearly held that the appellant had no cause of action as it had itself agreed to pay the 18% of the market value towards the lease amount and this position is not even disputed before the Court.

61. It is settled law that a person who signed a document which contains contractual terms is normally bound by them even though he is ignorant of the precise legal effect. (***Ref: Bihar State Electricity Board vs. M/s Green Rubber, AIR 1990 SC 699, Jharkhand Power Corporation Ltd. vs. ASP Sealing Products Ltd. 2009 (9) SCC 701***).

62. In ***Grasim Industries & others vs. Aggarwal Steel, AIR 2010 SCC 291 (Supp.)***, it was held that when a person signs a document, there is a presumption, unless there is proof of force or fraud, that he has read document property and understood it and only then he has affixed his signature thereon, otherwise no signature on document can ever be accepted. It would be difficult to accept that the parties had signed the document under some mistake. In particular, businessmen, being careful people (since their money is involved) would have ordinarily read and understood a document before signing it. Hence the presumption would be even stronger in their case.

Arbitral Tribunal ignored Section 17 of the Registration Act

63. The learned senior counsel for the petitioner would then bank upon and rely on the provisions of Section 17 of the Registration Act to canvass that the subsequent and unregistered documents in the teeth of registered documents could not be looked into and moreover it is settled that a document which varies the essential terms of the existing lease deeds such as the amount of rent must be registered. In support of such contention he has cited the following judgments:-

1. ***Atul Krishna Bose vs. Zahed Mandal, 1941 Cal 102 (103 Sec 91)***
2. ***Brahama Nand vs. Roshni Devi, 1989 HP Page 11***
3. ***Lalit Mohan Gosh vs. The Gopali Chuck Coal Company (1911-12) 16 Cwn 55***
4. ***Sunil Kumar Roy vs. Bhwara Kankanee Colories Limited***

64. However, this question need not be gone into as the same was neither raised before the Arbitrator nor does it find mention in the memorandum of objection.

65. Even otherwise invoking of applicability of Section 17 of the Registration Act is not a pure question of law and is a mixed question of fact and law, therefore, in absence of any foundation, this question cannot be gone into and is clearly an after thought.

Legal misconduct

66. It is then vehemently argued by the learned counsel for the petitioner that the learned Arbitrators by ignoring and rejecting the registered lease deed and further by not considering relevant papers and documents have misconducted themselves. In support of such submissions, reliance is placed on following judgments:-

1. ***Aboobaker Latif vs. Reception Committee, 1937 Bombay Page 411 and 414***
2. ***FCI vs. Chandu Constructions (2007) 4 SCC 697***
3. ***K.P. Poulose vs. State of Kerala (1975) 2 SCC 236 (239)***
4. ***Sikkim Subba Associates vs. State of Sikkim, 2001 (5) SCC 629***
5. ***Associate Builders vs. Delhi Development Authority (2015) 3 SCC 49***

67. A person urging the grounds of misconduct has to satisfy the Court from the record of the arbitral proceedings that there has been legal misconduct on the part of the arbitrator as a consequence of which the award came to be vitiated. The question of adducing any kind of oral evidence to substantiate the plea or stand does not arise, it has to be shown from the

proceedings carried on before the arbitrator and the evidence adduced before the arbitrator. However, nonetheless the person aggrieved should have at least raised the plea of misconduct in the objection petition under Section 34 of the Act. In absence of any grounds, I am afraid that the ground of legal misconduct cannot be permitted to be raised for the first time in arguments.

Novation of Contract

68. It is then contended by the petitioner that the Arbitrator while answering point No. 3 have decided that there was novation of contract when the petitioner executed undertaking (Annexure C-10) subsequently to the execution of the lease deed. It is contended that the undertaking at best was a condition subject to the determination of the lease rental which had to be positively done and conveyed on or before 31.03.2011.

69. I am afraid that even such contention on behalf of the petitioner is not tenable as the petitioner out of his own volition and free will has executed the undertaking even though the petitioner would contend that it was on account of economic duress and coercion that it was forced to execute such undertaking.

70. As already observed above, the petitioner has virtually never objected to or disowned the undertaking more specifically before the competent Court within the prescribed period of limitation and therefore in absence of any challenge that too within the prescribed period such plea is clearly not tenable at this stage.

71. That apart, it would be noticed that in the instant case there were no sale exemplars and the three lease deeds so executed were only as a temporary measures because the actual amount was only to be worked out later on as is clearly evident from the letter dated 14.10.1993 (Annexure C-5). The rates were determined and communicated to the petitioner vide letter dated 07.08.2001 (Annexure C-11) alongwith which three drafts of supplementary lease deeds were also annexed.

72. Admittedly, it was the petitioner who neither executed the sale deed nor sought legal recourse either against the undertaking so furnished by it or against the action of the respondents asking it to execute the supplementary lease deed in terms of the undertaking so furnished by it. Therefore, in such circumstances all the pleas as are now being sought to be raised, be it with respect to the legal misconduct, estoppels, undue investment, applicability of Sections 91 and 92 of the Evidence Act, Section 17 of the Registration Act, misconduct of the arbitrator etc., are nothing but clearly an afterthought.

73. It needs to be reiterated that nowhere in the petition, the plea of financial duress being raised nor the undertaking (Annexure C-10) being questioned. Even the objections raised by the petitioner in its letter dated 14.04.2010 Ex.RX-1 is with respect to the bill of lease rental amounting to Rs. 3,95,40,698/- up to 31.12.2009 and even thereafter no steps were taken by the petitioner to assail the demand so raised.

74. On the other hand, the letter dated 31.01.2007 Ex. RX-6 clearly shows that a bill amounting to Rs. 2,19,01,490/- was prepared against the petitioner for which again no lawful recourse was taken by the petitioner within the prescribed time.

Restitution and unjust enrichment

75. At this stage, it may be observed that the petitioner has also taken up the plea of restitution and unjust enrichment, but I really wonder how such plea is available to the petitioner.

76. Admittedly, the petitioner has not placed on record any document on record to even remotely indicate as to what was the actual loan amount availed by it on the three properties that had been leased out by respondent No. 2 in its favour, so that the Arbitrator or for that matter this Court could get a fair idea of the market value of the properties. After all it was these documents which alone could have gone a long way and proved the actual market value.

77. This is despite the fact that respondent No. 2 had served upon the petitioner a notice under Order 12 Rule 8 read with Section 151 CPC calling upon it to produce documents, wherein, apart from the original lease deed dated 31.12.2000, respondent No. 2 had asked the petitioner to produce the documents pertaining to the monetary assistance given to it by financial institutions/banks against the leased properties.

78. No doubt, reply was filed to this application but even therein the petitioner had only stated that it was not in a position to produce original lease deed dated 31.12.2000 and as regards the other documents regarding financial assistance it was stated that these documents have no relevance whatsoever with the issue.

79. Obviously, the petitioner has concealed material documents or else there was no reason why it should have not produced the desired documents and then furnished a reply as if it was the adjudicatory authority. Therefore, in the given circumstances, the Court essentially is required to draw an adverse inference against the petitioner for withholding the best evidence. Would the petitioner have really been prejudiced by the undertaking whereby it had been asked to cough-up more amount than the one agreed to, then there was no occasion why the petitioner would not have produced these documents, more particularly, in teeth of the allegation of respondent No. 2 that the properties valued therein was about Rs. 70-80 crores. This further assumes significance as the parties are *ad idem* that the rate of rent as per the lease deed was to be worked out @ 18% of the cost of the land. If respondent No. 2 had charged more than this amount then nothing prevented the petitioner from producing cogent and convincing evidence to this effect. However, having deliberately and willfully withheld the best evidence, the petitioner cannot claim any relief and can blame no one except itself.

Award against Public Policy of India

80. The petitioner would then argue that the award is declared against the public policy of India by contending that the award passed by the learned Tribunal below is blatant being against the statutory provisions, thereby violating the fundamental policy of Indian law and therefore deserves to be set aside.

81. This contention is clearly without any merit as this Court has already observed that the majority of the objections as raised by the petitioner are nothing but an afterthought and otherwise not tenable in the eyes of law. It needs to be reiterated that during the entire course of the arbitration proceedings till the passing of the award, the petitioner did not raise even a little finger questioning the procedure being adopted by the Arbitral Tribunal and therefore, the procedure adopted by the Tribunal is not open to challenge at this stage.

82. It is more than settled that this Court while deciding an application under Section 34 of the Act which is in the nature of the objections to the arbitral award, cannot re-appreciate evidence. Moreover, it has been established on record that it was pursuant to the undertaking given by the petitioner that the bills were raised by respondent No. 2 and such bills except for the levy of compound interest were never challenged by the petitioner.

83. Further, it is not in dispute that the majority of the recoveries already stood effected in the year, 2010 while the arbitral proceedings came to be initiated only in the year, 2014 and was thus clearly barred by limitation.

Economic Coercion

84. It is more than settled that burden to prove coercion and contract lies on the party seeking to deny the contract on the ground of coercion. The plea of coercion is required to be specifically pleaded and in absence of any pleadings except a remote mention therein in para 10 of the rejoinder (to which respondent has no right of rebuttal) such plea is not tenable. It was incumbent upon the petitioner to have specifically pleaded the details of such coercion so that respondent No. 2 was required to answer, must have full details and, therefore, would not be taken by surprise. Therefore, raising the plea that too for the first time in rejoinder does not meet and rather falls short of the requirement of law.

85. In ***Bishundeo Narain & another vs. Seogeni Rai & others, AIR (38) 1951 SC 280***, the Constitutional Bench of the Hon'ble Supreme Court observed as under:-

"25. It is also to be observed that no proper particulars have been furnished. Now if there is one rule which is better established than any other, it is that in cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud of which any Court ought to take notice, however strong the language in which they are couched may be, and the same applies to undue influence and coercion."

86. The said principle was followed in a later decision rendered by another Constitutional Bench of the Hon'ble Supreme Court in ***Ladli Parshad Jaiswal vs. The Karnal Distillery Co., Ltd. & others, AIR 1963 SC 1279,*** wherein it was observed as under:-

> *"That a plea that a transaction is vitiated because of undue influence of the other party thereto, gives notice merely that one or more of a variety of insidious forms of influence were brought to bear upon the party pleading undue influence and by exercising such influence, an unfair advantage was obtained over him by the other. But the object of a pleading is to bring the parties to a trial by concentrating their attention on the matter in dispute, so as to narrow the controversy to precise issues, and to give notice to parties of the nature of testimony required on either side in support of their respective case. A vague or general plea can never serve this purpose; the party pleading must therefore be required to plead the precise nature of the influence exercised, the manner of use of the influence, and the unfair advantage obtained by the other. This rule has been evolved with a view to narrow the issue and protect the party charged with improper conduct from being taken by surprise. A plea of undue influence must, to serve that dual purpose, be precise and all necessary particulars in support of the plea must be embodied in the pleading; if the particulars stated in the pleading are not sufficient and specific the Court should, before proceeding with the trial of the suit, insist upon the particulars, which give adequate notice to the other side of the case intended to be set up."*

87. The said principle was again reiterated in ***Subhash Chandra Das vs. Ganga Parsad Das, AIR 1967 SC 878*** and ***Varanasaya Sanskrit Vishwavidalaya vs. Dr. Raj Kishore Tripathi, AIR 1977 SC 615***.

88. Even otherwise the undertaking furnished by the petitioner was consensual because the same was neither challenged nor withdrawn and this fact has been specifically admitted by the Joint President of the petitioner company who while appearing as PW1 has in his cross-examination deposed as under:-

"It is correct the company has not laid any challenge for the undertaking Annexure R-2 before the initiation of present arbitration proceedings."

89. It is a settled law that there should be clear pleadings pertaining to coercion and it must be specifically pleaded i.e. the names, date, time etc., so that the party who is required to answer, must have full details and is not taken by surprise. That apart, cogent evidence should be adduced by the party to establish that case.

Lease not in accordance with H.P. Lease Rules, 1993

90. As a last ditch effort, the petitioner would contend that the lease deeds were to be executed in terms of the H.P. Lease Rules, 1993 and it was for this precise reason that even the format upon which the lease deeds were executed was the one prescribed under the Rules.

91. I am afraid that even this contention is not available to the petitioner as it has failed to place on record any material which would even remotely go to indicate that the lease to be executed by respondent No. 2 was to be in accordance with H.P. Lease Rules, 1993. To the

contrary, respondent No. 2 has led sufficient evidence on record to the effect that the land which was leased out to the petitioner belongs to it after the same had been purchased from the Industries department and it was thereafter that the same was leased out as per mutual understanding of the parties coupled with the undertaking (Annexure C-10) furnished by the petitioner.

92. In view of the aforesaid discussion, I find no merit in this petition and the same is accordingly dismissed.

Claim not filed by a competent person

93. However, before parting, it needs to be observed that the Arbitral Tribunal had decided Point No. 1 relating to the claim not being filed by competent person against the petitioner. However, I find the said finding to be unsustainable. PW1 Major General (Retd.) Shyamdas Chaudhary has placed on record power of attorney dated 01.08.2000 (Ex.C1) executed in his favour and therefore in absence of anything to the contrary there was no reason much less a valid or legal reason for the Tribunal to arrive at the aforesaid conclusion. Even otherwise, it is more than settled that technical plea has no place in suits instituted or defended by jurisdic person like banks, corporation etc. as was so held by the Hon'ble Supreme Court more than two decades back in ***United Bank of India vs. Naresh Kumar, 1996 (6) SCC 660***, wherein it was observed as under:-

> *"10. It cannot be disputed that a company like the appellant can sue and be sued in its own name. Under Order 6 Rule 14 of the Code of Civil Procedure a pleading is required to be signed by the party and its pleader, if any. As a company is a juristic entity, it is obvious that some person has to sign the pleadings on behalf of the company. Order 29 Rule 1 of the Code of Civil Procedure, therefore, provides that in a suit by or against a corporation the Secretary or any Director or other Principal Officer of the corporation who is able to depose to the facts of the case might sign and verify on behalf of the company. Reading Order 6, Rule 14 together with Order 29, Rule 1 of the Code of Civil Procedure it would appear that even in the absence of any formal letter of authority or power of attorney having been executed a person referred to in Rule 1 of Order 29 can, by virtue of the office which he holds, sign and verify the pleadings on behalf of the corporation. In addition thereto and dehors Order 29, Rule 1 of the Code of Civil Procedure, as a company is a juristic entity, it can duly authorise any person to sign the plaint or the written statement on its behalf and this would be regarded as sufficient compliance with the provisions of Order 6, Rule 14 of the Code of Civil Procedure. A person may be expressly authorised to sign the pleadings on behalf of the company, for example, by the Board of Directors passing a resolution to that effect or by a power of attorney being executed in favour, of any individual. In absence thereof and in cases where pleadings have been signed by one of its officers a Corporation can ratify the said action of its officer in signing the pleadings. Such ratification can be express or implied. The Court can on the basis of the evidence on record, and after taking all the circumstances of the case, specially with regard to the conduct of the trial, come to the conclusion that the corporation had ratified the act of signing of the pleading by its officer."*

94. In view of the aforesaid discussion, even while accepting the plea that the claim petition was filed by the petitioner through a competent person, I, however, find no merit in the application/objections and the same is accordingly dismissed, leaving the parties to bear their costs. Pending application(s), if any, stands disposed of.

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

Ms. Renu Sood ...Petitioner
Versus
Ram Prasad Gupta & another ...Respondents

CR No. 160 of 2016
Decided on :13.10.2017

H.P. Urban Rent Control Act, 1987- Section 24(3)- An application under Section 11 of the H.P. Urban Rent Control Act filed by the tenant for restoration of certain amenities and also for restoration of possession of the demised premises- The learned Rent Controller passed an interim direction for restoration of the demised premised- The learned First Appellate Court also upheld the order- While reversing the order of the two learned Courts below, **the High Court held**- that in face of best documentary evidence in the shape of rent receipts not being produced before the learned Rent Controller- Tenancy having denied by the landlord, it was incumbent upon the learned Rent Controller to have before him some tangible documentary evidence, personifying the fact of tenancy and only thereupon an interim order for restoration of possession could have been passed- Revision petition allowed- impugned order quashed and set aside. (Para-3 and 4)

For the petitioner : Mr. Satyen Vaidya, Senior Advocate with Mr. Vivek Sharma, Advocate.
For the respondents : Mr. N.L. Sahil, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The respondents/applicants claim themselves to be the tenants in the relevant demised premises. They also claim that the petitioner herein is their landlord. The quantum of rent purportedly defrayed by the respondents/applicants vis-à-vis the petitioner/landlord, is averred to be constituted in a sum of Rs. 700/- per mensem.

2. Importantly, the order impugned before this Court is upon an application, cast under the provisions of 24(5) of the Himachal Pradesh Urban Rent Control Act, 1987, hence obviously it not arise, from, concurrent pronouncement(s) made by both the learned Courts below, upon an application seeking eviction of the respondents/applicants from the demised premises. Contrarily, it arises from orders pronounced upon an application cast under Section 11 of HP Urban Rent Control Act, 1987, application whereof was for restoration vis-à-vis the applicant(s), of certain amenities, also was for restoration of possession of the purported demised premises, vis-à-vis the applicants. It is averred therein that the petitioner, by locking the door of the purported demised premises, thereupon his precluding the respondents/applicants from making ingress(s) therein. Consequently, the applicants/respondents claim in the apposite petition, for, possession of the purported demised premises, being restored, vis-à-vis them. Even when the application cast under the provisions of Section 11 of H.P. Urban Rent Control Act was not put to trial, yet the learned Rent Controller pronounced interim direction, for restoration of the possession of the purported demises premises, by the petitioner herein, vis-à-vis the respondents/applicants. The order of the learned Rent Controller was challenged before the learned Appellate Authority, whereupon the latter proceeded to affirm the orders recorded by the learned Rent Controller. Consequently, the petitioner is aggrieved therefrom, hence is led to institute the instant petition before this Court.

3. The order impugned before this Court, would not, suffer any infection(s) or any gross vices, also may not warrant any invalidation, only upon adduction before the learned Rent Controller, of, best documentary evidence, comprised in rent receipts personifying the factum of

the respondents/applicants defraying per mensem rent borne in a sum of Rs. 700/-, specifically qua the extant demised premises, vis-à-vis the petitioner herein. However, the aforesaid evidence did not visibly, exist before the learned Rent Controller, also he did not ensure its adduction before him, rather proceeded to make interim directions for restoration of possession of the demised premises, by the petitioner herein, vis-à-vis the respondents. Likewise, the learned Appellate Authority also proceeded to affirm the orders pronounced by the learned Rent Controller.

4. Be that as it may, even if some contentions are cast in the apposite reply furnished to the extant application, of the applicants/respondents, using, the relevant premises as a store, yet in the apposite sentence occurring at paragraph-6 of the reply to the petition, there also occurs a subsequent denial, of, letting of the premises by the petitioner vis-à-vis the respondents/applicants. However, even if it may be open to the petitioner to, through an appropriate application seek correction/amendments thereof, also upon it being allowed, any effect thereof may be blunted, (b) nonetheless, it was imperative for the learned Rent Controller, to ensure that before his proceeding to pronounce the aforesaid impugned interim directions, the aforesaid tangible documentary material, personifying the fact of a tenancy being created by the petitioner vis-à-vis the applicants/respondents vis-à-vis the extant premises, visibly existing on record. However, despite his not ensuring for existence of the aforesaid tangible documentary evidence, in prima-facie proof of the relevant fact, he has yet proceeded to make the impugned interim directions. In aftermath, the learned courts below have committed a grave illegality besides a material impropriety.

5. Consequently, the revision petition is allowed and the impugned order is quashed and set aside. However, the liberty is reserved to both the respondents to adduce the relevant best documentary evidence, also to move appropriate application(s) for relevant purpose(s). However, till a decision is recorded upon an application cast under the provisions of Section 11 of the H.P. Urban Rent Control Act, it is deemed fit to order that the learned Rent Controller shall ensure that the petitioner herein, may not, induct any tenant therein, also may not encumber or alienate it in any manner, also may not change its nature and possession. The learned Rent Controller, Shimla is directed to record his decision upon the Rent petition No. 209-2 of 2015, expeditiously within six months. All pending application(s), if any, are also disposed of. No costs.

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

State of H.P. .....Appellant.

Versus

Dheeraj Kumar. .....Respondent.

Cr. Appeal No. 370 of 2010
Date of decision: October 23, 2017.

Code of Criminal Procedure, 1973- Section 378- Appeal against Acquittal- Sections 376/506 of the Indian Penal Code, 1860- Accused acquitted of the aforesaid charges- State preferred an appeal against the aforesaid acquittal- **The High Court Held** – that the prosecutrix has not been subjected to sexual intercourse forcibly and against her will seeing to her age and the fact that the prosecutrix was well built and able bodied girl, no evidence on record to show any resistance and objection to the commission of such an act nor and there is any medical evidence in this behalf – The act thus held to be consensual. (Para-10)

Code of Criminal Procedure, 1973- Section 378- Appeal against Acquittal- Sections 376/506 of the Indian Penal Code, 1860- The High Court further held- that ocular evidence led by the prosecutrix herself is not supported by the medical evidence that she had resisted the act- further held- Had the act been forcible the neighbours and the labourers in an around the situs would have been in the know of the incident- The prosecutrix thus did not show any resistance and the act was thus consensual - The Trial Court had rightly acquitted the accused- appeal dismissed. (Para-12)

For the appellant Mr. D.S. Nainta and Mr. Virender Verma, Addl. Advocate Generals.
For the respondent Mr. Lakshay Thakur, Advocate.

The following judgment of the Court was delivered:

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

State of Himachal Pradesh is aggrieved by the judgment dated 22.4.2010 passed by learned Sessions Judge, Chamba (H.P).) in Sessions trial No. 26 of 2009 whereby the respondent (hereinafter referred to as the accused) has been acquitted of the charge under Sections 376/506 of the Indian Penal Code.

2. The complaint is that learned trial Court has failed to appreciate the evidence available on record in its right perspective and to the contrary based its findings on surmises and conjectures. Learned trial Court has allegedly erred in not placing reliance on the testimony of the prosecutrix who as per the prosecution version was taken by the accused to a 'Khandhar' (remains of a dilapidated building) and subjected to sexual intercourse against her will and without her consent. On her raising hue and cries the accused allegedly threatened her to done away with her life. Her testimony to this effect remained unshattered. The factum of there being no enmity of the complainant party with the accused, hence there was no reason of his false implication is also not taken into consideration. The impugned judgment, as such, has been sought to be quashed and set aside and the accused convicted of the offence he allegedly committed under Section 376 and 506 of the Indian Penal Code.

3. The present is a case where the prosecutrix (name withheld) at the time of occurrence was 19 years of age whereas the accused 20 years. They were resident of the same place i.e. Rajpura in the superb of Chamba town itself. It has been alleged that PW8 Saharo Begum Aunt (Bua) of the prosecutrix had cut grass in the Farm belonging to Horticulture department at Rajpura on 3.10.2008. The prosecutrix was deputed to bring grass to the house at 2:30 P.M. The accused came there around 3:30 P.M. He caught hold her arm and taken to a 'Khandhar' situated nearby. He subjected her to forcible sexual intercourse there. She raised hue and cries but he forced her to sit there. He threatened to kill her had she raised hue and cries and disclosed the occurrence to her parents. When it became little dark she was taken by him to his house and made to enter inside his room through a window. She was so frightened that could not even speak anything. During the night also, he subjected her to sexual intercourse forcibly at 4-5 occasions. On 4.10.2008 around 5:00 A.M. on finding the accused sleeping she came out through that very window and reached in her house. There she narrated the incident to her mother Smt. Gulzar Begum (PW1). She was brought by her mother to police station. She reported the manner in which she was subjected to sexual intercourse forcibly and the threats held out to her to the police.

4. On the report so lodged by the prosecutrix, FIR Ext.PW1/A came to be registered in Police Station, Chamba. The prosecutrix was taken to hospital where she was subjected to medical examination by Dr. Mrs. Arti Gupta, Gynecologist (PW13). She disclosed the history of being subjected to sexual intercourse on 3.10.2008 and during night time also after 10.00 P.M. four times by Dheeraj (accused) against her will and without her consent. Also that in the morning she was found in his company by her parents. On her general examination no marks of

injury on any part of her body were present. No marks of injury were there over thighs, private parts or nipples. Pubic hairs were not matted. The Pubic hairs were clipped and handed over to the police. On separating labia minora, old hymen tear were present. The vagina was found admitting two fingers with difficulty, however, the expert PW13 failed to indicate the time of sexual intercourse committed with the prosecutrix. The shirt and salwar of the prosecutrix as well as pubic hairs and vaginal swab preserved for analysis were sealed and handed over to the police.

5. Since semen was found on salwar and pubic hairs of the prosecutrix, therefore, PW13 in her opinion could not rule out the possibility of rape with the prosecutrix. The MLC is Ext.PW13/B. During the course of further investigation the I.O. has prepared the spot map Ext.PW12/A of the place of occurrence i.e. the so called 'Khandhar' Mark 'A' and that of the house of accused where the prosecutrix was allegedly subjected to sexual intercourse by the accused. The bed sheet spreaded on the bed lying in the room of the accused was also taken in possession vide recovery memo Ext.PW2/C on the identification of the room given by the prosecutrix. One currency note worth Rs. 10/- lying on the place of occurrence at the so called 'Khandhar' was also taken into possession vide recovery memo Ext.PW12/B. The accused was also got subjected to medical examination vide MLC Ext.PY and he was found capable of doing sexual intercourse. The date of birth certificate of the prosecutrix is mark 'Y'. Letters she allegedly written to the accused are mark D1 to D6.

6. On completion of the investigation and receipt of the report of Chemical examiner Ex.PX as well as finding a case for the commission of an offence punishable under Section 376 and 506 (II) IPC made out against the accused, report under Section 173 Cr.P.C. was filed in the Court. Learned trial Judge on going through the report and the documents annexed therewith has concluded that the same prima-facie disclose the commission of offence punishable under Sections 376 and 506(II) IPC and charge was accordingly framed against the accused. He, however, pleaded not guilty to the charge and claimed trial. The prosecution in turn has examined 13 witnesses in all. The material prosecution witnesses are however the prosecutrix who has stepped into the witness box as PW2 and her mother Smt. Gulzar Begum PW1 and also the Doctor PW13. The another material witness Jaiwant Raj PW7, the Pradhan of Gram Panchayat Rajpura, however, has not supported the prosecution case and turned hostile. Smt. Saharo Begum the Aunt of the prosecutrix is PW8. The remaining prosecution witnesses are police officials who remained associated during the investigation of the case in one way or the other, hence formal.

7. On the other hand the accused in his statement recorded under Section 313 Cr.P.C. has denied all the incriminating circumstances appearing in the prosecution evidence against him being incorrect except for that he was got medically examined vide MLC Ext.PY and found capable of performing sexual intercourse as well as his underwear and pubic hairs preserved by the Medical Officer for Chemical analysis. In his defence he has come forward with the version that he is innocent and has been implicated falsely in this case by distorting the facts against him. He, however, opted for not producing any evidence in his defence.

8. Learned trial Judge as is pointed out at the outset on appreciation of the evidence available on record has arrived at a conclusion that though the prosecutrix was subjected to sexual intercourse by the accused with her consent as in the opinion of learned trial Judge the evidence is not suggestive of that resistance was shown by her. The prosecution story that the prosecutrix was forcibly subjected to sexual intercourse is doubtful and she having attained the age of majority and being competent to give consent for sexual intercourse with her such an act on the part of the accused was found to be consensual and as such, while giving benefit of doubt to him he has been acquitted of the charge framed against him.

9. Mr. D.S. Nainta, learned Additional Advocate General has vehemently argued that the present is not a case of the commission of sexual intercourse by the accused with the consent of the prosecutrix and rather as per evidence as has come on record by way of her own statement she was assaulted sexually by applying force. On the other hand Mr. Lakshay Thakur,

Advocate, learned defence counsel has urged that the prosecutrix was in love with the accused. They being of same village were visiting each other frequently. The prosecution evidence according to Mr. Thakur is not suggestive of that the prosecutrix was exploited sexually by the accused by applying force and rather in the given facts and circumstances she was consenting party thereto.

10. On analyzing the rival submissions and also taking into consideration the given facts and circumstances of this case, it would not be improper to conclude that the present is not a case where the accused has subjected the prosecutrix to sexual intercourse forcibly and against her will for the reasons that she being a well built and able bodied girl aged 19 years could have not been subjected to sexual intercourse forcibly by the accused aged about 20 years at the relevant time being in her age group. Though as per the prosecution case the prosecutrix had shown resistance and objected to the commission of such an act by the accused with her and also that she slapped him as well as given a push, however, nothing to this effect find recorded in the FIR Ext.PW1/A which contains the very first version qua the manner in which this incident has taken place. Though as per this document the accused asked the prosecutrix that he had some work with her and when she enquired about it he caught hold her arm and taken her to a building in dilapidated condition ('Khandhar') situated in the farm of Horticulture department. As per her further version she tried to raise alarm, however, he gagged her mouth with his hand. He even threatened her to done away with had she disclosed the incident to her parents. This story, however, seems to be fabricated and engineered for the reasons that as per her own version the 'Khandhar' where she was taken by the accused at a distance of 550 feet from the farm was also part of the property of Horticulture department. She admit that the labourer used to work in the Farm and Chowkidar remains on duty there even during holidays also. Her mother PW1 has also stated so. However, as per her version the distance of that 'Khandhar' from Farm house is 200 yards. It is difficult to believe that in the presence of the labourers in the Farm the accused could have not taken the prosecutrix forcibly to the 'Khandhar' had she not been consenting party but accompany him there. Interestingly enough the accused and prosecutrix both belongs to Rajpura. The distance between their houses is not much. The same as per the version of the prosecutrix is 250 meters whereas that of her mother PW1 200 meters and as per that of the I.O. PW12 ASI Shyam Parshad 25-30 feet. Not only this, it is also established on record from the testimony of PW1 that before house of the accused house of one Bindu falls whereas in the backside the house of one Dharam Singh is situated. The prosecutrix also admit so in her cross-examination meaning thereby that the house of the accused is surrounded by other houses. There is nothing in the prosecution evidence qua the time when the prosecutrix was brought from the Farm by the accused to his house in the evening. She, however, submits that when it fell little dark she was brought there at that time meaning thereby that the neighbours i.e. Bindu and Dharam Singh etc. must be present in their houses. The prosecutrix if was not a consenting party to such an act the accused could have not been at all in a position to make her to enter inside the room through window. Had any resistance been shown by her when was being taken away firstly to that 'Khandhar' and thereafter to his house by the accused, the labourers and for that matter their neighbours would have noticed them and the accused could have not taken her forcibly. The present in our considered opinion is a case where the prosecutrix was in love with the accused. The letters mark D1 to D6, though being un-exhibited, hence could not be relied upon and also that when put to the prosecutrix during the course of recording her statement she denied the same to be in her hand, however, take us nearer to the factual position that the accused and prosecutrix both were in love, hence the possibility of meeting frequently with each other cannot be ruled out. Though as per the prosecution case the parents of the prosecutrix on her going missing from the house searched her here and there but could not be traced out and rather she at her own returned to the house early in the morning around 5.00/6:00 A.M. on 4.10.2008.

11. However, if the testimony of PW8 Saharo Begum the Aunt of the prosecutrix is seen she has not uttered even a single word that the efforts to trace out the prosecutrix were made by them. As per her version she had cut grass in the Farm at Rajpura and the prosecutrix

was sent to bring the same. She expressed her ignorance that the prosecutrix returned to home with grass or not. This witness is also resident of Rajpura, therefore, had the prosecutrix been gone missing and efforts made to trace her out, this fact should have come to her notice also. The story that the prosecutrix had gone missing when deputed to bring grass from the Farm seems to be false because as per the history given to the Doctor PW13 by the prosecutrix she was taken to some place by the accused on 3.10.2008 and during night time i.e. after 10:00 P.M. he committed sexual intercourse with her four times against her consent. In the morning she was found there (on the spot) by her parents. Such version of the prosecutrix before Medical officer seems to be correct because she being in love with the accused, the possibility of she accompanied him at her own cannot be ruled out.

12. The further testimony of PW13 the Doctor belies the prosecution version qua resistance shown by the prosecutrix to such an act and conduct on the part of the accused for the reasons that on her general examination no mark of injury could be found on any part of her body including thighs and private parts or over nipples when as per her version while subjecting her to sexual intercourse the accused had given tooth bites on her cheeks and breasts. Therefore, had it been so, some marks of injury were bound to occur on her cheeks and breasts. Though as per her version she received injury on her left leg due to forcible sexual act committed with her by the accused and she allegedly disclosed the same to the Medical Officer, however, nothing to this effect is there in the MLC Ext.PW13/B. While in the witness box the prosecutrix tells that she was subjected to sexual intercourse four times in the 'Khandhar' whereas 4-5 times in his house during the night, however, such version is an improvement as in the FIR Ext.PW1/A nothing has come as to how many times she was subjected to coitus at that 'Khandhar'. PW7 Jaiwant Raj, the Pradhan of Gram Panchayat could have said something positive qua the manner in which the investigation having taken place in his presence, however, he did not support the prosecution case and rather turned hostile. Otherwise also his testimony in cross examination conducted on behalf of the prosecution only show that the parcel containing bed sheet Ex.P1 already sealed was taken in possession in his presence vide memo Ext.PW2/C.

13. The I.O. of the Case PW12 ASI Shyam Parshad has not stated something special while in the witness box and his testimony in cross-examination that he did not record the statement of the Chowkidar nor tried to verify the labourers who were working in the Farm on that day lead to the only conclusion that he has conducted the investigation in cursory manner without taking much interest. His testimony that house of Dharam Singh is near to the house of accused and the house of the prosecutrix is at a distance of 25-30 feet from the house of the accused lends support to the defence version instead of the prosecution case.

14. In view of what has said hereinabove, the evidence as has come on record by way of the testimony of so called material prosecution witnesses is not at all suggestive of that the prosecutrix was subjected to sexual intercourse by the accused forcibly. Learned trial Judge rather on appreciation of the evidence available on record in its right perspective has rightly concluded that such an act on the part of the accused with her was consensual. He, therefore, has rightly been given the benefit of doubt and resultantly acquittal of the charge framed against him.

15. The remaining prosecution witnesses i.e. PW3 HC Kailash Chand the then MHC, Police Station, Sadar Chamba, C. Mehar Singh PW4, C. Rakesh Kumar PW5, LC Bimla Devi PW6, ASI Karan Singh PW9, ASI Dharam Pal PW10 and C. Madan Singh PW11 are formal and their testimony could have been used as link evidence had the prosecution been otherwise able to bring guilt home to the accused. Therefore, it is not desirable to discuss the evidence as has come on record by way of their respective testimony.

16. For all the reasons hereinabove, the appeal fails and the same is accordingly dismissed. Consequently, the impugned judgment is affirmed. The personal bond executed by the accused will stand cancelled and the surety discharged.

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

P.C.Sharma ....Petitioner.

Versus

Central Administrative Tribunal and others ....Respondents.

CWP No. 1299 of 2008.
Decided on 6.11.2017.

Constitution of India, 1950- Article 226 and 227- Civil Writ Petition- Service- As per the petitioner the qualifying marks altered vide circular dated 27.6.2001- Despite the fact that the petitioner had secured more than 33% marks in each paper but he was not declared as successful, as in the interregnum respondent-department had imposed a condition of 40% aggregate qualifying marks- petitioner had approached the Central Administrative Tribunal – The original application was dismissed- Hence- the writ petition- **The High Court held**- that since it was not a case where the rules of the game were changed after issuance of the circular inviting applications - the criteria of securing aggregate 40% marks in addition to securing 33% marks in each paper could not be faulted in any way- the findings returned by the Central Administrative Tribunal affirmed- writ petition stands dismissed. (Para-10)

For the petitioner. Ms. Shreya Chauhan, Advocate

For respondents Mr. Ashok Sharma, Assistant Solicitor General of India with Ms. Srishti Verma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J *(Oral).*

Brief facts necessary for adjudication of the present case are as under:-

On 19.7.2006 respondent-department had notified two posts of Assistant Administrative Officers (AAO) which were to be filled up through Limited Departmental Competitive Examination (LDCE). Examination consisting of two parts, i.e., (a) written examination consisting of five papers comprising 100 marks each; and (b) evaluation of service records comprising 150 marks. Petitioner who was serving with the respondent-department as an Assistant Administrative Officer at the relevant time, being eligible to participate in the LDCE (supra), applied for the post in issue. As per the petitioner vide circular dated 27.6.2001 though qualifying marks stood provided for all the subjects, however, aggregate qualifying marks were not contemplated in the same. Result of the examination was declared on 23.11.2006. Despite the fact that petitioner had secured more than 33% marks in each of the paper, he was not declared as a successful candidate as in the interregnum respondent-department had imposed a condition of 40% aggregate qualifying marks to be obtained by a candidate.

Feeling aggrieved, petitioner filed an original application, before learned Central Administrative Tribunal, praying for the following reliefs:-

i). That the impugned order dated 23.11.2006 (Annexure A-1) be quashed being illegal and contrary to the circular dated 27.6.2001(Annexure A-2) and further to promote the applicant along with all consequential benefits @ 18% p.a. w.e.f. the date of declaration of the result as per the rules governing the conditions of service of the applicant and also to quash the circular dated 25.11.2006 (Annexure A-5) in respect of one post for which

the applicant is entitled to be considered, and thereafter, selected and appointed.

ii). That the process of selection and appointment circulated vide order dated 25.11.2006 (Annexure A-5) be stayed during the pendency of the present application.

iii). That any other relief deemed feet and proper may kindly be granted to the applicant.

iv). That the cost of O.A. may kindly be awarded in favour of the applicant.

2. Respondent-department while opposing the said original application submitted in its reply that the scheme and syllabus for the LDCE for the post of Section Officer/AAO which was circulated by Indian Council of Agricultural Research on 27.6.2001 was partially modified on 20th October, 2005. It was further mentioned in the reply that applications for conducting the limited departmental competitive examination for the post of AAO were invited, vide circular dated 19.7.2006. Thereafter Director, CPRI on 27.7.2006 keeping in view the higher duties and responsibilities for the post in issue fixed the criteria of minimum qualifying marks in each paper, i.e., 33% and aggregate in written examination as 40%. It was further mentioned in the reply that written examination for the post of AAO was held from 16th to 19th October, 2006 at CPRI, Shimla and the criteria was duly announced in the examination hall at the time of examination. It also stands mentioned in the reply that before the examination, Director announced the same in the examination hall. This categorically finds mention in reply to para 4 sub para (vi) of reply filed by respondent-department to the original application on merits.

3. Rejoinder filed by the present petitioner before the learned Tribunal to the said para of the reply reads as under:-

"vi) That the contents of sub para No. vi) of the original application and the submissions made above are reiterated and that of the written statement is denied."

Incidentally in rejoinder filed to the preliminary submissions it stood denied by the original applicant that the criteria were announced in the examination hall.

4. Learned tribunal vide its order dated 17th October, 2007 dismissed the original application so filed by the present petitioner. While dismissing the original application, it was held by learned tribunal that it was not disputed that no candidate was selected pursuant to LDCE test held in October, 2006 and thereafter the Institute held another LDCE test in January, 2007 in which the applicant did not apply. Learned tribunal also took note of the fact that in the said process two persons qualified, one of whom had joined whereas the other has expressed his inability to join the post and the vacant post was under process of being filled up. Learned tribunal also held that provisions of the circular dated 27.6.2001 issued by ICAR provided that the Agricultural Scientists Recruitment Board/ICAR had the discretion to fix qualifying marks in any or all the subjects of the examination. It further held that the office of Director had fixed the criteria of minimum 33% marks in each paper and 40% in aggregate on 27.7.2006, i.e., much prior to the date of examination and it also took note from the stand of the respondent-department that the criteria was also announced at the time of holding the LDCE test. Learned tribunal also held that as the Director was having the power to fix the said criteria, the Court could not interfere with the same unless it was demonstrated that the act was arbitrary or against statutory rules which the applicant had failed to prove. Learned tribunal also held that if the applicant was not satisfied with the criteria, he ought to have challenged the same or he should have appeared in the written examination under protest which he could not to do so. Learned tribunal further held that even otherwise the entire selection process at this stage could not be unsettled keeping in view the fact that in the first examination no one had qualified and in subsequent examination those who had qualified had already joined on promotional posts, who were not party-respondents before the learned tribunal.

5. Thereafter, in para 14 of the order, learned tribunal observed as under:-

"We were, however, informed that the respondents are going to hold another LDCE for one post of AAO and the applicant requested that he may be allowed to appear in the same. In our opinion, there should be no objection in acceding to this prayer of the applicant. Accordingly, it is directed that in case the applicant applies now for the LDCE to be held, respondent No.2 shall entertain his application while condoning the delay, if any, and allow him to appear in the examination for the post of AAO."

Original Application was accordingly disposed of in the above terms.

6. The order so passed by learned tribunal stands assailed by way of this writ petition primarily on the ground that the order passed by learned tribunal is not sustainable in the eyes of law as the learned tribunal erred in not appreciating that once the process of appointment had been put into motion by the respondent-department vide circular dated 19.7.2006, thereafter respondent-department could not have changed the rule of the game.

7. No other point was urged.

8. We have heard learned counsel for the parties and have also gone through the records of the case as well as the order under dispute.

9. In our considered view there is no infirmity with the order under challenge. It is not in dispute that the circular vide which applications were invited for conducting limited departmental examination were issued on 19.7.2006. It is also not in dispute that the criteria of aggregate of 40% marks in addition to 33% minimum marks in each paper came into existence on 27.7.2006. It is also not in dispute that the examinations were held from 16th to 19th October, 2006. It is further not in dispute that not even a single candidate got selected pursuant to the said limited examination. It is also not in dispute that thereafter a fresh process was initiated by the respondent-department to fill up two posts in which the petitioner did not participate. It is further not in dispute that two candidates were successful in the subsequent process and one of them joined also but he was not arrayed as party-respondent in the original application.

10. Be that as it may, the fact of the matter remains that as on the date when the petitioner appeared in the limited competitive departmental examination, the criteria of 40% aggregate in all the subjects was in force. Now incidentally here it is not a case where after the issuance of circular inviting applications the rules of the game were changed to the effect that candidates who were eligible to apply for LDCE as per circular dated 19.7.2006 were subsequently rendered ineligible. All that was done on 27.7.2006 was that an additional criteria of securing of aggregate 40% marks was also imposed on all the candidates. This undoubtedly was within the authority of the Director, as has been held by learned tribunal which aspect could not be disputed by learned counsel for the petitioner during the course of arguments. Now here it is also not a case that this particular criteria was made applicable only on the petitioner and not on other candidates. In other words, the criteria of securing 40% additional marks was applicable across the board to all the appearing candidates. Now it is the stand of the respondent-department that the said criteria was also announced in the examination hall on the date of the examination which stands disputed by the petitioner. Whether or not the criteria was announced is a disputed as on the date when the examination was held is a disputed question of fact which cannot be gone into in the present proceedings wherein this Court is undertaking judicial review of an adjudication made by the learned tribunal. A perusal of the order under challenge demonstrates that the learned tribunal after taking into consideration the respective contentions of the parties by way of a well reasoned order concluded that there was no merit in the claim of the original applicant. Reasons that weighed with the learned tribunal have already been enumerated by us above and we are not repeating them for the sake of brevity. However, we are satisfied that the reasons so returned by learned tribunal in its order, under challenge before this Court, are duly borne out from the records of the case and are not perverse. We are also of the considered view that there was no illegality committed by the respondent-department as alleged by the petitioner because the criteria of securing aggregate 40% marks in addition to securing

33% marks in each paper was very much in vogue as on the date when the examination were conducted. Besides this, taking into consideration the fact that no candidate was successful in the limited competitive departmental examination so held in October, 2006 and that in the subsequent examination the petitioner did not participate and further that learned tribunal while disposing of the original application on the request of the present petitioner had directed the respondent-department to entertain the application of the present petitioner by condoning the delay in case petitioner intended to appear in the subsequent examination/for one of the post, in our considered view, the order so passed by learned tribunal neither suffers from any infirmity nor it warrants any interference. As we have already stated above, the order passed by learned tribunal is well reasoned order and the findings returned by it are duly borne out from the records of the case and the same are also duly sustainable in law.

Therefore, in view of the above we do not find any interference in the present writ petition, the same is accordingly dismissed, so also pending applications, if any.

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

Hardev Singh ...Petitioner
Versus
Puni Devi and others ...Respondents

CMPMO No. 203 of 2016
Decided on : 8.11.2017

Code of Civil Procedure, 1908- Order 22 Rule 3- An application for being impleaded as LRs. Of the deceased filed by the wife, purportedly on the basis of a Will, to the exclusion of all, however, in paragraph-3 of the application filed under Order 22 Rule 3- she had averred that beside her, one Jasvir Singh, Ajmer Singh, Jaspal Singh, Gurmit Kaur and Smt. Satto, being sons and daughters of her deceased husband from the earlier marriage were also there- The Learned Trial Court had issued notices of the aforesaid application to the contesting defendants, in the civil suit. However, no notices were issued to the aforesaid L.Rs reflected in para-3 of the applicant - **Held**- it was incumbent upon the learned Trial Court to make an effective determination, vis-à-vis the solitary capacity of Puni Devi (the wife) on demise of her husband, seeking impleadment by way of the application under Order 22 Rule 3- it was also enjoined upon the learned Trial Court below to ensure elicitations from the persons enumerated in para-3- Further held that it was the duty of the Court to protect the rights of other L.Rs. and it was, thus, imperative for the learned Trial Court to issue notices to them with the respect to the claim made by the wife, seeking exclusive testamentary disposition qua her. It was also held that non-issuance of notice was also an infraction of the principle(s) of audi alteram partem- Consequently, the orders of the trial Courts below reversed and set aside.

For the petitioner : Mr. Desh Raj Thakur, Advocate.
For the respondent : Ms. Shashi Kiran, Advocate, vice counsel for respondent No. 1.
Mr. Malay Kaushal, Advocate, for respondents No. 2 and 4.
Mr. Sunny Moudgill, Advocate vice Mr. Devender K. Sharma, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

Civil suit bearing No. 133/1 of 2011 was instituted by one Ran Singh against his son and grand son. In the instant civil suit he claimed a decree for possession. However, during

the pendency of civil suit bearing No. 133/1 of 2011, before the learned Civil Judge (Senior Division) Court No. 1, Paonta Sahib, District Sirmour, the aforesaid Ran Singh expired. On his demise, his widow one Punni Devi instituted an application cast under the provisions of Order 22 Rule 3 CPC, wherein she, on demise of her husband, claimed an exclusive right for representing his estate, right whereof stood anvilled upon her deceased husband making a testamentary dispositions qua it vis-a-vis her. However, in paragraph-3 of the application, she has averred of besides her, one Jasbir Singh, Ajmer Singh, Jaspal Singh, Gurmit Kaur and Smt. Satto, being respectively the sons and daughters of her deceased husband, from the latters' previous marriage. The learned trial Court, though, issued notice upon the aforesaid application, vis-à-vis the contesting defendants, yet it failed to issue notice upon the persons referred in paragraph-3 of the application, (i) who purportedly, unless the Will propounded by Puni Devi was judicially validated, hence held alongwith her an inheritable right in the estate of deceased Ran Singh, (ii) besides thereupon, they, on his demise, too were competent, to hence represent his estate AND claim their addition in the array of co-plaintiffs. Even though, no imperative obligation is cast upon the Court below, for issuing any pre-adjudication notice upon the aforesaid application upon all the purported LRs of the deceased litigant concerned, (iii) yet when one Puni Devi had averred of deceased Ran Singh leaving behind certain persons, who thereupon may purportedly hold alongwith her an inheritable right(s) in the estate of Ran Singh, (iv) besides when the contesting defendant had in their reply thereto, contended that the relevant testamentary disposition, wherein Puni Devi was constituted, as the solitary legatee being a fraudulent document, thereupon in the light of the mandate of provisions of Order 22 Rule 5 CPC, the provisions whereof stand extracted hereinafter:

> **Determination of question as to legal representative-** Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court.
>
> Provided that where such question arises before an Appellate Court, that Court may, before determining the question, direct any subordinate Court to try the question and to return the records together with evidence, if any recorded at such trial, its findings and reasons therefor, and the Appellate Court may take the same into consideration in determining the question."

(v) it was incumbent upon the learned trial Court, to make an effective determination, vis-à-vis the solitary capacity of Puni Devi, to, on demise of her husband Ran Singh, seek impleadment in his place in the array of co-plaintiffs, (vi) for facilitating whereof it was enjoined to ensure elicitations from them besides from the persons enumerated in paragraph-3, of the apposite application qua whether the testamentary disposition, stand assailed, by the purported LRs of deceased Puni Devi before the Civil Court concerned. All the aforesaid elicitations from all the purported LRs of deceased Ran Singh was imperative, given the learned counsel for the petitioner, submitting, before this Court (vii) of the aforesaid testamentary disposition standing assailed before the Civil Court concerned. Further more, unless an effective binding verdict, is recorded, upon the civil suit, instituted before the civil Court concerned, by the other legal representatives of deceased Ran Singh, (viii) thereupon concomitantly, the exclusivity of entitlement of Puni Devi, to, on demise of Ran Singh claim qua hers being the solitary befitting person to represent his estate, also cannot be concluded to be yet cinchingly established. Even though, some time may elapse in a conclusive binding judicial verdict being pronounced upon the aforesaid testamentary disposition, whereon a challenge is laid by the purported legal representatives of deceased Ran Singh, wherein the latter constituted one Puni Devi to be his solitary legatee, (ix) nonetheless, thereupon the interest(s) in the extant litigation, of other purported LRs of deceased Ran Singh is yet enjoined to be protected (x) failing which a grave prejudice vis-à-vis their entitlement(s) to the benefits of decree of possession, if any, pronounced upon the instant suit, would ensue, rather benefits thereof would ensue vis-à-vis them. For precluding the aforesaid legal mishaps, it was imperative for the learned trial Court, to issue notice upon them also to elicit from them, their contentions' with respect to the espousal of one Puni Devi qua her solitary entitlement, to succeed

the estate of her deceased husband, on anvil of his making a testamentary disposition vis-à-vis her, validity whereof is yet under cloud. However, the learned trial Court has misled itself, to not, serve any notice upon the other purported legal heirs of deceased Ran Singh, whereas service upon them (xi) would have, precluded an untenable event of theirs being not permitted to be arrayed along with Puni Devi in the array of co-plaintiffs. Significantly, hence the impugned order whereby solitarily one Puni Devi, on demise of her husband, hence has been permitted to succeed to his estate, also hers being made the solitarily legal representative, of the deceased plaintiff suffers, from a vice of it being rendered in gross infraction of the principle(s) of *audi alteram partem*.

Consequently, the impugned order is reversed and set aside. The matter is remanded to the learned trial Court to, after affording opportunities to all the purported legal representatives of deceased Ran Singh, to, in accordance with law, make a befitting verdict qua theirs', on demise of one Ran Singh, being entitled to represent his estate. The parties are directed to appear before the learned trial Court on 27.11.2017. All pending application(s), if any, are also disposed of.

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BEFORE HON'BLE MR.JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

RSR Private Limited ....Petitioner

Versus

State of H.P. & Others ....Respondents

CWP No.910 of 2017
Judgment Reserved on: 12.10.2017
Date of decision: 8.11.2017

Constitution of India, 1950- Cancellation of tender- Petitioner being the lowest and the successful bidder was not awarded the rate contract for the purpose of Plant Protection Equipments (A) (Foot, Hand Compression & Knapsack, Sprayer etc.) for the year 2017-2018- writ petition filed- Held- the frivolous objections were raised by the Members of the Tenders Opening Committee (TOC) vis-à-vis the petitioner who admittedly was the lowest bidder cannot be sustained- On facts held that there was no overwritings and cuttings made in the tender documents, which was made the basis of cancelling the entire process- Further held- that cancelling the tender was taken in hot haste, without any plausible/reasonable explanation, even it was not a malafide exercise of power, it was certainly without application of mind- Hence, bad in the eyes of law. (Para-23 to 25)

Constitution of India, 1950- Cancellation of tender- Held that though normally Court should not interfere in the tender/contractual matters while exercising powers of judicial review but it can certainly exercise jurisdiction if the process adopted was malafide or made to favour someone or process adopted or decision made was so arbitrary that no man of ordinary prudence could have reached it- On facts held, that the authority responsible for taking the final decision in the matter had failed to apply its mind while arriving at a final decision in the matter- While cancelling the tender the competent authority had failed to examine the tender in the light of the opinion of the Standing Counsel as well as one of the Members of the Committee (TOC)- Had the same been taken into consideration much time if the department could have been saved from the unnecessary litigation- The process adopted to cancel the tender was held to be arbitrary and irrational – Consequently, action of the respondents cancelling the tender quashed and set aside- respondents also burdened with cost of Rs.1 lac. (Para-38, 41, 46 and 47)

Cases referred:
Tata Cellular versus Union of India, (1994) 6 SCC 651
Air India Ltd. versus Cochin International Airport Ltd (2000) 2 SCC 617
Michigan Rubber (India) Limited versus State of Karnataka and others, (2012) 8 SCC 216
Master Marine Services (P) Ltd. vs. Metlalfe & Hodkinson (P) Ltd. and another, (2005)6 SCC 138
Jagdish Mandal vs. State of Orissa and others, (2007)14 SCC 517
Reliance Telecom Ltd. & Anr. v Union of India & Anr, 2017 SCC OnLine 36
State of Jharkhand v. M/s. CWE-SOMA Consortium AIR 2016 SCW 3366
Central Coalfields Limited v. SLL-SML (Joint Venture Consortium) AIR 2016 SCW 3814
E.P. Royappa vs. State of Tamil Nadu (1974) 4 SCC 3.
Gulam Mustafa vs. State of Maharashtra (1976) 1 SCC 800
Union of India vs. Ashok Kumar, (2005) 8 SCC 760
Central Coalfields Limited and another vs. SLL-SML (Joint Venture Consortium) and others, (2016) 8 SCC 622
Haryana Urban Deveopment Authority and others vs. Orchid Infrastructure Developers Private Limited, (2017)4 SCC 243
Reliance Telecom Limited and another vs. Union of India and another, (2017)4 SCC 269

For the Petitioner:	Mr.Sanjeev Bhushan, Senior Advocate with Ms.Abhilasha Kaundal, Advocate.
For Respondent No.1:	Mr.Shrawan Dogra, Advocate General with Mr.Anup Rattan, Additional Advocate General and Mr.J.K. Verma & Mr.Kush Sharma, Deputy Advocate Generals.
For Respondent Nos.2 to 5:	Mr.Onkar Jairath, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

Petitioner-firm being aggrieved with action of respondents inasmuch as not awarding it rate contract with respect to purchase of Plant Protection Equipments (A) (Foot, Hand Compression & Knapsack, Sprayer etc.) for the year 2017-2018 despite its being lowest and successful bidder and also with the issuance of communication dated 29.4.2017 (Annexure P-10) issued by respondent No.2, cancelling all the tenders, approached this Court by way of instant Civil Writ Petition, seeking therein direction to respondents to award rate contract with respect to aforesaid items for the year 2017-18 and to hold a fair and impartial inquiry with regard to unnecessary delay caused and attempts made by official of respondent No.2 to oust/debar the petitioner from the tender process with malafide intention and for the extraneous reasons.

2. Before adverting to the factual matrix of the case, it may be noticed that this Court, after having taken note of pleadings available on record as well as original record pertaining to tender process initiated by respondent No.2 for the purchase of Plant Protection Equipments, had passed detailed judgment on 13.9.2017, wherein this Court, after having noticed certain omissions and inaction on the part of competent authority while dealing with the tender submitted by the petitioner, concluded that it would have exercised power under Article 226 of the Constitution of India to undo the wrong committed by the respondent authority, but, taking note of the fact that pursuant to decision dated 22nd April, 2017, respondent-Corporation has already issued fresh tender, deems it fit to restrain itself from passing any stringent order.

3. Subsequent to passing of judgment dated 13.9.2017, whereby petition having been preferred by the petitioner herein was disposed of with the direction to respondents to act judiciously while examining/analyzing tenders submitted by various parties including petitioner pursuant to fresh advertisement issued by the Department, Review Petition being No.81 of 2017

came to be filed on behalf of the present petitioner, seeking therein review and recall of judgment dated 13.9.2017 for the reasons stated in the review petition.

4. Petitioner in the review petition claimed that there is error apparent on the face of the judgment, which has ultimately prevented this Court from quashing the decision and further prevented it from ordering the allotment of tender in favour of the petitioner. While referring to paras 16 and 17 of the judgment dated 13.9.2017, petitioner claimed in review petition that this Court disposed of writ petition on the pretext that pursuant to order dated 22nd April, 2017 issued by Managing Director, H.P. Agro Industries Corporation, wherein it had taken decision to cancel all the tenders of Plant Protection Equipments, respondent No.2 issued fresh notice inviting tender in newspaper i.e. in "The Hindustan Times" (Delhi Edition) and in "Amar Ujala" (Chandigarh Edition), on 28th May, 2017, wherein rate contract for supply of Pesticides, Plant Protection Equipments and Micronutrients for Annual Rate Contract for the year 2017-18, were again invited.

5. In this background, review petitioner, while referring to findings returned by this Court in para 39 of judgment dated 13.9.2017, contended that this Court would have proceeded to undo the wrongs committed by respondents-authorities, had the factum with regard to non issuance of fresh notice inviting tender in newspaper on 28th May, 2017 been correctly recorded in paras 16 and 17 of the judgment.

6. This Court, taking note of grounds contained in the review petition, summoned the original record and after having perused the same found that there is error apparent on the face of the judgment inasmuch as no fresh tenders were issued by the respondent pursuant to decision/communication dated 22nd/29th April, 2017 that of Managing Director, H.P. Agro Industries Corporation Limited, which fact was got erroneously recorded in para-16 of the judgment in question. Accordingly, this Court, while allowing review petition having been preferred by the petitioner herein came to the conclusion that recording of aforesaid fact heavily weighed with the Court while declining relief claimed in the writ petition and accordingly recalled impugned judgment dated 13.9.2017 passed in the instant Civil Writ Petition. On same day i.e. on 12.10.2017, this Court re-heard the parties and reserved the judgment.

7. For having bird's eye view, facts sans unnecessary details, which may be relevant for adjudication of present case are that respondent No.2 invited tenders for purchase of Plant Protection Equipments (A) (Foot, Hand Compression & Knapsack, Sprayer etc.) for the Departments of Horticulture, Agriculture etc., Himachal Pradesh for the year 2017-2018 by advertising Notice Inviting Tender *(for short 'NIT')* in Hindustan Times (Delhi Edition) on 2nd February, 2017. Petitioner-firm, who claimed itself to be authorized manufacturer of the Plant Protection Equipments, qua which tenders were issued/invited, submitted tender document (Annexure P-2). As per terms and conditions contained in tender form (Annexure P-3), tender was to be opened on 23rd February, 2017 at 3.30 P.M.

8. Careful perusal of record suggests that tenders submitted by the petitioner as well as other tenderers were opened on 23rd February, 2017. As per petitioner, its tender was found to be lowest amongst other nine bidders and as such he was legitimately expecting that rate contract in terms of Tender Notice would be awarded to it on or before 31st March, 2017, since, till that date, there was already rate contract in operation. As per petitioner, on 23rd February, 2017, simultaneously other tenders pertaining to altogether different works were also processed and opened by the same Tenders Opening Committee *(for short 'TOC')*, who after opening the same out rightly rejected one tender for want of earnest money, whereas, in the case of present tender, all tenders were found in order and as such after conclusion of meeting, *'TOC'* apprised the petitioner that he would be awarded tender/rate contract with respect to the present tender on or before expiry of previous tenders i.e. 31st March, 2017. Petitioner has further alleged that respondents instead of awarding work to it despite being lowest tenderer, decided to convene a meeting of Technical Scrutiny Sub Committee *(for short 'TSSC'),* having four members including one person, who was also a Member of *TOC'* i.e. respondent No.3. As per petitioner, *'TSSC'* was otherwise required to call the present petitioner for negotiation and thereafter award the rate

contract, but, Committee, referred above, without associating the petitioner convened the meeting. However, fact remains that the Committee, as referred above, did not take any decision with regard to awarding of work to the petitioner-firm, as a result of which it was compelled to file various representations vide Annexures P-4 to P-8. Since no action, if any, was taken by the Authorities concerned, pursuant to aforesaid representations sent by the petitioner, petitioner vide Annexure P-9 got legal notice served upon the respondents, calling upon them to award work to it being the lowest bidder. In the aforesaid background, petitioner alleging malafide or inaction on the part of respondents in not awarding it work despite its being lowest bidder, approached this Court by way of instant petition on 2nd May, 2017.

9. During the pendency of petition, referred above, communication dated 29th April, 2017 (Annexure P-10) came to be issued by respondent, cancelling therein tenders in question, as a consequence of which petitioner amended its writ petition after obtaining necessary permission of the Court. By way of amendment, petitioner, apart from other reliefs, also sought quashing of communication dated 29th April, 2017.

10. Mr.Sanjeev Bhushan, learned Senior Counsel representing the petitioner-firm, while inviting the attention of this Court to the communication dated 29th April, 2017, whereby tender in question came to be cancelled, strenuously argued that after opening of tenders by *'TOC'* on 23rd February, 2017, there was no scope left for *'TSSC'* to reject the tender submitted by the petitioner on the ground mentioned in the communication referred above. While alleging malafide and biasness on the part of Member of *'TOC',* Mr.Bhushan, strenuously argued that respondent No.3, who happened to be a Member of *'TOC',* was hell bent in ousting the petitioner from tendering process to favour another firm, which was at number two. Learned Senior Counsel further contended that since petitioner-firm highlighted irregularities committed by the office of Corporation while rejecting the valid tender of the petitioner, respondents without there being valid and just reason decided to cancel the tender.

11. Mr. Sanjeev Bhushan, learned Senior Counsel, while inviting the attention of this Court to condition No.4, as contained in tender form (Annexure P-3), contended that all cuttings/corrections, if any, in tender document were required to be signed/initialled by the tenderers and as such it cannot be said that if there were cuttings and corrections in the tender document, it was to be rejected out rightly. Learned Senior Counsel also made this Court to travel through tender form filled up by the petitioner to demonstrate that cuttings made in the tender document were duly initialed and signed by the representative of the petitioner-firm and as such there was no occasion for *'TSSC'* to reject its tender. While referring to the noting given by one of the Member of the *'TSSC'* as stands mentioned in communication dated 29th April, 2017 (Annexure P-10), learned Senior Counsel contended that it stands duly proved on record that the cuttings made in the tender were duly attested by the authorized representative of the petitioner-firm. Learned Senior Counsel further contended that Authorities before proceeding to place matter before *'TSSC'* invited another bidders/tenderers for negotiation, whose rates were definitely higher than the petitioner, which action of respondents itself smacks of extraneous consideration. Learned Senior Counsel, while referring to documents available on record, further stated that it is quite apparent from the conduct of the officers of respondent-Corporation i.e. respondents No.4 and 5, that they left no stone unturned to oust the petitioner-firm that too with a view to accommodate another firm and tried their best to impress upon the authorities that there is/was illegality in the tender submitted by the petitioner-firm. Respondents No.4 and 5, solely with a view to ensure ouster of petitioner, presented altogether false story before the management, who ultimately decided to cancel the tender.

12. Mr.Onkar Jairath, learned counsel representing respondents No.2 to 5, while inviting the attention of this Court to the reply having been filed on behalf of respondents No.2 and 3, seriously disputed the contents contained in the petition as well as arguments advanced by learned Senior Counsel representing the petitioner. Mr.Jairath contended that the petitioner has not approached this Court with clean hands; rather an attempt has been made to conceal the material facts. Mr.Jairath contended that since there were major cuttings and over-writings in

the tender form, submitted by the petitioner, he could not be awarded contract for supply of Plant Protection Equipment (Sprayer) in question. While referring to conditions No.4 and 9 of the tender document, Mr.Jairath contended that rates and units were not required to be over written and as per terms and conditions, it was not permissible that rates and units are over-written and as such authorities rightly not considered the rates offered by the petitioner-firm.

13. Learned counsel further contended that perusal of tender submitted by the petitioner-firm clearly reveals that neither petitioner-firm nor its authorized representative ever properly signed the cuttings/corrections in the tender form. There is no infirmity and illegality in the decision of the Committee to reject the tender submitted by the petitioner. Learned counsel also disputed that tender submitted by the petitioner was finally accepted and he was declared to be the lowest bidder. As per Mr.Jairath, *'TOC'*, after having opened the tender on 23rd February, 2017, only announced/read-over the rates quoted by the parties in front of all the bidders and their representatives, but at no point of time, work was ordered to be awarded in favour of present petitioner. Learned counsel further contended that 'TOC' after having noticed major cuttings and over-writings on rates and units quoted in the tender document of the petitioner submitted the tender to *'TSSC'* for further examination. Lastly, Mr.Jairath contended that during the pendency of present petition, Authority concerned has decided to cancel the tender so that transparency is maintained while awarding the rate contract and as such the present petition deserves to be dismissed having rendered infructuous.

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

15. As has been noticed above that this Court, after having taken note of nature of dispute *interse* parties, deemed it fit to summon the original record pertaining to tender in question, which was made available during final arguments. Perusal of pleadings vis-à-vis record suggests that the petitioner amongst other bidders submitted its tender for the purchase of Plant Protection Equipments for the Department of Horticulture and Agriculture etc. on annual rate contract basis for the year 2017-18. It is also not in dispute that tenders submitted by various parties including the petitioner-firm came to be opened as per the terms and conditions contained in the tender form on 23rd February, 2017.

16. This Court further, with a view to ascertain the correctness of submission made by the learned Senior Counsel representing the petitioner that rates submitted by the petitioner-firm were found to be lowest and they were declared eligible being lowest, carefully perused the record including notings, perusal whereof suggests that tenders were opened by the *'TOC'* on 22nd and 23rd February, 2017, where-after comparative statement was prepared and decision was taken to call the meeting of *'TSSC'* on 16th and 17th March, 2017 for evaluation of statement/tenders. But, definitely there is no mention, as such, in the record with regard to petitioner-firm having found lowest bidder.

17. Proceedings of the meeting of *'TOC'* held on 22nd and 23rd February, 2017 for opening tenders invited for rate contract of Pesticides, Plant Protection Equipment, Bio-Fertilizers and Organic Fertilizer, reveal that Committee, after having opened all nine tenders received for 'Sprayers' announced the rate in front of parties/their representatives. However, while preparing comparative statement, it was noticed that M/s.RSR Retail Pvt.Ltd. Nodia (UP), petitioner herein, had made cuttings in the rates quoted by it for item code Nos.10017, 10018, 10019, 10020 and 10020A, accordingly Committee, taking note of condition No.4 of the tender document, submitted all tenders alongwith the proceedings to the *'TSSC'* for examination and for further recommendations.

18. Perusal of decision, as taken by *'TSSC'* in its meeting held on 16th/17th March, 2017 suggests that Committee, after having noticed cuttings/over-writing made in the tender documents submitted by petitioner decided not to call the parties as far as tender for Plant Protection Equipment (Sprayers) is concerned and decided to place the matter before the management for appropriate decision. Notings, as referred at N-43-44 in the record of the Department, are contrary to minutes/recommendations of *'TSSC'* held on 16th/17th March, 2017.

Minutes of meeting of *'TSSC'* as have been taken note above nowhere suggest that decision was taken by *'TSSC'* to cancel the tender of petitioner-firm, rather Committee, taking note of cuttings in the rates quoted by the petitioner qua certain items decided not to call all the parties of Plant Protection Equipment (Sprayers) and resolved to place the matter before management for appropriate decision. Whereas, noting at N-47-48 on the record suggests that *'TSSC'* in its meeting after having noticed cuttings/overwriting in the tender submitted by the petitioner decided to reject the tender of petitioner and to maintain transparency called L-II i.e. M/s.Hymark Agritech Pvt.Ltd., Noida, (UP) for negotiations. Though there is mention in the record, as noticed above, that decision was taken by the Committee to call L-II for negotiations, but noting given at N-44 to N-53 clearly suggests that none was called for negotiations, rather matter was placed before the Competent Authority, who further advised to seek legal opinion from the standing counsel of the Corporation vide order dated 7th April, 2017. It also emerge from the record that on 11th April, 2017, standing counsel of respondent-Corporation opined as under:-

> ***"There are few cuttings which have been made by the tenderer. The amount which have been shown in figures have rightly been shown in the words. Moreover, as per the requirement of the condition No.4 of the tender form the cuttings made in the tender form should be duly signed by the tenderer. In the present tender form the cuttings have been duly signed by the tenderer. In my opinion the cuttings made there in the tender are not material. These are duly signed as required by the terms and conditions of the tender."***

19. It also emerge from the record that on 22nd April, 2017, Managing Director of Himachal Pradesh Agro Industries Corporation, after having taken note of legal opinion rendered by standing counsel, proceeded to pass following orders:-

> ***"After going through the tender notice, tender documents, proceedings of the Tender Opening Committee, Technical Scrutiny Sub Committee and Legal Opinion, it has been observed that there are different opinion with regard to the tender of M/s RSR Retain Pvt.Ltd., Noida due to which it is difficult to come to any conclusion at this stage.***
>
> ***In the absence of any clear and specific recommendations by the Sub Committee, the under signed is left with no option but to cancel all the tenders of Plant Protection Equipment (Item Code No.AIC-0021(A))".***

Pursuant to aforesaid decision taken by Managing Director of the Corporation, fresh proposal was initiated to re-tender the left out items.

20. Though perusal of the record suggests that there are/were cuttings/over writings qua certain items in the tender document submitted by the petitioner-firm, but those appeared to have been initialed and signed by the representative of the petitioner-firm. Otherwise also, condition No.4, as contained in tender document, which is reproduced hereinbelow clearly provides that all cuttings/corrections must be signed by tenderers. Any omission in filling the columns of units and rates may debar a quotation, meaning thereby that the tender cannot be rejected on the ground of cuttings/corrections, if the same are signed and initialed by the bidder or its representative. Though perusal of condition No.4, as contained in tender document, suggests that the *'TOC'* is/was empowered to out rightly reject such quotation/tender submitted by the bidder, but, needless to say such power cannot be exercised arbitrarily, rather power, if any, in this regard is expected to be exercised judiciously.

> ***"4. All the columns of the quotations (Schedule-A) form shall be duly properly and exhaustively filled in. The rates and units shall not be over written. Quotations shall always be both in figures and words. The words "No quotation" should be written across the item(s) in the schedule for which a tenderer does not wish to tender. All cuttings /corrections must be signed by the tenderers. Any omission in filling the columns of units and rates***

may debar a quotation, the tender opening committee is empowered to out rightly reject such quotation/tender.

9. The HP Agro Industries Corporation Ltd. reserves the right of rejection/approval of all or any of the tender(s) without assigning any reasons thereto and reserves that right to negotiate with any of the tenderer(s) where deemed necessary and to award parallel rate contract to any or all of the participating tenderer(s).”

21. It also emerge from the record that one of the Member of *‘TSSC’* categorically opined that cuttings/over writing, as allegedly made in tender document submitted by the petitioner, are not material as same have been signed/initialed by the representative of petitioner-firm.

22. At this stage, it may be noticed that it also emerge from the record that there are contradictions in the notings prepared by concerned officers/officials for the perusal of competent Authority vis-à-vis actual proceedings/ recommendations of *‘TSSC’,* who held its meeting on 16th /17th March, 2017 for finalizing the rate contract of Pesticides, Micronutrients, Plant Protection Equipment, Bio-Fertilizers and Organic Fertilizer. This Court was unable to lay its hand to any document suggestive of the fact that after decision of *‘TSSC’,* second lowest firm was ever called for negotiations as far as rate contract/tender for purchase of Plant Protection Equipment is concerned. No doubt, officials of respondent-Corporation had recorded that since tender of petitioner-firm has been rejected, Committee has decided to call M/s.Hymark Agritech Pvt.Ltd., Noida, (UP) to maintain transparency. Definitely, aforesaid noting in the record is contrary to the actual recommendations/minutes of meeting of the Committee held on 16th 17th March, 2017, wherein decision was taken not to call any of tenderer as far as tender for purchase of Plant Protection Equipment is concerned.

23. This Court, after having taken note of condition No.4, as contained in tender document, has no hesitation to conclude that authorities responsible for scrutiny of tender document wrongly arrived at conclusion that in view of over-writings and cuttings made in tender document, which were duly initialed and signed by the representative of petitioner-firm, tender submitted by the petitioner deserves to be rejected. This is none of the case of respondents that cuttings/over writings were not initialed and signed by the representative of the petitioner-firm and as such there appears to be considerable force in the contention of learned Senior Counsel representing the petitioner-firm that frivolous objections were raised by the Members of Committee to oust the petitioner-firm, whose rates were admittedly lowest. There is no denial, as such, on the part of respondents that rates offered by the petitioner-firm were not lowest as compared to the other tenderers.

24. After having carefully gone through the record as well as conditions contained in tender document, it can safely be inferred that decision taken by the respondent in cancelling the tender was taken in hot haste manner because admittedly there is no plausible/reasonable explanation available on record with regard to rejection of tender submitted by the petitioner-firm. Perusal of notings given in the record, which are admittedly contrary to the actual proceedings of meeting of *“TSSC”* held on 16th and 17th March, 2017, compels this Court to agree with the contention of learned Senior Counsel representing the petitioner that there is an attempt on the part of officials of respondent-Corporation to persuade competent Authority/concerned quarters to reject the tender submitted by the petitioner and thereafter offer the tender to second lowest bidder, but that may not be sufficient for this Court to conclude that there was malafide against the petitioner-firm. The competent Authority, who ultimately decided to cancel the tender in question, has nowhere assigned reason, if any, on record to differ with opinion rendered by one of the Member of the *‘TSSC’* as well as standing counsel of Corporation, who after having taken note of term No.4 of tender document, categorically opined that there is no material defect in the tender submitted by the petitioner-firm. After having carefully perused notings given at N/60-61, this Court is compelled to conclude that Authority, who ultimately decided to cancel the tender,

had no valid reason to cancel the tender of petitioner-firm and its order of cancellation dated 22nd April, 2017 is without application of mind.

25. Having gone through the record vis-à-vis tender submitted by the petitioner, we are unable to accept aforesaid conclusion drawn by the competent authority as far as his observation that there are different opinions with regard to tender of M/s.RSR Pvt.Ltd. As has been taken note above, there are two opinions available on file, one is given by standing counsel of the Corporation and one by the Members of the Committee, where they have unequivocally stated that there is no defect in the tender of the petitioner. Apart from aforesaid two opinions, this Court could not lay its hand to opinion, if any, rendered by any Authority, be it *'TOC' and 'TSSC'* with regard to validity of tender document submitted by the petitioner-firm.

26. It is well settled by now that the Courts would normally not interfere in the tender/contractual matters while exercising powers of judicial review. Power of judicial review can only be exercised by constitutional Courts, if it is proved on record that process adopted or decision so made by the Authorities is intended to favour someone or the Authority has acted with malafide or decision made is so arbitrary and irrational that no responsible authority acting reasonably could have reached. Needless to say that Court can also exercise power of judicial review in case it is shown that public interest is affected. In this regard, reliance is placed upon judgment rendered by Hon'ble Apex Court in ***Tata Cellular versus Union of India, reported in (1994) 6 SCC 651.***

27. Hon'ble Apex Court in ***Air India Ltd. versus Cochin International Airport Ltd. reported in (2000) 2 SCC 617*** held that even when some defect is found in the decision-making process, the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene.

28. Hon'ble Apex Court, in ***Michigan Rubber (India) Limited versus State of Karnataka and others, reported in (2012) 8 SCC 216,*** while discussing power of an authority in setting up terms and conditions of a tender, has specifically held that the Government undertakings should have a free hand while framing terms and conditions and Courts should only interfere in case there is material on record to demonstrate that same are arbitrary, discriminatory, malafide or actuated by bias. The Hon'ble Apex Court has held as under:

> ***"35.....As noted in various decisions, the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the courts would interfere. The courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical....."***

29. Hon'ble Apex Court in ***Master Marine Services (P) Ltd. vs. Metlalfe & Hodkinson (P) Ltd. and another, (2005)6 SCC 138*** again reiterated the principles that (a) State can choose its own method to arrive at a decision; (b) State and its instrumentalities have duty to be fair to all concerned; (c) even when some defect is found in decision making process, Court must exercise its extra ordinary writ jurisdiction with great caution and that too in furtherance of public interest.

30. The Apex Court in ***Jagdish Mandal vs. State of Orissa and others, (2007)14 SCC 517,*** reiterated the aforesaid principles by stating that before interfering in a tender and contractual matter, in exercise of its power of judicial review, Court should pose itself the following question:-

> ***"(i) Whether the process adopted or decision made by the authority is malafide or intended to favour someone;***

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached".

31. Recently, Hon'ble Apex Court in ***Reliance Telecom Ltd. & Anr. v Union of India & Anr, reported in 2017 SCC OnLine 36*** has specifically held that the condition to put a cap and make a classification not allowing certain entities to bid is not an arbitrary one as it is based on the acceptable rationale of serving the cause of public interest. Hon'ble Apex Court has further held that aforesaid exercise allows new entrants and enable the existing entities to increase their cap to make the service more efficient. Moreover, the Court cannot get and dwell as an appellate authority into complex economic issues on the foundation of competitors advancing the contention that they were not allowed to bid in certain spheres. Hon'ble Apex Court, in the aforesaid case has further approved the action of the authorities concerned, who put stringent conditions to ensure competition in the market by preventing large/big operators from acquiring large amount of spectrum. The Hon'ble Apex Court held as under:

"33. The objective behind Spectrum capping is to ensure competition in the market by preventing large/big operators from acquiring large amount of spectrum, which they may not require but only hoard to prevent the small operators from effectively competing in the market, and that is why, TRAI has recommended on 02.07.2015 that the basic objective of prescribing a spectrum cap is to prevent a TSP from acquiring large holdings of spectrum through auction, M&A or trading, as it may lead to non-level playing field thereby disturbing the competition in the market. It cannot be left to the market forces alone to decide the maximum spectrum holding as a TSP and, hence, the provision of cap should continue on the spectrum holding that a TSP may acquire or otherwise. The argument that the respondent should have notionally included the spectrum surrendered by BSNL/MTNL would result in creating a situation where though the spectrum put to auction remains the same (i.e., limited), yet a large/big player will be able to bid for the entire spectrum (which it otherwise could not have done due to Clause 5.3.1.) thereby effectively giving a tool to the large/big operators to deprive/starve small operators, who quite avowedly, cannot match the buying power of larger operators of spectrum.

78. We have already discussed that the condition to put a cap and make a classification not allowing certain entities to bid is not an arbitrary one as it is based on the acceptable rationale of serving the cause of public interest. It allowed new entrants and enabled the existing entities to increase their cap to make the service more efficient. The Court cannot get and dwell as an appellate authority into complex economic issues on the foundation of competitors advancing the contention that they were not allowed to bid in certain spheres. As the stipulation in the tender was reasonable and not based on any extraneous considerations, the Court cannot interfere in the NIA in exercise of the power of judicial review. The contention is that the State cannot hoard the spectrum as per the 2G case. We are disposed to think that in the case at hand, it cannot be said that there has been hoarding. The directions given in the 2G case had been complied with and the auctions have been held thereafter from the year to year. The feasibility of communication, generation of revenue and its maximization and subserving of public interest are to be kept in view. The explanation given by the Union of India for not putting the entire spectrum to auction is a reasonable one and it is put forth that an endeavour would be made to put it to auction when it

becomes available in sufficient quantum. The Court cannot interfere with eth tender conditions only on the ground that certain amount of spectrum has not been put to auction. The submission is that whatever has been put to auction and is available should have been notionally added so that the entities which have certain quantum of spectrum in praesenti could have participated in the auction and put forth their bids for a higher quantum. This argument may look attractive on a first blush but pales into insignificance on a studied scrutiny. As is evincible, one of the petitioners had earlier more than 65 MHz in a bad and because of the limited auction and non-addition of available spectrum on notional basis, it has obtained less quantum. With this submission, the contention of legitimate expectation has been associated. We have already repelled the submission pertaining to legitimate expectation. If there has been a reduction for a particular entity because of the terms and conditions of the tender, it has to accept it, for he cannot agitate a grievance that he could have obtained more had everything been added notionally. Notionally adding up or not adding up, we think, is a matter of policy and that too a commercial policy and in a commercial transaction, a decision has to be taken as prudence would command. In this regard, reference to the decision in Asia Foundation & Construction Ltd. v. Trafalgar House Construction (I) Ltd. would be apt. In the said case, the Court referred to the authority in Tata Cellular (supra) and thereafter opined that though the principle of judicial review cannot be denied so far as exercise of contractual powers of government bodies are concerned, but it is intended to prevent arbitrariness or favouritism and it is exercised I the larger public interest or if it is brought to the notice of the court that in the matter of award of a contract power has been exercised for any collateral purpose. In the instant case, we are unable to perceive any arbitrariness or favouritism or exercise of power for any collateral purpose in the NIA. In the absence of the same, to exercise the power of judicial review is not warranted. In the case at hand, we think, it is a prudent decision once there is increase of revenue and expansion of the range of service."

32. The Apex Court in ***State of Jharkhand v. M/s. CWE-SOMA Consortium reported in AIR 2016 SCW 3366,*** has held that the State derives its power to enter into a contract under Article 298 of the Constitution of India and has the right to decide whether to enter into a contract with a person or not subject only to the requirement of reasonableness under Article 14 of the Constitution of India. Apex Court held as under:

"13. The appellant-state was well within its rights to reject the bid without assigning any reason thereof. This is apparent from clause 24 of NIT and clause 32.1 of SBD which reads as under:-

"Clause 24 of NIT: "Authority reserves the right to reject any or all of the tender(s) received without assigning any reason thereof." Clause 32.1 of SBD: "...the Employer reserves the right to accept or reject any Bid to cancel the bidding process and reject all bids, at any time prior to award of Contract, without thereby incurring any liability to the affected Bidder or Bidders or any obligation to inform the affected Bidder or Bidders of the grounds for the Employer's action." In terms of the above clause 24 of NIT and clause 32.1 of SBD, though Government has the right to cancel the tender without assigning any reason, appellant-state did assign a cogent and acceptable reason of lack of adequate competition to cancel the tender and invite a fresh tender. The High Court, in our view, did not keep in view the above clauses and right of the government to cancel the tender.

> ***14. The State derives its power to enter into a contract under Article 298 of the Constitution of India and has the right to decide whether to enter into a contract with a person or not subject only to the requirement of reasonableness under Article 14 of the Constitution of India. In the case in hand, in view of lack of real competition, the state found it advisable not to proceed with the tender with only one responsive bid available before it. When there was only one tenderer, in order to make the tender more competitive, the tender committee decided to cancel the tender and invited a fresh tender and the decision of the appellant did not suffer from any arbitrariness or unreasonableness."***

33. The Apex Court in ***Central Coalfields Limited v. SLL-SML (Joint Venture Consortium) reported in AIR 2016 SCW 3814,*** has further held that Court can go into the question of malafides raised by a litigant, but in order to succeed, much more than a mere allegation is required. Bald and unfounded allegations of malafides are not sustainable and that malafides must be specifically pleaded and proved. Hon'ble Apex Court has held as under:

> ***"44. On asking these questions in the present appeals, it is more than apparent that the decision taken by CCL to adhere to the terms and conditions of the NIT and the GTC was certainly not irrational in any manner whatsoever or intended to favour anyone. The decision was lawful and not unsound.***
>
> ***55. On the basis of the available case law, we are of the view that since CCL had not relaxed or deviated from the requirement of furnishing a bank guarantee in the prescribed format, in so far as the present appeals are concerned every bidder was obliged to adhere to the prescribed format of the bank guarantee. Consequently, the failure of JVC to furnish the bank guarantee in the prescribed format was sufficient reason for CCL to reject its bid.***
>
> ***56. There is nothing to indicate that the process by which the decision was taken by CCL that the bank guarantee furnished by JVC ought to be rejected was flawed in any manner whatsoever. Similarly, there is nothing to indicate that the decision taken by CCL to reject the bank guarantee furnished by JVC and to adhere to the requirements of the NIT and the GTC was arbitrary or unreasonable or perverse in any manner whatsoever."***

34. By now it is settled law that burden of proving malafides is on the person making allegations and burden is very heavy as has been held by the Hon'ble Apex Court in ***E.P. Royappa vs. State of Tamil Nadu (1974) 4 SCC 3.***

35. In ***Gulam Mustafa vs. State of Maharashtra (1976) 1 SCC 800,*** Hon'ble Apex Court has held, *"It (malafides) is the last refuge of a* losing *litigant."*

36. In the judgments referred herein above, Hon'ble Apex Court has held that there is every presumption in favour of the administration that the power has been exercised bona fide and in good faith. It is to be remembered that the allegations of malafides are often more easily made than proved and proof of high degree is required to prove the same.

37. In the instant case, it would be profitable to have a look at judgment passed by Hon'ble Apex Court in case ***Union of India vs. Ashok Kumar, reported in (2005) 8 SCC 760,*** wherein it has been held that seriousness of allegations of malafides demands proof of high order of credibility and the Courts should be slow to draw dubious inferences from incomplete facts placed before them by a party, particularly when the imputations are grave and they are made against the holder of an office having high responsibility. It was held:

> ***"21. Doubtless, he who seeks to invalidate or nullify any act or order must establish the charge of bad faith, an abuse or a misuse by the authority of***

its powers. While the indirect motive or purpose, or bad faith or personal ill- will is not to be held established except on clear proof thereof, it is obviously difficult to establish the state of a man's mind, for that is what the employee has to establish in this case, though this may sometimes be done. The difficulty is not lessened when one has to establish that a person apparently acting on the legitimate exercise of power has, in fact, been acting mala fide in the sense of pursuing an illegitimate aim. It is not the law that mala fide in the sense of improper motive should be established only by direct evidence. But it must be discernible from the order impugned or must be shown from the established surrounding factors which preceded the order. If bad faith would vitiate the order, the same can, in our opinion, be deduced as a reasonable and inescapable inference from proved facts. (S. Pratap Singh v. State of Punjab AIR 1964 SC 72). It cannot be overlooked that burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demand proof of a high order of credibility. As noted by this Court in E. P. Royappa v. State of Tamil Nadu and Another (AIR 1974 SC 555), Courts would be slow to draw dubious inferences from incomplete facts placed before it by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration. (See Indian Railway Construction Co. Ltd. v. Ajay Kumar (2003) 4 SCC 579).”

38. Careful perusal of expositions of law, as discussed herein above, certainly suggests that Courts should normally not interfere in the contractual matters in exercise of powers of judicial review and it can only be exercised in case it is satisfied that process adopted was malafide or made to favour someone or process adopted or decision made is so arbitrary that no man of ordinary prudence could have reached.

39. It is well settled by now that every action of the executive/government must be informed with reasons and should be free from arbitrariness. That is very essence of the rationale and its bare minimal requirement and, to the application of this principle, it make no difference whether exercise of the powers involved an affectation of some right or denial of some privilege. In ***Tata Cellular vs. Union of India, reported in (1994) 6 SCC 651*** *(supra),* it has been specifically held that if an administrative decision, such as a deviation in the terms of the NIT is not arbitrary, irrational, unreasonable, mala fide or biased, the Courts will not judicially review the decision taken. Similarly, the Courts will not countenance interference with the decision at the behest of an unsuccessful bidder in respect of a technical or procedural violation. Recently, the Hon'ble Apex Court in ***Central Coalfields Limited vs. SLL-SML (Joint Venture Consortium)*** *(Supra),* taking note of the aforesaid principles laid down in **Tata Cellular vs. Union of India** *(Supra)* reiterated that Court, while exercising its power under Article 226 in tender/contractual maters, should pose to itself following questions:

> “(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;
>
> Or
>
> Whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is such that no responsible authority acting reasonable and in accordance with relevant law could have reached”;
>
> (ii) Whether public interest is affected.”

40. Hon'ble Apex Court, while framing aforesaid questions, categorically held that if answers to aforesaid questions are in negative, in that eventuality, Court should not be inclined to interfere in the contractual matters, while exercising powers under Article 226 of the

Constitution of India. In this regard, reliance is also placed on the judgment of Hon'ble Apex Court in ***Central Coalfields Limited and another vs. SLL-SML (Joint Venture Consortium) and others, (2016) 8 SCC 622***, wherein the Hon'ble Apex Court has held as under:-

> ***36. It was further held that if others (such as the appellant in that case) were aware that non-fulfillment of the eligibility condition of being a registered II Class hotelier would not be a bar for consideration, they too would have submitted a tender, but were prevented from doing so due to the eligibility condition, which was relaxed in the case of respondents 4. This resulted in unequal treatment in favour of respondents 4 â"“ treatment that was constitutionally impermissible. Expounding on this, it was held: â"œIt is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affectation of some right or denial of some privilege.â" (Emphasis given)***
>
> ***43. Continuing in the vein of accepting the inherent authority of an employer to deviate from the terms and conditions of an NIT, and re-introducing the privilege-of-participation principle and the level playing field concept, this Court laid emphasis on the decision making process, particularly in respect of a commercial contract. One of the more significant cases on the subject is the three-judge decision inTata Cellular v. Union of India,(1994) 6 SCC 651which gave importance to the lawfulness of a decision and not its soundness. If an administrative decision, such as a deviation in the terms of the NIT is not arbitrary, irrational, unreasonable, mala fide or biased, the Courts will not judicially review the decision taken. Similarly, the Courts will not countenance interference with the decision at the behest of an unsuccessful bidder in respect of a technical or procedural violation. This was quite clearly stated by this Court (following Tata Cellular) in Jagdish Mandal v. State of Orissa,(2007) 14 SCC 517in the following words:***
>
> > ***"22.œJudicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be***

resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold."

This Court then laid down the questions that ought to be asked in such a situation. It was said:

"22. ...Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226."

41. Having perused the pleadings as well as record made available by the respondent-Corporation, this Court is compelled to conclude that Authority responsible for taking final decision in the matter has failed to apply its mind while arriving at final decision in the matter. Decision of Authority concerned is not at all fair and reasonable, who instead of examining the matter itself, proceeded to cancel the tender ignoring the opinion of standing counsel as well as noting given by one member of the Committee. Apart from above, Authority, while cancelling tender in question, also failed to examine and consider condition No.4 contained in tender document. Had competent Authority cared/bothered to examine tender in question in the light of aforesaid condition (condition No.4) contained in tender document, it would have definitely not taken decision dated 22nd April, 2017 and issued communication dated 29th April, 2017 to cancel the tender in question. Had competent Authority applied its mind and taken decision in the light of opinion of standing counsel as well as one member of the Committee, much time of department as well as of this Court would have not been wasted.

42. This Court, after having perused record, has no hesitation to conclude that Authority not acted reasonably and judiciously, while taking final decision qua the tender submitted by petitioner firm. Though this Court was unable to find anything on record, from where it could be inferred that action of the Authority for not accepting the tender of the petitioner was mala fide or intended to favour someone, but it is constrained to assume that process adopted or decision taken by respondent-department, while rejecting the tender submitted by the petitioner is so arbitrary and irrational that no responsible authority acting reasonably and in accordance with relevant law could have acted. Perusal of notings given in the record compels this Court to agree with the contention of learned counsel representing the petitioner that action of respondents, while dealing with the tender of the petitioner-firm, is not free from bias, rather there appears to be an attempt on the part of certain officials to ensure fresh tendering as far as purchase of Plant Protection Equipment is concerned. As has been repeatedly held by Hon'ble Apex Court that if the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.

43. Recently Hon'ble Apex Court in its judgments in ***Haryana Urban Deveopment Authority and others vs. Orchid Infrastructure Developers Private Limited, (2017)4 SCC 243*** and ***Reliance Telecom Limited and another vs. Union of India and another, (2017)4 SCC 269,*** again reiterated that basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are

amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose.

44. In the case at hand, as has been observed above, though there is nothing on record to suggest that process adopted or decision made by Authority is malafide or intended to favour someone, but definitely process adopted or decision made is so arbitrary or irrational that this court can conclude that no responsible authority acting reasonably and in accordance with law would have taken decision as has been taken in the present case and as such impugned action of respondents inasmuch as not cancelling the tender in question deserves to be rectified in accordance with law.

45. Consequently, in view of detailed discussion made hereinabove as well as law laid down by Hon'ble Apex Court, the decision/communication dated 22nd/29th April, 2017, taken/issued by the Managing Director, H.P. Agro Industries, cancelling therein tender in question is quashed and set aside with a further direction to the respondent-Corporation to consider the tender submitted by the petitioner with respect to purchase of Plant Protection Equipment for the year 2017-18, ignoring the alleged short comings as pointed by *"TOC"* and *"TSSC"* and thereafter award rate contract in its favour, if it is a lowest bidder. Needless to say authorities concerned while examining/analyzing tender in the light of direction issued by this Court shall act judiciously strictly in accordance with law without there being any malice towards the petitioner. Necessary action in terms of direction passed by this Court shall be taken by the authorities concerned within fifteen days from the receipt of copy of instant judgment.

46. Before parting, we are constrained to place on record our displeasure and anguish over the practice adopted by the respondents-Authorities while dealing with the tender in question and as such respondents-authorities are warned to be more careful and cautious in future while discharging their duties. Registry is directed to supply a copy of this judgment to the Chief Secretary to the Government of Himachal Pradesh, so that necessary safeguards/steps are taken by the Government, to sensitize/educate its officers with regard to procedure/approach required to be followed and adopted in the tender matters.

47. Since petitioner was unnecessarily pushed to the wall and it was compelled to initiate legal proceedings in the Court of law, respondents-authorities are liable to compensate it suitably, accordingly costs of Rs.one lac is imposed upon the respondents-authorities, which shall be paid within a period of six weeks from today. Accordingly, the writ petition is disposed of in the aforesaid terms.

48. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

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

Court on its own motion ...Petitioner.

Versus

State of H.P. & others ...Respondents.

CWPIL No.133 of 2017
Date of Decision: November 14, 2017

Constitution of India, 1950- Article 226- Public Interest Litigation- Letter petition taking suo moto cognizance of non-payment of salaries to 99 nurses posted at the Lal Bahadur Shastri Medical College and Hospital, Mandi, H.P.- Salary not disbursed for want of grant-in-aid under the appropriate Head of Account- **Held**- Right to a sum of money is property- Right to livelihood is

a part of life under Article 21 of the Constitution- Right to income from the salary affects the Right to Life- It is a fundamental right and cannot be consigned to the limbo of undefined premises and uncertain applications- deprivation of income thus directly violates the Right to Life under Article 21 of the Constitution of India. (Para-10 to 12)

Constitution of India, 1950- Article 226- Letter Petition- Further held- State to act as an model employer and the following directions came to be issued:-

A. The Chief Secretary to the Government of Himachal Pradesh, shall provide a mechanism for enabling the employees to vent out their grievances of non-disbursement of due and admissible wages/salaries/emoluments. And one such mechanism being of setting up a 'Web Portal' at the level of the Principal Secretary/ Secretary of the concerned Department(s), where the employees can lodge their grievances/complaints. Such grievances/ complaints shall be processed and adequately responded to within a period of one week. This would facilitate speedy redressal of genuine grievances and prevent unnecessary litigation, clogging the wheels of administration of justice. Such endeavour shall not only be in the spirit of Litigation Policy, framed by the State Government. We see great advantage in the use of information and technology. Not only it would result into effective and efficient redressal of grievances, if any, but also improve efficiency in the affairs of governance of the State.

B. All the Head of Departments of Government of Himachal Pradesh/Government Institutes/State Instrumentalities to ensure that in future emoluments to all employees of their respective Departments/Institutes are disbursed in time;

C. In case of said emoluments not being disbursed on schedule, except in the event of the emoluments being withheld as per law, the State/ instrumentality of the State shall be liable to compensate the employees concerned by paying statutory interest or the existing rate for saving bank deposit account provided by the State Bank of India, whichever is higher;

D. Immediately thereto, the Head of the Departments/Instrumentality of the State shall hold an inquiry, which shall be completed within a period of 30 days, to ascertain the omission on the part of the concerned person, resulting in delay of disbursement on schedule; and

E. Pursuant to the findings of the inquiry, the interest which stands paid to such employee, shall be recovered from the erring officer(s)/officials(s). (Para-39)

Cases referred:

State of Madhya Pradesh v. Ranjojirao Shinde & another, AIR 1968 SCC 1053
Madan Mohan Pathak and another v. Union of India and others, (1978) 2 SCC 50
Bombay Dyeing & Manufacturing Co. Ltd. v. The State of Bombay and others, AIR 1958 SC 328
Maharana Shri Jayvantsinghji Ranmalsinghji v. The State of Gujarat and others, AIR 1962 SC 821
Olga Tellis and others v. Bombay Municipal Corporation and others, (1985) 3 SCC 545
Justice K.S. Puttaswamy (Retd.) & another v. Union of India and others, AIR 2017 SC 4161
M/s Shantistar Builders v. Narayan Khimalal Totame & others, (1990) 1 SCC 520
Delhi Transport Corporation v. D.T.C. Mazdoor Congress & others, 1991 Supp(1) SCC 600
D.K. Yadav v. J.M.A. Industries Ltd., (1993) 3 SCC 259
Chameli Singh & others v. State of U.P. & another, (1996) 2 SCC 549
Professor Devendra Mishra v. University of Delhi, 167 (2010) DLT 259
Kapila Hingorani v. State of Bihar, (2003) 6 SCC 1
State of Jharkhand and another v. Harihar Yadav and others, (2014) 2 SCC 114
Allahabad Bank; All India Allahabad Bank Retired Employees Association; Allahabad Bank Retirees Assn v. All India Allahabad Bank Retired Employees Association; Allahabad Bank; Controlling Authority, (2010) 2 SCC 44

For the Petitioner : Mr. Rajnish K. Lall, Advocate, as Amicus Curiae.
For the Respondents : Mr. Anup Rattan, Additional Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

On a letter petition, taking *suo moto* cognizance, this Court issued notice to the State. Allegedly, salaries of 99 nurses posted at the Lal Bahadur Shastri Medical College and Hospital, Mandi (hereinafter referred to as Medical College), were not disbursed for more than seven months. The Court requested Mr. Rajnish K. Lall, Advocate, to assist as an Amicus.

2. Today in Court, Mr. Anup Rattan, learned Additional Advocate General, has handed over affidavit dated 13.11.2017 that of the Director, Health Services, Himachal Pradesh, admitting the following facts:

i. The Medical College is run by the State Government.

ii. With the approval of the Government, through Rogi Kalyan Smiti, nurses were posted in the Medical College.

iii. Salary could not be disbursed for want of grant-in-aid under the appropriate Head of Account.

iv. Budgetary allocation of a sum of Rs.1,75,00,000/-, under various Heads, including grant-in-aid salary was made.

v. With the completion of codal formalities, emoluments to the tune of Rs.72,71,598/- stood released to the appointees. This was so done on 31.8.2017.

vi. With effect from 1.10.2017, a Sub Treasury at Ner Chowk, District Mandi, was made functional and operational, for which place funds stood allocated for disbursement.

vii. On 30.10.2017, further some of Rs.1,02,28,402/- stands sanctioned and re-allocated to the newly created Treasury office. This was towards the amount of grant-in-aid salary.

viii. Emoluments upto 31.8.2017 of all the appointees, including nursing and para-medical categories, stand released.

3. Sum and substance of the affidavit being that salaries could not be disbursed to the employees, more so the nursing staff, on account of lack of funds and proper mechanism for disbursement in place.

4. Any which way, certain facts cannot be disputed–(a) factum of employment of staff, including nurses, (b) relationship of employer and employee, (c) amount due and admissible, (d) delay in disbursement of salaries, and (e) that the employees were entitled to timely disbursement of salary.

5. Well, this takes us to a larger issue and that being as to whether the State and its functionaries are duty bound to take appropriate action for timely disbursement of salaries of its employees or not. Is not the Welfare State obliged under the Constitution of India (hereinafter referred to as the Constitution) to take timely action, ensuring disbursement of undisputed emoluments. Also, as to whether an employee has a corresponding right in law, to receive the same within time or not.

6. In the instant case, salaries of large number of employees are not being disbursed within time. Is it not a case of mis-governance and/or lack of governance, violating the right of livelihood of an employee or not?

7. With undisputed facts, we proceed to examine the position in law.

8. Part XIV of the Constitution deals with the services under the Union and the States. By virtue of Article 309, conditions of service of persons appointed to public services and posts, in connection with the affairs of the State, can be regulated.

9. The Medical College is run by the State and the appointment of nurses and the staff is in accordance with the procedure established by law, is not in dispute.

Right to a sum of money is property

10. A Five Judges Bench of the Apex Court in *State of Madhya Pradesh v. Ranjojirao Shinde & another,* AIR 1968 SCC 1053, has observed:

> "It is obvious that a right to a sum of money is property"

11. A Seven Judges Bench of the Apex Court in *Madan Mohan Pathak and another v. Union of India and others*, (1978) 2 SCC 50 observed:

> "13. It is clear from the scheme of fundamental rights embodied in Part III of the Constitution that the guarantee of the right to property is contained in Article 19 (1) (f) and clauses (1) and (2) of Article 31. It stands to reason that 'property' cannot have one meaning in Article 19(1)(f), another in Article 31 clause (1) and still another in Article 31, clause (2). 'Property' must have the same connotation in all the three Articles and since these are constitutional provisions intended to secure a fundamental right, they must receive the widest interpretation and must be held to refer to property of every kind. While discussing the scope and content of Entry 42 in List III of the Seventh Schedule to the Constitution, which confers power on Parliament and the Legislatures to legislate with respect to "acquisition and requisitioning of property" It was pointed out by Shah J., speaking on behalf of the majority in *R.C. Cooper v. Union of India,* (1970) 1 SCC 564 that property which can be compulsorily acquired by legislation under this Entry means the
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> > highest right a man can have to anything, being that right which one has to lands or tenements, goods or chattels which does not depend on another's courtesy: it includes ownership, estates and interests in corporeal things, and also rights such as trade-marks, copyrights, patents and even rights *in persona* capable of transfer or transmission, such, as debts; and signifies a beneficial right to or a thing considered as having a money value, especially with reference to transfer or succession, and to their capacity of being injured.
>
> It would, therefore, seem that, according to the decision of the majority in *R. C. Cooper's* case, debts and other rights in *personam* capable of transfer or transmission are property which can form the subject- matter of compulsory acquisition. And this would seem to be unquestionable on principle, since even jurisprudentially debts and other rights of action are property and there is no reason why they should be excluded from the protection of the constitutional guarantee. Hidayatullah, C.J., had occasion to consider the true nature of debt in *H. H. Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur & Ors. v. Union of India*, (1971) 1 SCC 85, where the question was whether the Privy Purse payable to the Ruler was property of which he could be said to be deprived by the Order of the President withdrawing his recognition as Ruler. The learned Chief Justice, making a very penetrating analysis of the jural relationship involved, in a debt, pointed out that
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> > a debt or a liability to pay money passes through four stages. First there is a debt not yet due. The debt has not yet become a part of the obligor's 'things' because no net liability has yet arisen. The Second stage is when the liability may have arisen but is not either ascertained or admitted. Here again the amount due has not become a part of the obligor's things, The third stage is reached when the liability is both ascertained and

> admitted. Then it is property proper of the debtor in the creditor's hands. The law begins to recognise such property in insolvency, in ,dealing with it in fraud of creditors, fraudulent preference of one creditor against another, subrogation, equitable estoppel, stoppage intransitive etc. A credit- debt is then a debt fully provable and which is fixed and absolutely owing. The last stage is when the debt becomes a judgment debt by reason of a decree of a Court.

and applying this test, concluded that the Privy Purse would be property and proceeded to add:

> As, soon as an Appropriation Act is passed there is established a credit- debt and the outstanding Privy Purse becomes the property of the Ruler in the hands of Government. It is also a sum certain and absolutely payable.

Since the effect of the Order of the President was to deprive the, Ruler of his Privy Purse which was his property the learned Chief Justice held that there was infringement of the fundamental right of the Ruler under Article 31 (2). Hegde, J., also pointed out in a separate but concurring judgment that since the right to get the Privy Purse was a legal right "enforceable through the courts", it was undoubtedly property and its deprivation was sufficient to, found a petition based on contravention of Article 31(2). It was also held by this Court in *State of Madhya Pradesh v. Ranajirao Shinde,* AIR 1968 SC 1053m that a right to receive cash grant annually from the State was property within the, meaning of that expression in Article 19(1)(f) and clause (2) of Article 31. The right to pension was also regarded as property for the purpose of Article 19(1) (f) by the decisions of this Court in *Deokinanda Prasad v. State of Bihar*, (1971) 2 SCC 330, and *State of Punjab v. K. R. Erry & Sobhag Rai Mehta*, (1973) 1 SCC 120. This Court adopted the same line of reasoning when it said in *State of Gujarat and Anr. v. Shri Ambica Mills Lid., Ahmedabad*, (1974) 4 SCC 656 that

> unpaid accumulations represent the obligation of the, employers to the employees and they are the property of the employees". Mathew, J., speaking on behalf of the Court, observed that the obligation to, the employees owned by the employers was "property from the standpoint of the employees".

It would, therefore, be seen that Property within the meaning of Article 19(1)(f) and clause (2) of Article 31 comprises every form of property, tangible or intangible, including debts and chooses in action, such as unpaid accumulation of wages, pension, cash grant and constitutionally protected Privy Purse. The debts due and owing from the Life Insurance Corporation in respect of annual cash bonus were, therefore, clearly property of Class III and Class IV employees within the meaning of Article 31, clause (2). And so also was their right to receive annual cash bonus for the period; from the date of commencement of the impugned. Act upto 31st March, 1977, for that was a legal right enforceable through a court of law by issue of a writ of Mandamus, (Vide the observation of Hegde, J., at page 194 in the Privy Purse case.)

12. Prior to the 44th Amendment of the Constitution, which led to the repeal of Article 31, by virtue of the Constitution (44th Amendment) Act, 1978, a Constitution Bench (Five Judges) of the Apex Court in *Bombay Dyeing & Manufacturing Co. Ltd. v. The State of Bombay and others,* AIR 1958 SC 328, held – unpaid wages of an employee, so earned by him, would become a debt due to him from the employer and as such was a property which could be assigned under the law. The observation was made in the context where, under the provisions of the Bombay Labour Welfare Fund Act, unclaimed accumulated wages of employees working with several private entities, stood transferred to a body constituted under the said Act. The context being different

but the principle of the unpaid wage of an employee, so earned by him, is a property continued to be reiterated, even subsequently, by another Constitution Bench (Five Judges) of the Apex Court in *Maharana Shri Jayvantsinghji Ranmalsinghji v. The State of Gujarat and others,* AIR 1962 SC 821.

13. With repeal of Article 31, right to property continued to remain as Constitutional Right, by virtue of insertion of Article 300A.

Article 21 – Right to Life

14. A Constitution Bench (Five Judges) of the Hon'ble Supreme Court of India in *Olga Tellis and others v. Bombay Municipal Corporation and others,* (1985) 3 SCC 545, has held that right to livelihood, which is comprehended in the right guaranteed by Article 21 of the Constitution, cannot be deprived, except according to the procedure established by law.

15. The principles laid down by the Apex Court in *Olga Tellis (supra)*, stand reiterated by a Constitution Bench (Nine Judges) in *Justice K.S. Puttaswamy (Retd.) & another v. Union of India and others,* AIR 2017 SC 4161, in the following terms:

> "114. In Olga Tellis v Bombay Municipal Corporation195, Chandrachud C J, while explaining the ambit of Article 21 found a rationale for protecting the right to livelihood as an incident of the right to life. For, as the Court held, deprivation of livelihood would result in the abrogation of the right to life:
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> > "148. The sweep of the right to life conferred by Article 21 is wide and far-reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the 195 (1985) 3 SCC 545 PART I 111 life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life liveable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life…""

16. In *M/s Shantistar Builders v. Narayan Khimalal Totame & others,* (1990) 1 SCC 520, the Hon'ble Apex Court held:

> "9. Basic needs of man have traditionally been accepted to be three - food, clothing and shelter. The right to life is guaranteed in any civilized society. That would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in. The difference between the need of an animal and a human being for shelter has to be kept in view. For the animal it is the bare protection of the body; for a human being it has to be a suitable accommodation which would allow him to grow in every aspect - physical, mental and intellectual. The Constitution aims at ensuring fuller development of every child. That would be possible only if the child is in a proper home. It is not necessary that every citizen must be ensured of living in a well-built comfortable house but a reasonable home particularly for people in

> India can even be mud-built thatched house or a mud-built fire-proof accommodation."

17. That 'right to life' includes 'right to livelihood' stood settled way back in by a Constitution Bench of the Apex Court in the year 1991. In *Delhi Transport Corporation v. D.T.C. Mazdoor Congress & others,* 1991 Supp(1) SCC 600, while dealing with the constitutional validity of Regulation 9(b) of the Delhi Road Transport Authority (Conditions of Appointment and Service) Regulations, 1952, enabling the employer to terminate services of the employee by issuance of one month notice or payment in lieu thereof, the Court held that:

> "262. The right to life includes right to livelihood. The right to livelihood therefore cannot hang on to the fancies of individuals in authority. The employment is not a bounty from them nor can its survival be at their mercy. Income is the foundation of many fundamental rights and when work is the sole source of income, the right to work becomes as much fundamental. Fundamental rights can ill-afford to be consigned to the limbo of undefined premises and uncertain applications. That will be a mockery of them."
>
> "316. .....It would, further, be held that right to public employment which includes right to continued public employment till the employee is superannuated as per rules or compulsorily retired or duly terminated in accordance with the procedure established by law is an integral part of right to livelihood which in turn is an integral facet of right to life assured by Art. 21 of the Constitution. Any procedure prescribed to deprive such a right to livelihood or continued employment must be just, fair and reasonable procedure. In other words an employee in a public employment also must not be arbitrarily unjustly and unreasonably be deprived of his/her livelihood which is ensured in continued employment till it is terminated in accordance with just, fair and reasonable procedure..."

18. It was further held that income is the foundation of many fundamental rights and when work is the sole source of income, the right to work becomes as much fundamental and fundamental rights can ill-afford to be consigned to the limbo of undefined premises and uncertain applications.

19. That right to life, enshrined in Article 21, would include right to livelihood, stood reiterated by the Apex Court in *D.K. Yadav v. J.M.A. Industries Ltd.,* (1993) 3 SCC 259, in the following terms:

> "12. .....Article 21 clubs life with liberty, dignity of person with means of livelihood without which the glorious content of dignity of person would be reduced to animal existence....."

20. In *Chameli Singh & others v. State of U.P. & another,* (1996) 2 SCC 549 (Three Judges), the Apex Court observed:

> "8. .....Right to live guaranteed in any civilised society implies the right to food, water, decent environment, education medical care and shelter. These are basic human rights known to any civilised society....."

21. A salaried person by and large depends upon income from salary for his sustenance and sustenance of his family and if he is not paid salary despite working for a long period, will it not affect his life and liberty? This amounts to denial of basic human rights of a citizen and would also amount to deprivation of his life and liberty guaranteed to every citizen under Article 21 of the Constitution. (Vide *Professor Devendra Mishra v. University of Delhi,* 167 (2010) DLT 259).

22. Income of a person is the cornerstone of many of his fundamental rights. This can be interpreted to mean that receiving of income is a foundational feature of the Right to

Livelihood. Thereby, it becomes obvious that a deprivation of income on part of the State directly violates the Right to Life under Article 21.

23. The State through its inaction has thwarted self-development of the employees who were deprived of their hard earned money. After all, a man may use his income for purposes other than the three basic needs which have been mentioned in *Shantistar* (supra). Thereby the state prevented the welfare of its own citizens which goes against the core objectives of a welfare state like India.

24. There is multiplicity of legislations whereby the state has imposed a duty on varied industries to ensure that their employees enjoy a decent standard of living. Therefore, when the State did not disburse the salaries to its employees despite having the money in its coffers, money which was ready to be disbursed, it was clearly engaging in practicing double standards.

25. From a theological perspective, Dignity of a human being stems from the fact that each person is created in the image of God. Consequentially, it can be said that every human being is entitled to dignity because it is inherent in him. Thereby, the state through its administrative inaction has clearly desecrated the dignity which was inherent in its employees. Thereby, the state has also acted contrary to the provisions of Chapter IV and Chapter IV A of the Constitution of India.

26. It can clearly be seen that none of the three basic needs of man mentioned in *Shantistar* (Supra) can be acquired without monetary power. Thereby, through its inaction the state has clearly exhibited a lethargic, if not callous, attitude towards disbursal of its mandated duties. Therefore, the inaction of the state clearly enables a violation of the Right to Life as mandated under the Constitution of India.

27. In *Kapila Hingorani v. State of Bihar,* (2003) 6 SCC 1, the Apex Court has observed:

> "30. The Government companies/public sector undertakings being 'states' would be constitutionally liable to respect life and liberty of all persons in terms of Article 21 of the constitution of India. They, therefore, must do so in cases of their own employees. The government of the State of Bihar for all intent and purport is the sole shareholder. Although in law, its liability towards the debtors of the company may be confined to the shares held by it but having regard to the deep and pervasive control it exercises over the Government companies; in the matter of enforcement of human rights and/or rights of the citizen of life and liberty, the State has also an additional duty to see that the rights of employees of such corporations are not infringed."
>
> "71. The States of India are welfare States. They having regard to the constitutional provisions adumbrated in the Constitution of India and in particular Part IV thereof laying down the Directive Principles of the State Policy and part IVA laying down the Fundamental Duties are bound to preserve the practice to maintain the human dignity."

28. Further, the Apex Court in *Kapila Hingorani v. State of Bihar,* (2005) 2 SCC 262, has held that the employees have a human right as also a fundamental right under Article 21 which the States are bound to protect. Even where the public sector undertakings were unable to pay the salaries of its employees, the Apex Court directed the State to disburse the same on the basis of the aforesaid principle. We notice that the Court was dealing with a case, where salaries of several employees of instrumentalities owned by the State were not disbursed and on the basis of news paper report a public spirited citizen, a Supreme Court lawyer, had invited attention of the Court to the apathy on the part of the State.

29. Coming to the facts of the present case, An employee, i.e., a salaried person primarily depends upon his income from salary for the purpose of subsistence of his family. In

our considered view, if such a salaried person is not paid his due and admissible salary despite having zealously worked for more than six months, the same will obviously affect his life and liberty. This definitely would amount to denial of basic human rights of a citizen and would violate fundamental right of life and liberty guaranteed to a citizen under Article 21 of the Constitution of India.

30. Therefore, by arbitrarily denying wages to the employees for a period of more than six months, right to livelihood was denied to them by the State without following the procedure established by law, which in our considered view, is a blatant violation of Article 21 of the Constitution of India.

State - a Model Employer

31. The Apex Court in *State of Jharkhand and another v. Harihar Yadav and others,* (2014) 2 SCC 114, observed:

> "52. Having regard to the position that has emerged, we are compelled to dwell upon the role of the State as a model employer. In *Som Prakash Rekhi v. Union of India*, (1981) 1 SCC 449, Krishna Iyer, J., has stated thus: -
>
> > "Social justice is the conscience of our Constitution, the State is the promoter of economic justice, the founding faith which sustains the Constitution and the country is Indian humanity. The public sector is a model employer with a social conscience not an artificial person without soul to be damned or body to be burnt."
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> 53 In *Gurmail Singh and others v. State of Punjab and others*, (1991) 1 SCC 189 it has been held that the State as a model employer is expected to show fairness in action.
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> 54. In *Balram Gupta v. Union of India and Another*, 1987 Supp1 SCC 228 the Court observed that as a model employer the Government must conduct itself with high probity and candour with its employees.
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> 55. In *State of Haryana v. Piara Singh*, (1992) 4 SCC 118 the Court has ruled that the main concern of the court in such matters is to ensure the rule of law and to see that the Executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16.
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> 56. In *Bhupendra Nath Hazarika and another v. State of Assam and others*, (2013) 2 SCC 516 while laying emphasis on the role of the State as a model employer, though in a different context, the Court observed:
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> > "65.....It should always be borne in mind that legitimate aspirations of the employees are not guillotined and a situation is not created where hopes end in despair. Hope for everyone is gloriously precious and a model employer should not convert it to be deceitful and treacherous by playing a game of chess with their seniority. A sense of calm sensibility and concerned sincerity should be reflected in every step. An atmosphere of trust has to prevail and when the employees are absolutely sure that their trust shall not be betrayed and they shall be treated with dignified fairness then only the concept of good governance can be concretized."
>
> "57. If the present factual matrix is tested on the anvil of the aforesaid principles, there can be no trace of doubt that both the States and the Corporations have conveniently ostracized the concept of "model employer". It would not be wrong to say that they have done so with Pacific calmness, sans vision, shorn of responsibility and oblivious of their role in such a situation. Their action reflects the attitude of emotionlessness, proclivity of impassivity and deviancy with cruel impassibility. Neither of the States nor the Corporations have even thought for a moment about the livelihood of the employees. They have remained totally alien to the situation to which the employees have been driven

> to. In a State of good governance the Government cannot act like an alien. It has an active role to play. It has to have a constructive and progressive vision....."

32. The Corporate and Industrial Houses are expected by the Indian State to take measures which provide a decent standard of living to members of the society generally and more specifically, to their employees. Therefore, the State has the duty to set an example of being a model employer to its employees. If State does itself does not give salary to its employees for their hard work then how can it be expected that the private entrepreneur will take care of their employees.

33. The Apex Court in *State of W.B. v. Haresh C. Banerjee & others,* (2006) 7 SCC 651, has held that pension is not a bounty payable on the sweet will and the pleasure of the Government and to receive pension is a valuable right of a government servant, is a sell-settled legal proposition.

34. Gratuity has also been held to be a statutory right which cannot be taken away. (*Allahabad Bank; All India Allahabad Bank Retired Employees Association; Allahabad Bank Retirees Assn v. All India Allahabad Bank Retired Employees Association; Allahabad Bank; Controlling Authority,* (2010) 2 SCC 44).

35. We are pained by the fact that wages were denied to the Nurses and other staff of the Medical College by the State for more than six months without there being any plausible explanation or reason available with the State to justify their act. The attitude of the State is appalling.

36. We notice that State has formulated a Litigation Policy with the avowed object of not only reducing litigation, saving avoidable cost on unproductive litigation, reducing avoidable load on judiciary with respect to Government induced litigation. This is in tune with the mandate of Article 39-A of the Constitution of India, obligating the State to promote equal justice and provide free legal aid. In fact, by virtue of clause 1.4 (d to h) of the State Litigation Policy, the State is under an obligation to take steps to reduce litigation, wherever possible. Now, if the employees are not paid their salaries within time, obviously, they are left with no remedy but to rush to the Courts.

37. Of late, litigation pertaining to employees of the State has increased and it is not that State is the petitioner. The action assailed is of mis-governance or avoidable omissions on the part of the Government. Why should the State force an employee to litigate in a case where emoluments/salaries, which are undisputed, are not disbursed in time.

38. An employee has a constitutional right to receive salary/emoluments within time, so also State is under a constitutional obligation and duty to disburse the same.

39. In the light of the aforesaid discussion and position of law, in exercise of our writ jurisdiction, we deem it necessary to pass the following directions:-

> A. The Chief Secretary to the Government of Himachal Pradesh, shall provide a mechanism for enabling the employees to vent out their grievances of non-disbursement of due and admissible wages/salaries/emoluments. And one such mechanism being of setting up a 'Web Portal' at the level of the Principal Secretary/ Secretary of the concerned Department(s), where the employees can lodge their grievances/complaints. Such grievances/ complaints shall be processed and adequately responded to within a period of one week. This would facilitate speedy redressal of genuine grievances and prevent unnecessary litigation, clogging the wheels of administration of justice. Such endeavour shall not only be in the spirit of Litigation Policy, framed by the State Government. We see great advantage in the use of information and technology. Not only it would result into effective and efficient redressal of grievances, if any, but also improve efficiency in the affairs of governance of the State.

B. All the Head of Departments of Government of Himachal Pradesh/Government Institutes/State Instrumentalities to ensure that in future emoluments to all employees of their respective Departments/Institutes are disbursed in time;

C. In case of said emoluments not being disbursed on schedule, except in the event of the emoluments being withheld as per law, the State/ instrumentality of the State shall be liable to compensate the employees concerned by paying statutory interest or the existing rate for saving bank deposit account provided by the State Bank of India, whichever is higher;

D. Immediately thereto, the Head of the Departments/Instrumentality of the State shall hold an inquiry, which shall be completed within a period of 30 days, to ascertain the omission on the part of the concerned person, resulting in delay of disbursement on schedule; and

E. Pursuant to the findings of the inquiry, the interest which stands paid to such employee, shall be recovered from the erring officer(s)/officials(s).

We direct the Chief Secretary to the Government of Himachal Pradesh to ensure compliance of the above directions and file affidavit within a period of four weeks.

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

Ravi Basnet ... Petitioner

Versus

State of Himachal Pradesh ... Respondent

CrMP(M) No. 1389 of 2017
Decided on November 14, 2017

Code of Criminal Procedure, 1973- Section 439- Bail- Section 15 of the Narcotic Drugs and Psychotropic Substances Act- Petitioner apprehended with 2.008 kg. poppy husk, a Nepali National- the principles relating to grant of bail reiterated- **On facts held**- that thought the bail petitioner hails from the Nepal and it may be difficult for the prosecution to secure his presence during trial, but, the aforesaid apprehension of the prosecution can well be met by directing the bail petitioner to furnish local surety who shall be responsible for the ensuring presence of the bail petitioner during the trial. (Para-13)

Cases referred:

Sanjay Chandra versus Central Bureau of Investigation (2012)1 Supreme Court Cases 49
Siddharam Satlingappa Mhetre versus State of Maharashtra and others, (2011) 1 SCC 694
Gurbaksh Singh Sibbia vs. State of Punjab, (1980) 2 SCC 565
Sundeep Kumar Bafna versus State of Maharashtra (2014)16 SCC 623
Prasanta Kumar Sarkar versus Ashis Chatterjee and another (2010) 14 SCC 496

For the petitioner : Mr. Anirudh Sharma, Advocate.
For the respondent : Mr. R.K. Sharma, Deputy Advocate General.
HC Naveen Kumar No. 45, I/O, PS Solan, District Solan, H.P.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

By way of instant bail petition filed under Section 439 CrPC, prayer has been made for grant of bail in case FIR No. 270 of 2017 dated 9.10.2017, registered under Section 15

of Narcotic Drugs & Psychotropic Substances Act, at Police Station, Solan, District Solan, Himachal Pradesh.

2. Sequel to order dated 7.11.2017, HC Naveen Kumar No. 45, I/O, PS Solan, District Solan, Himachal Pradesh, has come present with the record. Mr. R.K. Sharma, learned Deputy Advocate General has also placed on record status report, prepared on the basis of investigation carried out by the investigating agency till date. Record perused and returned.

3. Record/status report filed by the investigating agency suggests that on 9.10.2017, bail petitioner was apprehended by the police party carrying/possessing 2.008 kg poppy husk, near Shimla View Hotel, Salogra on NH No. 5. Since bail petitioner was unable to produce valid permit, if any, for possessing aforesaid contraband, he was taken into custody and since then is in custody.

4. Mr. Anirudh Sharma, learned counsel representing the petitioner submits that investigation in the case is complete and at this stage, nothing is required to be recovered from the bail petitioner, as such, he deserves to be enlarged on bail. Petitioner is residing in India for the last 14-15 years and there is no likelihood of his fleeing the hands of justice in case enlarged on bail. Learned counsel further contended that contraband allegedly recovered from the bail petitioner is 2.008 kg, which is not a commercial quantity and as such rigours of Section 37 of the Act ibid are not attracted to the present case. Learned counsel further contended that bail petitioner can be ordered to be enlarged on bail subject to furnishing of local surety.

5. Mr. R.K. Sharma, learned Deputy Advocate General, while opposing aforesaid prayer having been made by the learned counsel representing the petitioner contended that there is overwhelming evidence on record collected by investigating agency suggestive of the fact that bail petitioner is involved in the offence under Section 15 of the Narcotic Drugs & Psychotropic Substances Act, and as such he does not deserve to be shown any leniency by this Court, rather he is a native of Nepal and may leave the country in case enlarged on bail, thereby escaping the hands of justice. However, Mr. Sharma, fairly stated that investigation in the case is complete and *Challan* stands presented in the competent Court of law and presently, bail petitioner is in judicial custody.

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

7. Though this Court, after having perused record/status report sees no force in the arguments of learned counsel representing the petitioner that there is no evidence available on record, suggestive of the fact that bail petitioner is involved in the alleged crime. However taking in view the fact that petitioner's guilt is yet to be proved by the prosecution by leading cogent and convincing evidence, as such, it would not be proper to allow petitioner to incarcerate in jail for indefinite period. This Court can not lose sight of the fact that freedom of an individual cannot be allowed to be curtailed till the time guilt of the petitioner is proved in accordance with law.

8. By now it is well settled that gravity alone cannot be decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. The Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49; has been held as under:-

> "The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial

could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

9. Law with regard to grant of bail is now well settled. The Apex Court in **Siddharam Satlingappa Mhetre** versus **State of Maharashtra and others**, (2011) 1 SCC 694, while relying upon its decision rendered by its Constitution Bench in **Gurbaksh Singh Sibbia** vs. **State of Punjab**, (1980) 2 SCC 565, laid down the following parameters for grant of bail:-

"111. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case. As aptly observed in the Constitution Bench decision in Sibbia's case (supra) that the High Court or the Court of Sessions to exercise their jurisdiction under section 438 Cr.P.C. by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honour.

112. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

(i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) The possibility of the applicant to flee from justice;

(iv) The possibility of the accused's likelihood to repeat similar or the other offences.

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail." (Emphasis supplied)

10. Hon'ble Apex Court, in **Sundeep Kumar Bafna** versus **State of Maharashtra** (2014)16 SCC 623, has held as under:-

"8. Some poignant particulars of Section 437 CrPC may be pinpointed. First, whilst Section 497(1) of the old Code alluded to an accused being "brought before a Court", the present provision postulates the accused being "brought before a Court other than the High Court or a Court of Session" in respect of the commission of any non-bailable offence. As observed in Gurcharan Singh vs State(Delhi Admn) (1978) 1 SCC 118, there is no provision in the CrPC dealing with the production of an accused before the Court of Session or the High Court. But it must also be immediately noted that no provision categorically prohibits the production of an accused before either of these Courts. The Legislature could have easily enunciated, by use of exclusionary or exclusive terminology, that the superior Courts of Sessions and High Court are bereft of this jurisdiction or if they were so empowered under the Old Code now stood denuded thereof. Our understanding is in conformity with Gurcharan Singh, as perforce it must. The scheme of the CrPC plainly provides that bail will not be extended to a person accused of the commission of a non-bailable offence punishable with death or imprisonment for life, unless it is apparent to such a Court that it is incredible or beyond the realm of reasonable doubt that the accused is guilty. The enquiry of the Magistrate placed in this position would be akin to what is envisaged in State of Haryana vs Bhajan Lal, 1992 (Supp)1 SCC 335, that is, the alleged complicity of the accused should, on the factual matrix then presented or prevailing, lead to the overwhelming, incontrovertible and clear conclusion of his innocence. CrPC severely curtails the powers of the Magistrate while leaving that of the Court of Session and the High Court untouched and unfettered. It appears to us that this is the only logical conclusion that can be arrived at on a conjoint consideration of Sections 437 and 439 of the CrPC. Obviously, in order to complete the picture so far as concerns the powers and limitations thereto of the Court of Session and the High Court, Section 439 would have to be carefully considered. And when this is done, it will at once be evident that the CrPC has placed an embargo against granting relief to an accused, (couched by us in the negative), if he is not in custody. It seems to us that any persisting ambivalence or doubt stands dispelled by the proviso to this Section, which mandates only that the Public Prosecutor should be put on notice. We have not found any provision in the CrPC or elsewhere, nor have any been brought to our ken, curtailing the power of either of the superior Courts to entertain and decide pleas for bail. Furthermore, it is incongruent that in the face of the Magistrate being virtually disempowered to grant bail in the event of detention or arrest without warrant of any person accused of or suspected of the commission of any non-bailable offence punishable by death or imprisonment for life, no Court is enabled to extend him succour. Like the science of physics, law also abhors the existence of a vacuum,

> as is adequately adumbrated by the common law maxim, viz. 'where there is a right there is a remedy'. The universal right of personal liberty emblazened by Article 21 of our Constitution, being fundamental to the very existence of not only to a citizen of India but to every person, cannot be trifled with merely on a presumptive plane. We should also keep in perspective the fact that Parliament has carried out amendments to this pandect comprising Sections 437 to 439, and, therefore, predicates on the well established principles of interpretation of statutes that what is not plainly evident from their reading, was never intended to be incorporated into law. Some salient features of these provisions are that whilst Section 437 contemplates that a person has to be accused or suspect of a non-bailable offence and consequently arrested or detained without warrant, Section 439 empowers the Session Court or High Court to grant bail if such a person is in custody. The difference of language manifests the sublime differentiation in the two provisions, and, therefore, there is no justification in giving the word 'custody' the same or closely similar meaning and content as arrest or detention. Furthermore, while Section 437 severally curtails the power of the Magistrate to grant bail in context of the commission of non-bailable offences punishable with death or imprisonment for life, the two higher Courts have only the procedural requirement of giving notice of the Bail application to the Public Prosecutor, which requirement is also ignorable if circumstances so demand. The regimes regulating the powers of the Magistrate on the one hand and the two superior Courts are decidedly and intentionally not identical, but vitally and drastically dissimilar. Indeed, the only complicity that can be contemplated is the conundrum of 'Committal of cases to the Court of Session' because of a possible hiatus created by the CrPC."

11. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

12. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496**,** has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

13. True it is, that bail petitioner hails from Nepal and it may be difficult for the prosecution to secure his presence during trial but aforesaid apprehension expressed by the learned Deputy Advocate General can be met by directing bail petitioner to furnish local surety, who shall be responsible for ensuring presence of the bail petitioner during trial.

14. In view of the aforesaid discussion, petitioner has carved out a case for grant of bail. Moreover, quantity of contraband allegedly recovered from the bail petitioner is 2.008 kg,

which is not a commercial quantity and as such, rigours of Section 37 of the Act ibid are not attracted in this case.

15. In view of above, present petition is allowed and the petitioner is ordered to be enlarged on bail in the aforementioned FIR, subject to furnishing personal bonds in the sum of Rs.50,000/- with one local surety in the like amount to the satisfaction of learned Chief Judicial Magistrate, concerned with following conditions:

(a) He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

(b) He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(c) He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

(d) He shall not leave the territory of India without the prior permission of the Court.

16. It is clarified that if the petitioner misuses the liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

17. 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 present petition alone.

The petition stands accordingly disposed of.

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

Mohan Singh Guleria ....Petitioner.

Versus

State of HP and others. ....Respondents.

CWP No. 801 of 2017.
Decided on 20.11.2017.

Constitution of India, 1950- Article 226 and 227- Civil Writ Petition- The Security Interest (Enforcement) (Amendment) Rules, 2002- The respondent bank after initiating auction under The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002 had invited bids for auction of some commercial property which came to be picked up by the petitioner for Rs.4,50,00,000/- (4.50 cr.) - petitioner had been directed to deposit 15% of the auction amount, which was deposited by the petitioner as per the stipulations and the balance amount of Rs.3,37,50,000/- was to be paid within 15 days of the auction- since, petitioner could not do so, he sought to pay the balance amount on or before 20.1.2017 alongwith 13% interest for the delayed period- petitioner had further sought time till 10.2.2017 for deposit of the outstanding amount- however, on 18.3.2017 petitioner was informed by the bank that since the petitioner has failed to make payment within the extended period of time i.e. till 28.2.2017, amount of Rs.1,27,50,000/- which stood deposited by the petitioner stands forfeited as per terms and conditions of auction and as per Rules 9(4) and 9(5) of the Security Interest (Enforcement) (Amendment) Rules, 2002- petitioner challenged the action of the respondent

bank- **Held**- that action of the respondent bank was unwarranted and illegal as the amended Rules came into force w.e.f. 4.11.2016 and the auction process had been put into motion on 2.11.2016 – earlier rules were thus in force and the respondent bank could not have forfeited the amount as per the amended rules, wherein a period of three months had been stipulated for making full and final payment- It was further held that every Statute or Statutory Rule is prospective in nature unless it is expressly or by necessary implication made to have retrospective effect. (Para-14 to 19)

Cases referred:

P. Mahendran and others Vs. State of Karnataka and others (1990) 1 Supreme Court Cases 411

K. Kuppusamy and another Vs. State of T.N. and others (1998) 8 Supreme Court Cases 469

Katikara Chintamani Dora and others Vs. Guntreddi Annamanaidu and others, (1974) 1 Supreme Court Cases 567

For the petitioner : Mr. Ramakant Sharma, Sr. Advocate with Mr. T.S. Chauhan, Advocate.

For respondents : Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan, Addl. Advocate General for respondent No.1-State.
Mr. Sanjeev Bhushan, Sr. Advocate with Ms. Abhilasha Kaundal, Advocate for respondent No.2. to 4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.*(Oral).*

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

"a) That the respondents may be directed to confirm the sale held on 15.12.2016 in pursuance to Annexure P-1;

b) That the respondents No.2 to 3 may be directed to communicate the balance amount to be deposited by the petitioner;

c) That respondents No. 2 to 4 may be directed to allow the petitioner to participate in the auction proceeding in pursuance to Annexure P-13 without insisting for earnest money deposit and money already deposited by the petitioner may be adjusted towards the future bid to held on 8th May, 2017;

d) That the impugned order contained in Annexure P-10 and P-13 may kindly be quashed and set aside;

e) The record of the case may be called for."

2. Undisputed facts necessary for adjudication of the petition are that respondent No.4-Authorized Officer, HDFC Bank Ltd., initiated action under SARFAESI Act against M/s Shivansh Autozone Pvt. Ltd., i.e., its borrower for not repaying the dues of respondent No.2-Bank availed against credit facilities. In this process, respondent No.4 in its capacity as the authorized officer of the bank proceeded under Section 13(4) of SARFAESI Act and took symbolic possession of the property i.e., Commercial Showroom, NH 21, Village Bagla Muhalchalah, Chakkar, Badbast No. 207, Sub Tehsil Bath, Tehsil Sadar, Mandi, District Mandi, H.P. Thereafter respondent No.4 invited bid for auction of the said commercial property by issuing advertisement Annexure P-1. Reserve price of the property was fixed at Rs.4,50,00,000/-. 29.11.2016 was the date of inspection on which date, property could be inspected between 12:00 noon to 3:00 p.m. The date and time of auction were fixed as 15.12.2016 between 2:30 p.m. to 3:30 p.m. Last date for deposit of earnest amount was 9.12.2016 upto 16:00 hours. The petitioner who was eligible to participate in the bid deposited 10% of the reserve price vide RTGS receipt, Annexure P-2. Auction of the property was conducted on 15th December, 2016, on which date the bid of the petitioner for an amount of Rs.4.50crore was accepted vide communication of even date

Annexure P-3. The petitioner was directed vide said communication to deposit an amount of Rs.67.50lac towards 15% of the auction amount as per the terms and conditions of the auction notice. Said amount of Rs.67.50lac stood deposited by the petitioner on 15.12.2016 (Annexure P-4). Though as per terms of the auction, the successful bidder was to pay balance 75% of the sale consideration i.e. an amount of Rs.3,37,50,000/- within 15 days from the date of auction i.e., 15.12.2016, however, as the petitioner could not do so, the petitioner was accordingly directed by the respondent vide communication dated 31.12.2016 Annexure P-7 to do the needful on or before 20.1.2017 failing which amount deposited by the petitioner was to be forfeited. This was to be done along with interest @ 13% for the delayed period.

3. In response thereto, petitioner informed the respondent-bank that the petitioner be granted some more time to make the full and final payment and assured that all outstanding payment shall be settled on or before 10.2.2017. In the meanwhile, an amount of Rs.15.00 lac was also deposited by the petitioner with respondent Bank on 24.1.2017. Vide communication dated 18.3.2017, Annexure P-10, the petitioner was informed by respondent No.4 on behalf of respondent No.2-Bank that as he had failed to make payment within the extended period of time i.e. till 28.2.2017 as was permitted by the bank, amount of Rs.1,27,50,000/- which stood deposited by the petitioner to respondent-Bank stands forfeited as per the terms and conditions of auction and as per Rule 9(4) and 9 (5) of The Security Interest (Enforcement) (Amendment) Rules, 2002. This was followed by issuance of notice Annexure P-13, whereby the property was put for e-auction on 8.5.2017.

4. Feeling aggrieved, petitioner filed present writ petition praying for the reliefs already enumerated above.

5. Mr. Ramakant Sharma, learned Senior Counsel for the petitioner has primarily argued that the impugned act of respondent- Bank forfeiting the amount so deposited by the petitioner and further putting the property to e-auction is prima facie arbitrary, as the petitioner had already made necessary arrangements for the payment of the entire amount as would be evident from Annexure P-11 and P-12 appended with the writ petition which demonstrate that petitioner stood granted term loan of Rs.375.00 lacs for purchase of property in issue by TATA Capital Financial Services Limited which amount was to be disbursed in the month of March, 2017 itself. According to learned Senior Counsel despite petitioner's having made respondent-Bank aware of the fact that the entire amount would be deposited by the month of April, 2017, the impugned action was taken by respondent-Bank to the deterrent of the petitioner. Learned Senior Counsel further argued that there was no undue delay in making the payment on behalf of the petitioner, as petitioner was making arrangements in this regard and delay if any was caused by respondent-bank as there was no confirmation of sale in favour of the petitioner so made by respondents No.2 and 4 to facilitate the petitioner's obtaining the loan for the purchase of the said property. It was further submitted by learned Senior Counsel that petitioner was willing not only to deposit the entire balance amount but was also willing to compensate the respondent-Bank for additional expenses which stood incurred by it, details of which stand furnished by the respondent-Bank on the directions of this Court by way of an affidavit dated 30.6.2017.

6. Mr. Sanjeev Bhushan, learned Senior Counsel appearing for respondents No.2 to 4 while defending the act of respondent-Bank submitted that there was no arbitrariness in the acts of the respondent- Bank, as the respondent-Bank had acted in its best interest pursuant to the acts of omission on the part of the petitioner to comply with the terms of auction. It was further submitted by learned Senior Counsel for respondents No.2 to 4 that even otherwise Rule 9(4) and 9 (5) of The Security Interest (Enforcement) (Amendment) Rules, 2002 as amended upto date did not permit extension of period beyond three months from the date of auction for the purpose of depositing the auction amount.

7. We have heard learned counsel for the parties and have also gone through the records of the case.

8. Moot question which arises for consideration in the present case is as to whether Rule 9(4) of the Rules (supra) which stood amended w.e.f. 4.11.2016 will govern the auction process which stood initiated on 2.11.2016 or the said auction process is to be governed by the Rules which were in vogue as on the date when the said auction process was put into motion by way of issuance of an advertisement. Besides this, the other question which this Court is to answer is as to whether the act of respondents No.2 and 4 of forfeiting the amount deposited by the petitioner with them and further putting the property to re-auction is arbitrary or not.

9. We will deal with the legal issue first. We are doing so for the reason that when this Court had observed as to what prejudice will be caused to the respondent-Bank in case the petitioner is directed to deposit the balance amount with interest, it was stated on behalf of respondents No. 2 and 4 that the said respondents even if they so intent to, can't do the same because of the bar so created by Rule 9(4) (supra) as it stands post amendment.

10. The Security Interest (Enforcement) (Amendment) Rules, 2002 have been framed by the Central Government in exercise of powers conferred by Sub Section (1) and Clause (b) of Sub Section (2) of Section 38 read with Sub Sections (4), (10) and (12) of Section 13 of The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Amendment was carried out in these Rules vide SO 1046 (E) dated 3.11.2016 which amendment has come into force w.e.f. 4.11.2016. As per the said amendment, Rule 9 as it stands post amendment reads as under:

"9. Time of sale, Issue of sale certificate and delivery of possession, etc.-

[(1) No sale of immovable property under these Rules, in first instance shall take place before the expiry of thirty days from the date on which the public notice of sale is published in newspapers as referred to in the proviso to sub-Rule (6) of Rule 8 or notice of sale has been served to the borrower:

PROVIDED FURTHER that if the sale of immovable property by any one of the methods specified by sub Rule (5) of Rule 8 fails and sale is required to be conducted again, the authorized officer shall serve, affix and publish notice of sale of note less than fifteen days to the borrower, for any subsequent sale.]

(2) The sale shall be confirmed in favour of the purchaser who has offered the highest sale price in his bid or tender or quotation or offer to the authorised officer and shall be subject to confirmation by the secured creditor:

PROVIDED that no sale under this Rule shall be confirmed, if the amount offered by sale price is less than the reserve price, specified under sub-Rule (5) of [Rule 8] :

PROVIDED FURTHER that if the authorised officer fails to obtain a price higher than the reserve price, he may, with the consent of the borrower and the secured creditor effect the sale at such price.

[(3) On every sale of immovable property, the purchaser shall immediately, i.e. on the same day or not later than next working day, as the case may be, pay a deposit of twenty-five per cent of the amount of the sale price, which is inclusive of earnest money deposited, if any to the authorised officer conducting the sale and in default of such deposit, the property shall be sold again.]

(4) The balance amount of purchase price payable shall be paid by the purchaser to the authorised officer on or before the fifteenth day of confirmation of sale of the immovable property or such extended period [as may be agreed upon in writing between the purchaser and the secured creditor, in any case not exceeding three months.].

(5) In default of payment within the period mentioned in sub-Rule (4), the deposit shall be forfeited [to the secured creditor] and the property shall be resold and the defaulting purchaser shall forfeit all claims to the property or to any part of the sum for which it may be subsequently sold.

(6) On confirmation of sale by the secured creditor and if the terms of payment have been complied with, the authorised officer exercising the power of sale shall issue a certificate of sale of the immovable property in favour of the purchaser in the Form given in Appendix V to these Rules.

(7) Where the immovable property sold is subject to any encumbrances, the authorised officer may, if he thinks fit, allow the purchaser to deposit with him the money required to discharge the encumbrances and any interest due thereon together with such additional amount that may be sufficient to meet the contingencies or further cost, expenses and interest as may be determined by him:

[PROVIDED that if after meeting the cost of removing encumbrances and contingencies there is any surplus available out of the money deposited by the purchaser such surplus shall be paid to the purchaser within fifteen days, from date of finalisation of the sale.]

(8) On such deposit of money for discharge of the encumbrances, the authorised officer [shall] issue or cause the purchaser to issue notices to the persons interested in or entitled to the money deposited with him and take steps to make, the payment accordingly.

(9) The authorised officer shall deliver the property to the purchaser free from encumbrances known to the secured creditor on deposit of money as specified in sub-Rule (7) above.

(10) The certificate of sale issued under sub-Rule (6) shall specifically mention that whether the purchaser has purchased the immovable secured asset free from any encumbrances known to the secured creditor or not."

11. Sub Rule (4) of Rule 9 as it stands post amendment envisages that the balance amount of purchase price shall be paid by the purchaser to the authorized officer on or before 15th day of confirmation of immovable property or such extended period as may be agreed upon in writing between the purchaser and secured creditor which in any case will not exceed three months.

12. Rule 9 as it stood before the said amendment read as under:-

"9. Time of sale, Issue of sale certificate and delivery of possession, etc.-

(1) No sale of immovable property under these Rules shall take place before the expiry of thirty days from the date on which the public notice of sale is published in newspapers as referred to in the proviso to sub-Rule (6) or notice of sale has been served to the borrower.

(2) The sale shall be confirmed in favour of the purchaser who has offered the highest sale price in his bid or tender or quotation or offer to the authorised officer and shall be subject to confirmation by the secured creditor:

Provided that no sale under this Rule shall be confirmed, if the amount offered by sale price is less than the reserve price, specified under sub-Rule (5) of Rule 9 :

Provided further that if the authorised officer fails to obtain a price higher than the reserve price, he may, with the consent of the borrower and the secured creditor effect the sale at such price.

(3) On every sale of immovable property, the purchaser shall immediately pay a deposit of twenty-five per cent of the amount of the sale price, to the authorised officer conducting the sale and in default of such deposit, the property shall forthwith be sold again.

(4) The balance amount of purchase price payable shall be paid by the purchaser to the authorised officer on or before the fifteenth day of confirmation of sale of the immovable property or such extended period as may be agreed upon in writing between the parties.

(5) In default of payment within the period mentioned in sub-Rule (4), the deposit shall be forfeited and the property shall be resold and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold.

(6) On confirmation of sale by the secured creditor and if the terms of payment have been complied with, the authorised officer exercising the power of sale shall issue a certificate of sale of the immovable property in favour of the purchaser in the Form given in Appendix V to these Rules.

(7) Where the immovable property sold is subject to any encumbrances, the authorised officer may, if he thinks fit, allow the purchaser to deposit with him the money required to discharge the encumbrances and any interest due thereon together with such additional amount that may be sufficient to meet the contingencies or further cost, expenses and interest as may be determined by him.

[Provided that if after meeting the cost of removing encumbrances and contingencies there is any surplus available out of money deposited by the purchaser such surplus shall be paid to the purchaser within fifteen day, from date of finalisation of the sale.]

(8) On such deposit of money for discharge of the encumbrances, the authorised officer 15[shall] issue or cause the purchaser to issue notices to the persons interested in or entitled to the money deposited with him and take steps to make, the payment accordingly.

(9) The authorised officer shall deliver the property to the purchaser free from encumbrances known to the secured creditor on deposit of money as specified in sub-Rule (7) above.

(10) The certificate of sale issued under sub-Rule (6) shall specifically mention that whether the purchaser has purchased the immovable secured asset free from any encumbrances known to the secured creditor or not."

13. Sub Rule (4) of un-amended Rule 9 thus, inter alia, provided that the balance amount of purchase shall be paid by the purchaser to the authorized officer on or before 15th day of confirmation of the sale of immovable property or such extended period as may be agreed upon in between the parties. The embargo of maximum of three months was not there in the un-amended Rules. This embargo has been created by the amended Rules which have come in force w.e.f. 4.11.2016.

14. Now coming to the facts of this case, herein the process to auction the property in issue was put into motion by way of issuance of an advertisement which was published in the newspapers on 2.11.2016. In other words, when the process to auction the property in dispute was put into motion by way of issuance of advertisement, the amended Rules were not in force. The Rules which governed the field, provided that the amount so payable by the purchaser to the secured creditor could be paid within such period as may be agreed upon in writing between the parties. It is settled principle of law that a process put into motion has to be taken to its logical conclusion as per the Rules which were in vogue at the time when the process was initiated and even if there is subsequent change in the Rules, then also the process which already stood initiated has to be completed as per old Rules itself.

15. A five Judges' Bench of Hon'ble Supreme Court of India in Commissioner of Income Tax (Central)-I, New Delhi Vs. Vatika Township Private Limited (2015) 1 Supreme Court Cases 1 has held:-

"27. A legislation, be it a statutory Act or a statutory Rule or a statutory Notification, may physically consists of words printed on papers. However, conceptually it is a great deal more than an ordinary prose. There is a special peculiarity in the mode of verbal communication by a legislation. A legislation is not just a series of statements, such as one finds in a work of fiction/non fiction or

even in a judgment of a court of law. There is a technique required to draft a legislation as well as to understand a legislation. Former technique is known as legislative drafting and latter one is to be found in the various principles of '*interpretation of statutes*'. Vis-à-vis ordinary prose, a legislation differs in its provenance, lay-out and features as also in the implication as to its meaning that arise by presumptions as to the intent of the maker thereof.

28. Of the various Rules guiding how a legislation has to be interpreted, one established Rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the Rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bed rock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as *lex prospicit non respicit* : law looks forward not backward. As was observed in *Phillips vs. Eyre*, a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.

29. The obvious basis of the principle against retrospectivity is the principle of '*fairness*', which must be the basis of every legal Rule as was observed in the decision reported in *L'Office Cherifien des Phosphates* v. *Yamashita-Shinnihon Steamship Co. Ltd.* Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later."

16. A three Judges' Bench of Hon'ble Supreme Court of India in **P. Mahendran and others Vs. State of Karnataka and others** (1990) 1 Supreme Court Cases 411 has held:-

"5. It is well-settled Rule of construction that every statute or statutory Rule is prospective unless it is expressly or by necessary implication made to have retrospective effect. Unless there are words in the statute or in the Rules showing the intention to affect existing rights the Rule must be held to be prospective. If a Rule is expressed in language which is fairly capable of either interpretation it ought to be construed as prospective only. In the absence of any express provision or necessary intendment the Rule cannot be given retrospective effect except in matter of procedure. The amending Rule of 1987 does not contain any express provision giving the amendment retrospective effect nor there is anything therein showing the necessary intendment for enforcing the Rule with retrospective effect. Since the amending Rule was not retrospective, it could not adversely affect the right of those candidates who were qualified for selection and appointment on the date they applied for the post, moreover as the process of selection had already commenced when the amending Rules came into force. The amended Rule could not affect the existing rights of those candidates who were being considered for selection as they possessed the requisite qualifications prescribed by the Rules before its amendment moreover construction of amending Rules should be made in a reasonable manner to avoid unnecessary hardship to those who have no control over the subject matter."

Though this decision has been rendered by Hon'ble Supreme Court in a service matter, however, the principle of law laid down by the Hon'ble Supreme Court is that every Statute or Statutory Rule is prospective unless it is expressly or by necessary implication made to have retrospective effect and amendment of Rule cannot adversely affect the rights of a party pertaining to a process which already stood commenced before amending Rules came into force.

17. A three Judges' Bench of Hon'ble Supreme Court of India in **K. Kuppusamy and another Vs. State of T.N. and others** (1998) 8 Supreme Court Cases 469 has held:-

> **"3. The short point on which these appeals must succeed is that the Tribunal fell into an error in taking the view that since the Government had indicated its intention to amend the relevant Rules, its action in proceeding on the assumption of such amendment could not be said to be irrational or arbitrary and, therefore, the consequential orders passed have to be upheld. We are afraid this line of approach cannot be countenanced. The relevant Rules, it is admitted, were framed under the proviso to Article 309 of the Constitution. They are statutory Rules. Statutory Rules cannot be overridden by executive orders or executive practice. Merely because the Government had taken a decision to amend the Rules does not mean that the Rule stood obliterated. Till the Rule is amended, the Rule applies. Even today the amendment has not been effected. As and when it is effected ordinarily it would be prospective in nature unless expressly or by necessary implication found to be retrospective. The Tribunal was, therefore, wrong in ignoring the Rule.**

18. A three Judges' Bench of Hon'ble Supreme Court of India in **Katikara Chintamani Dora and others Vs. Guntreddi Annamanaidu and others**, (1974) 1 Supreme Court Cases 567 has held:-

> **"50. It is well settled that ordinarily, when the substantive law is altered during the pendency of an action, rights of the parties are decided according to law, as it existed when the action was begun unless the new statute shows a clear intention to vary such rights (Maxwell on Interpretation, 12th Edn. 220). That is to say, in the absence of anything in the Act, to say that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act is passed."**

19. Therefore, it is but apparent from the law cited above that amendments are always prospective until and unless the language of the Rule itself envisages that the amendment is sought to be retrospective. In the present case, it is not in dispute that the amendment so incorporated in Sub Rule (4) of Rule 9 (supra) was introduced w.e.f. 4.11.2016. Thus the amendment itself makes it clear that the same is prospective and not retrospective. When the said amendment is prospective and not retrospective it is not understood as to how the auction process which was commenced before incorporation of the said amendment could be said to be governed by the amended Rule. In our considered view, the auction process has to be governed by the Rules which were in vogue when the said process was put into motion by way of issuance of advertisement as that is the day when the right stood crystallized on the parties who were eligible to participate in the auction qua the conditions of auction. Therefore, the auction in issue is to be governed by the provisions of Sub Rule (4), Rule 9 (supra) as it stood before the amendment which was so carried out w.e.f. 4.11.2016 and the contention of the respondent-Bank that the said bank cannot extend time to the purchaser to deposit amount in excess of three months is ill-founded.

20. Now we will address the second issue as to whether the act of respondents No.2 and 4 of forfeiting the amount so deposited by the petitioner and thereafter subjecting the property to re-auction is arbitrary or not. In our considered view, the impugned acts of respondents No.2 and 4 are arbitrary. This is for the reason that the petitioner had brought it

into the notice of respondent Bank on 28.2.2017 that he had funds to pay the entire bid amount to the respondent-bank and that the entire amount shall be paid by the month of April, 2017. Respondent-Bank rather than permitting the petitioner to deposit the balance amount, of course along with interest for the delayed period, went ahead to re-auction the property. Now the re-auction was slated for the month of May, 2017 i.e. subsequent to the month in which petitioner had assured respondents No.2 and 4 that he shall be paying the entire purchase amount to the bank. In this view of the matter, according to us, the act of the respondent-bank forfeiting the amount deposited by the petitioner and initiating fresh steps for re-auctioning the property in issue is arbitrary. The interest of the bank is to get its money back which it had given by way of loan to original borrower and it is not understood as to how this interest of the bank was being served by on one hand not permitting the petitioner to deposit the auction amount with interest in the month of April, 2017 and further while putting the entire property to re-auction in the month of May, 2017. Incidentally we find in the notice of re-auction even the reserve price is the same as it was in the notice of auction dated 4.11.2016. This demonstrates that impugned acts of the respondent-bank are flagrantly arbitrary and thus violative of Article 14 of the Constitution of India.

In view of above discussion, this writ petition is allowed. Impugned communication dated 18.3.2017, Annexure P-10, and auction notice, Annexure P-13, are quashed and set aside. Petitioner is directed to deposit the balance purchase amount with respondents No.2 and 4 along with interest as per communication dated 31.12.2016 as calculated upto 30.4.2017 on or before 15.12.2017. In addition, petitioner shall also pay to the said respondents an amount of Rs.2,12,711/- i.e., the amount which had subsequently been incurred as is evident from the affidavit dated 30.6.2017 filed by respondent-bank. Parties are further directed to thereafter complete the process of sale in accordance with law forthwith, including issue of sale certificate. It is clarified that in case balance amount is not deposited by the petitioner as directed by this Court on or before 15.12.2017, then the respondent-bank shall be at liberty to re-auction the property. No order as to costs. Pending miscellaneous applications if any also stand disposed of.

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

Dharam Chand .....Petitioner.

Versus

Inderjeet Singh. .....Respondent.

Cr. Revision No. 125 of 2015
Decided on : 21.11.2017

Code of Criminal Procedure, 1973- Section 482- Section 142 of the Negotiable Instruments Act, 1881- The learned Trial Court based on the verdict of the Hon'ble Supreme Court in Dashrath Rupsingh Rathor vs. State of Maharastra & another returned the complaint under the Negotiable Instruments Act to the complainant to be presented before the appropriate Court- Order of the learned Trial Court challenged- The High Court in revision held thus - that in view of the Negotiable Instruments (Amendment) Ordinance, 2015, wherein, sub section (2) was inserted into Section 142 of the Negotiable Instruments Act- The case can be filed either where the payee or holder of the cheque maintained an account or where the cheque was presented by the payee or holder for payment.

The revision allowed- The complainant directed to present the complaint before the returning Court within two weeks. (Para-2)

For the petitioner: Mr. Parveen Chauhan, Advocate.

For the respondent: None.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The instant petition is directed against the order recorded by the learned JMIC Dalhousie, upon, complaint No. 11/14 of 2014, whereby the aforesaid complaint preferred before it, was returned to be presented, to the appropriate Court, holding the apposite jurisdiction to try it. The aforesaid order, is made, on anvil of a verdict recorded by the Hon'ble Apex Court, in Dashrath Rupsingh Rathor vs. State of Maharastra & another. However, subsequent thereto, on 29.12.2015, an amendment, in the hereinafter extracted, manner, has occurred in Section 142 of the Negotiable Instruments Act, relevant part whereof stand extracted hereinafter:

> "3. In the principal Act, Section 142 shall be numbered as sub-section (1) thereof and after sub-section (1) as so numbered, the following sub-section shall be inserted,
>
> "(2) The offence under Section 138 shall be inquired into and tried only by a court within whose local jurisdiction,-
>
> (a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or
>
> (b) If the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.
>
> *Explanation.*- for the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account".
>
> 4. In the principal Act, after section 142, the following section shall be inserted, namely:-
>
> "142A. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 or any judgment, decree, order or direction of any court, all cases transferred to the court having jurisdiction under sub-section (2) of section 142, as amended by the Negotiable Instruments (Amendment) Ordinance, 2015, shall be deemed to have been transferred under this Act, as if that sub-section had been in force at all material times.
>
> (2) Notwithstanding anything contained in sub-section (2) of section 142 or sub-section (1), where the payee or the holder in due course, as the case may be, has filed a complaint against the drawer of a cheque in the court having jurisdiction under sub-section (2) of Section 142 or the case has been transferred to that court under sub-section (1) and such complaint is pending in that court, all subsequent complaints arising out of section 138 against the same drawer shall be filed before the same court irrespective of whether those cheques were delivered for collection or presented for payment within the territorial jurisdiction of that court.
>
> (3) If, on the date of the commencement of the Negotiable Instruments (Amendment) Act, 2015, more than one prosecution filed by the same payee or holder in due course, as the case may be, against the same drawer of cheques is pending before different courts, upon the said fact having been brought to the notice of the court, such court shall transfer the case to the court having jurisdiction under sub-section (2) of section 142, as amended by the negotiable

Instruments (Amendment) Ordinance, 2015, before which the first case was filed and is pending, as if that sub-section had been in force at all material times."

2. A close reading, of, the attractable hereat provisions, discloses, that the appropriate Court, holding the jurisdiction, to, try the apposite complaint, arising from dishonor of negotiable instrument IS (i) wherewithin whose local limits, of jurisdiction, stand(s) located, the bank, where the payee or holder in due course, maintains his account AND wherebefore the dishonoured negotiable instrument is presented, for collection(s) in his account. Consequently, bearing in mind the afore-extracted amendment(s) carried vis-à-vis Section 142, of, the Negotiable Instruments Act, (ii) thereupon with presentation, of, the dishonoured negotiable instrument, being, made by the payee, at State Bank of India, Branch Dalhousie, District Chamba, H.P., whereat also he maintains his account(s), (ii) AND whereat after collection, from, the account(s) of the complainant maintained at a Bank located at Jammu, moneys would hence pour, (iii) thereupon with the aforesaid bank wherein the payee maintains his account(s) being situated, within, the local limits of the jurisdiction, of, Court located at Dalhousie, (iv) thereupon jurisdiction, was statutorily fastened in the aforesaid Court, for trying the complaint. In aftermath it was, not, appropriate for the learned Judicial Magistrate, Dalhousie, to rely upon the pronouncement made by the Hon'ble Apex Court, in case supra, (v) given its verdict not holding prevalence thereat, (vi) rather given prevalence thereat, of, the apposite amended provisions.

3. In view, of, a mandate recorded by the Hon'ble Apex Court in Criminal Appeal No. 1557 of 2015, titled M/s Bridgestone India Pvt. Ltd. vs. Inderpal Singh, mandate whereof, is borne in the apposite paragraph occurring at Sr. No. 14, para whereof stands reproduced hereinafter:-

> "In the above view of the matter, the instant appeal is allowed, and the impugned order passed by the High Court of Madhya Pradesh, by its Indore bench, dated 05.05.2011, is set aside. The parties are directed to appear before the Judicial Magistrate, First Class, Indore, on 15.01.2016. In case the complaint filed by the appellant has been returned, it shall be re-presented before the Judicial magistrate, first Class, Indore, Madya Pradesh, on the date of appearance indicated hereinabove."

whereby the Hon'ble Apex Court, permitted, the complainant, to, represent the complaint before the returning Court, given, it, in consonance with the apt amendment(s), hence holding jurisdiction to, try it, (i) thereupon in consonance therewith, the returning Court, is, directed, to, on its representation therebefore, by the complainant accept it AND thereafter try it in accordance with law. The complaint be re-presented before the returning Court, within two weeks. In aftermath the petition is allowed and the impugned order is quashed and set aside.

In view of the above directions the petition as well as all pending application(s), if any, are disposed of.

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BEFORE HON'BLE MR.JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

Harbans Lal ....Petitioner

Versus

Punjab National Bank & Others ....Respondents

CWP No.1842 of 2017
Judgment reserved on: 02.11.2017
Date of decision: 22.11.2017

Constitution of India, 1950- Article 226- Service matter- Correction of date of birth- Petitioner seeking direction to the respondent to correct his date of birth in his office/service

profile as 12.09.1958 instead of 12.09.1957 – further direction to the respondents to superannuate him as per his corrected date of birth – **Held**- representation for the first time made by the petitioner on 14.6.2017 after lapse of 37 years from the date of his initial engagement about 3 ½ months prior to his superannuation – **Further held**- that it is trite that a civil servant can claim correction of his date of birth, if he is in possession of irrefutable proof in this behalf, though there is no period of limitation prescribed for seeking correction of date of birth- the government servant must do so without any unreasonable delay- On facts held that the petitioner submitted the application for correction of date of birth too late in the day at the fag end of his career, delay was inordinate and as such could not be condoned – petition dismissed.

(Para-11 to 15)

Cases referred:

Union of India vs. Harnam Singh, (1993)2 SCC 162

U.P. Madhyamik Shiksha Parishad and Others vs. Raj Kumar Agnihotri, (2005)11 SCC 465

Punjab & Haryana High Court at Chandigarh vs. Megh Raj Garg & Another, (2010)6 SCC 482

State of Rajasthan vs. Bhawani Singh and Others, 1993 Supp (1) SCC 306

For the Petitioner: Mr.Gaurav Gautam, Advocate.

For the Respondents: Mr.G.S. Rathore, Advocate.

The following judgment of the Court was delivered:

Per Sandeep Sharma,J.

Being aggrieved and dis-satisfied with the rejection of his representation i.e. Annexure P-5, whereby he had requested respondent No.4 i.e. Chief Manager, Punjab National Bank, Damtal, District Kangra, H.P. to correct his date of birth in his service record, the petitioner has approached this Court by way of instant petition, seeking therein direction to the respondents to correct his date of birth in his office/service profile as well as records as 12.09.1958 instead of 12.09.1957. Petitioner has further prayed for direction to the respondents to superannuate him as per his corrected date of birth i.e. 12.09.1958 and thereafter to pay him consequential benefits accordingly.

2. For having bird's eye view, necessary as well as undisputed facts sans unnecessary details are that the petitioner was appointed as peon-cum-chowkidar on 06.09.1979 in the respondent-Bank and at the time of joining, he mentioned his date of birth as 12.09.1957, as is evident from application Annexure R-1. Petitioner while joining service also submitted his educational qualification certificate, wherein his date of birth is also recorded as 12.09.1957, as is evident from marks sheet issued by Himachal Pradesh State Education Board *(for short 'HPSEB')* on 07.07.1981 i.e. Annexure R-2. Petitioner has also placed on record certificate issued by *'HPSEB',* which also reveals that his date of birth is recorded as 12.09.1957.

3. As per petitioner, he moved an application on prescribed format i.e. Form G-625, as prescribed by *'HPSEB',* praying therein to carry out necessary correction in his matriculation certificate by correcting his date of birth, which, as per him, is inadvertently recorded as 12.09.1957 instead of 12.09.1958. In support of aforesaid plea, though petitioner has placed on record application submitted by him to the *'HPSEB'* (Annexure P-2), but there is no mention of date, from where it can be inferred that on which date such prayer was made by petitioner for correction of his date of birth. Petitioner has also not chosen to implead *'HPSEB'* as a party-respondent, who could substantiate factum with regard to correction allegedly made by Board of School Education, pursuant to the request of petitioner vide Annexure P-2. Petitioner has further averred in the petition that *'HPSEB',* while allowing aforesaid correction, took into consideration documents available in their record, such as, Form G-13, Entries in the Admission and Withdrawal Register of the petitioner's school (Annexure P-3). Petitioner has also placed on record certificate obtained by him from Principal, Government Senior Secondary School, Ghoran,

Tehsil Nurpur, District Kangra, certifying the date of birth of the petitioner to be 12.9.1958 (Annexure P-4).

4. Pursuant to the aforesaid correction made vide Form G-625, as prescribed by *'HPSEB'*, authenticity of which is also doubtful in the absence of corroboration, if any, on the part of *'HPSEB'*, who is not made as a party, petitioner filed representation dated 14.06.2017 (Annexure P-4) addressed to respondent No.4, praying therein for correction of his date of birth as recorded in his service/bank record. In the aforesaid representation, petitioner represented to the bank-authorities that since duplicate school leaving certificate dated 27.5.2017 has been issued in his favour, reflecting therein his date of birth as 12.09.1958, necessary correction may be carried out so that he is superannuated on the basis of his correct date of birth i.e. 12.09.1958.

5. At this stage, it may be noticed that, save and except, representation dated 14.6.2017, no communication is/was ever made by the petitioner with the respondent-bank, requesting therein to effect change in his service record as far as his date of birth is concerned. Representation dated 14.6.2017 admittedly came to be filed by the petitioner after a lapse of 37 years from the date of his initial engagement i.e. 06.09.1979, just at the fag end of his carrier that too just 3½ months prior to his date of superannuation i.e. 30.09.2017, which prayer of him, is/was not acceded to by the bank authorities, as is evident from communication dated 18.07.2017 i.e. Annexure P-6. Even present petition came to be filed before this Court after one month of passing of order dated 18.07.2017 i.e. Annexure P-6.

6. After having perused reply filed by the respondents, there appears to be no dispute with regard to initial appointment of the petitioner in the respondent-bank as well as his request with regard to correction of date of birth. But definitely, after having perused documents adduced on record by respondent-bank, it clearly emerge that petitioner, at the time of his initial appointment, had furnished copy of matriculation certificate, wherein admittedly his date of birth is recorded as 12.09.1957. Similarly, perusal of application submitted by him for selection as Customer Care Officer in JMG Scale-I (Annexure R-3) reveals that petitioner disclosed his date of birth as 12.9.1957. Perusal of Confidential Reports Annexures R-5, R-6, R-7 and R-8, placed on record by respondents, which pertain to the years 2009 to 2012, clearly suggest that petitioner, while submitting self information for the purpose of Confidential Reports, has been disclosing his date of birth as 12.9.1957. Respondent-bank has also placed on record HRD Division Circular No.125 dated 4.1.2003, issued by Human Resource Development Division, Head Office, New Delhi, to demonstrate that in case of an employee, who has passed matriculation examination, the date of birth as per matriculation certificate shall be taken as conclusive proof of age and in case of an employee, who has not passed matriculation examination, his age should be admitted on the basis of a certificate from the Municipal record or Police Station of the place, where such an employee was born or school leaving certificate of a recognized school (Annexure R-9).

7. Since, in the case at hand, petitioner was matriculate, he submitted his matriculation certificate as well as school leaving certificate, wherein his date of birth is recorded as 12.09.1957 and as such same entry came to be recorded in service record of the petitioner. Since certificate sought to be brought on record by the petitioner with regard to proposed amendment in his date of birth is/was not matriculation certificate as required as per aforesaid Circular, same was not considered by the respondent-bank. Though Shri Gaurav Gautam, learned counsel appearing for the petitioner, made sincere and concerted efforts to persuade this Court to agree with his contention that since factum with regard to mistake committed by the authorities while issuing matriculation certificate only came to the notice of respondents after his initial engagement, respondents-authorities ought to have taken into consideration duplicate certificate issued by Form G-625 as prescribed by *'HPSEB'*, which was issued after proper verification of record, but, this Court is unable to accept the aforesaid contention of Shri Gautam. As has been taken note above, there is nothing on record from where it can be inferred that on which date application for correction of date of birth is/was preferred by petitioner on Form G-625, as prescribed by *'HPSEB'*.

8. Apart from above, petitioner has not placed on record duplicate certificate, as claimed to have been issued by *'HPSEB',* suggestive of the fact that his date of birth was corrected to 12.09.1958 instead of 12.09.1957 by *'HPSEB'*. Petitioner has only placed on record certificate issued by Principal, GSSS, Ghoran, who has certified that date of birth of the petitioner i.e. 12.9.1958 is correct as per school record. Aforesaid certificate issued by Principal may not be sufficient to conclude that date of birth was corrected by *'HPSEB',* and *'HPSEB'* is not before us to certify correction, if any, made by it on the application filed by the petitioner. Otherwise also, as has been taken note above, petitioner's application at the time of initial engagement is/was considered strictly on the basis of matriculation examination as was required under Circular No.125, dated 4.1.2003, issued by HRD Division of respondent-bank.

9. It is not in dispute, as is clearly evident from the record that the petitioner kept mum for long 37 years and just 3½ months prior to his retirement made a representation to the respondents-authorities for carrying out correction in his service record. Though we are clear in our mind that there is/was no occasion, as such, for respondents to exceed to the aforesaid request having been made by the petitioner, but, even otherwise, we do not know on what basis the petitioner sought correction in his service record because there is nothing on record to substantiate the claim of the petitioner that on his request duplicate certificate came to be issued by *'HPSEB'*. It is only certificate issued by Principal, GSSS, Gharun, who has only stated that date of birth of the petitioner i.e. 12.9.1958 is correct as per record.

10. After having perused material placed on record by the respondents, we are in agreement with the submissions having been made by Mr.G.S. Rathour, learned counsel representing the respondents, that no steps, whatsoever, are/were taken by the petitioner for long 37 years to get his date of birth corrected and as such no indulgence can be shown to him by this Court that too when he has already superannuated on 30.09.2017. Similarly, we find from the record that every time petitioner, while submitting his personal information to enable the concerned officer to write his ACRs, has disclosed his date of birth as 12.9.1957 and not as 12.9.1958.

11. Though, there is nothing on record, placed by either of the parties, from where it can be inferred that there is/was limitation prescribed under Rules for seeking correction of date of birth, but by now it is well settled that the Government servant must do so without any unreasonable delay and if the Government servant approaches the employer at a belated stage or at the fag end of service, the general principle of refusing relief on the grounds of laches or stale claims, is generally applied by the Courts and Tribunals. Hon'ble Apex Court in ***Union of India vs. Harnam Singh, (1993)2 SCC 162*** has held that a Government servant who has declared his age at the initial stage of the employment is, of course, not precluded from making a request later on for correcting his age. It is open to a civil servant to claim correction of his date of birth, if he is in possession of irrefutable proof relating to his date of birth as different from the one earlier recorded and even if there is no period of limitation prescribed for seeking correction of date of birth, the Government servant must do so without any un-reasonable delay. The Court has held as under:-

> ***"7. A Government servant, after entry into service, acquires the right to continue in service till the age of retirement, as fixed by the State in exercise of its powers regulating conditions of service, unless the services are dispersed with on other grounds contained in the relevant service rules after following the procedure prescribed therein. The date of birth entered in the service records of a civil servant is, thus of utmost importance for the reason that right to continue in service stands decided by its entry in the service record. A Government servant who has declared his age at the initial stage of the employment is, of course, not precluded from making a request later on for correcting his age. It is open to a civil servant to claim correction of his date of birth, if he is in possession of the irrefutable proof relating to his date of birth as different from the one***

earlier recorded and even if there is no period of limitation prescribed for seeking correction of date of birth, the Government servant must do so without any unreasonable delay. In the absence of any provision in the rules for correction of date of birth, the general principle of refusing relief on grounds of latches or stale claims, is generally applied to by the courts and tribunals. It is nonetheless competent for the Government to fix a time limit, in the service rules, after which no application for correction of date of birth of a Government servant can be entertained. A Government servant who makes an application for correction of date of birth beyond the time, so fixed, therefore, cannot claim, as a matter of right, the correction of his date of birth even if he has good evidence to establish that the recorded date of birth is clearly erroneous. The law of limitation may operate harshly but it has to be applied with all its rigour and the courts or tribunals cannot come to the aid of those who sleep over their rights and allow the period of limitation to expire. Unless altered, his date of birth as recorded would determine his date of superannuation even if it amounts to abridging his right to continue in service on the basis of his actual age. Indeed, as held by this Court in State of Assam & Anr. v. Daksha Prasad Deka & Ors., [1971] 2 SCR 687 a public servant may dispute the date of birth as entered in the service record and apply for its correction but till the record is corrected he can not claim to continue in service on the basis of the date of birth claimed by him. This court said: (SCC pp.625-26, para 4)

> ***"...The date of compulsory retirement under F.R. 56(a) must in our judgment, be determined on the basis of the service record, and not on what the respondent claimed to be his date of birth, unless the service record is first corrected consistent with the appropriate procedure. A public servant may dispute the date of birth as entered in the service record, and may apply for correction of the record. But until the record is corrected, he cannot claim that he has been deprived of the guarantee under Article 311 (2) of the Constitution by being compulsorily retired on attaining the age of superannuation on the footing of the date of birth entered in the service record."***

12. Hon'ble Apex Court in ***U.P. Madhyamik Shiksha Parishad and Others vs. Raj Kumar Agnihotri, (2005)11 SCC 465*** reiterated the law laid down by it in ***Union of India vs. Harnam Singh*** *supra* and held as under:-

> ***"16(2) State of Uttaranchal and Others vs. Pitamber Dutt Semwal, (2002)1 UPLBEC 441 SC.***
>
> ***In this case, here again, this Court was considering Rule 2 of the U.P. Recruitment Service (Determination of Date of the Birth) Rules, 1974 and held as under:***
>
> ***"6. These rules, the validity of which have not been challenged, clearly stipulate that no application or representation shall be entertained for correcting any date or age record and the entry made in the service book shall be deemed to be the correct date of birth. Be that as it may, even de hors the said rule, we are of the opinion that the plea of the respondent that the date of birth was wrongly recorded was highly belated. He joined service in 1964, the service book was prepared in 1965 and according to the appellant, he has signed the said service book at least on three occasions. In any case, the plea of the wrong recording of the age in the service book has been taken, nearly thirty years after the service book was prepared. In our opinion, the Division Bench was in error in ignoring the***

provisions of the said Rule 2 and even otherwise, in the facts of this case, there was no occasion for the High Court to have interfered with the decision of the appellant."

3. State of T.N. vs. T.V. Venugopalan, (1994) 6 SCC 302,

In this case, this Court held that the rule provided that an application for alteration of recorded date of birth would be entertained only if made within five years after entering the service. This Court held that an employee already in service at the time of enforcement of such rule should make the application for correction within five years from the date of enforcement of the rule, otherwise he would lose his right to make such an application and the Government servant would not be permitted to challenge the entry at the fag end of his service.

4. Executive Engineer vs. Rangadhar Mallik, 1993 Supp (1) SCC 763.

In this case, this Court was considering Rule 65 of the Orissa General Finance Rules stipulating that representation for correction of date of birth made near about the time of superannuation shall not be admitted. This Court held that the representation for correcting the date of birth made by respondent after 18 years is not maintainable in law since the entry regarding date of birth made in the service record was on the basis of the horoscope produced by the employee himself and after obtaining his signature.

5. Govt.of A.P. vs. M. Hayagreev Sarma, (1990) 2 SCC 682.

The A.P. Public Employment (Recording and Alteration of Date of Birth) Rules, 1984 was under consideration in this case by this Court. The date of birth of the employee was recorded in the service book on the basis of school certificate at the time of entry into service. The employee's application for alteration in the date of birth so recorded was finally rejected prior to coming into force of the rules. A subsequent claim was made by the employee for alteration after commencement of the rules. This Court held that the subsequent claim for alteration after the commencement of the rules even on the basis of the extracts of entry contained in births and deaths register maintained under Births, Deaths and Marriages Registration Act, 1886 was not open.

6. Union of India vs. Harnam Singh, (1993) 2 SCC 162.

In this case, there was a delay of five years in seeking for alteration prescribed in Note 5 to FR 56(m) as substituted in 1979. This Court held that those already in service prior to 1979, for a period of more than five years, obliged to seek alteration within the maximum period of five years from the date of coming into force of amended note 5 in 1979. Alteration sought by the employee in 1991, 35 years after his induction into the service during which period he had several occasions to see the service book to raise any objection regarding his date of birth cannot be allowed in view of unexplained and inordinate delay.

7. Burn Standard Co. Ltd. vs. Dinabandhu Majumdar, AIR 1995 SC 1499.

"10. Entertainment by High Courts of writ applications made by employees of the Government or its instrumentalities at the fag end of their services and when they are due for retirement from their services, is unwarranted. It would be so for the reason that no employee can claim a right to correction of birth date and entertainment of such writ applications for correction of dates of birth of some employees of Government or its instrumentalities will mar the chances of promotion of

his juniors and prove to be an undue encouragement to the other employees to make similar applications at the fag end of their service careers with the sole object of preventing their retirements when due. Extraordinary nature of the jurisdiction vested in the High Courts under Article 226 of the Constitution is not meant to make employees of Government or its instrumentalities to continue in service beyond the period of their entitlement according to dates of birth accepted by their employers, placing reliance on the so-called newly found material. The fact that an employee of Government or its instrumentality who has been in service for over decades, with no objection whatsoever raised as to his date of birth accepted by the employers as correct, when all of a sudden comes forward towards the fag end of his service career with a writ application before the High Court seeking correction of his date of birth in his Service Record, the very conduct of non- raising of an objection in the matter by the employee, should be a sufficient reason for the High Court, not to entertain such applications on grounds of acquiescence, undue delay and laches. Moreover, discretionary jurisdiction of the High Court can never be said to have been reasonably and judicially exercised if it entertains such writ application, for no employee, who had grievance as to his date of birth in his 'service and Leave Record' could have genuinely waited till the fag end of his service career to get it corrected by availing of the extraordinary jurisdiction of a High Court."

8. In Secy. & Commr.Home Deptt. vs. R. Kirubakaran, 1994 Supp (1) SCC 155, this Court held : (SCC pp.158-59 & 160, paras 7 & 9)

"An application for correction of the date of birth by a public servant cannot be entertained at the fag end of his service. It need not be pointed out that any such direction for correction of the date of birth of the public servant concerned has a chain reaction, inasmuch as others waiting for years, below him for their respective promotions are affected in this process. Some are likely to suffer irreparable injury, inasmuch as, because of the correction of the date of birth, the officer concerned, continues in office, in some cases for years, within which time many officers who are below him in seniority waiting for their promotion, may lose the promotion forever. According to us, this is an important aspect, which cannot be lost sight of by the Court or the Tribunal while examining the grievance of a public servant in respect of correction of his date of birth. As such, unless clear case on the basis of materials which can be held to be conclusive in nature, is made out by the respondent, the Court or the Tribunal should not issue a direction, on the basis of materials which make such claim only plausible and before any such direction is issued, the Court must be fully satisfied that there has been real injustice to the person concerned and his claim for correction of date of birth has been made in accordance with the procedure prescribed, and within time fixed by any rule or order. The onus is on the applicant to prove about the wrong recording of his date of birth in his service book.

As such whenever an application for alteration of the date of birth is made on the eve of superannuation or near about that time, the Court or the Tribunal concerned should be more cautious because of the growing tendency amongst a section of public servants, to raise such a dispute, without explaining as to why this question was not raised earlier. In the facts and circumstances of the case, it is not possible to uphold the finding recorded by the Tribunal."

It is thus seen from the above quoted judgments that this Court has consistently taken the view that correction in entries made in Government records on the basis of which the Government servant got the service cannot be allowed to be changed just a few years before retirement or at the fag end of his retirement.

17. In the instant case, the U.P. Recruitment to Services (Determination of Date of Birth) Rules came into force w.e.f. 28.05.1974. Rule 2 of the Rule was amended by the first amendment Rules, 1980 of 07.06.1980."

13. Hon'ble Apex Court in ***Punjab & Haryana High Court at Chandigarh vs. Megh Raj Garg & Another, (2010)6 SCC 482,*** has held as under:-

"12. An analysis of the above reproduced rule makes it clear that the declaration of age made at the time of or for the purpose of entry into government service is conclusive and binding on the government servant. The only exception to this is that the government servant can make an application for correction of age within two years from the date of entry into service. This necessarily implies that an application made by a government servant for correction of age after two years of his entry into service cannot be entertained by the competent authority. However, the competent authority can, at any time, correct the age recorded in the service book or in the history service of a gazetted government employee if it is satisfied that the age has been so recorded with a view to give undue benefit to the employee / officer like continuance in service beyond the age of superannuation. Of course, while undertaking this exercise, the competent authority is bound to comply with the rule of audi alteram partem and give a reasonable opportunity to the concerned employee/officer to represent his cause against the proposed change in the recorded age/date of birth. In other words, while there is a complete bar to the making of an application by the government servant for correction of his recorded age after two years from the date of his entry into government service, the competent authority can make correction at any time if it is found that the age recorded in the service book is incorrect and has been so recorded with a view to enable the concerned employee to continue in service beyond the age of superannuation or gain any other advantage.

13. Undisputedly, the date of birth of respondent No.1, who joined service in March 1973 was recorded in his service book as 27.3.1936. This was done keeping in view the declaration made by him in the application form submitted for the purpose of recruitment to the service and his matriculation certificate. Being a law graduate, respondent No.1 must have been aware of the date of birth i.e., 27.3.1936 recorded in his matriculation certificate and this must be the reason why he mentioned that date in the application form submitted to the Public Service Commission. If the correct date of birth of respondent No.1 was 27.3.1938 and this was supported by the certificates issued by the schools in which he had studied before appearing in the matriculation examination, then he would have immediately after joining the service made an application to the University for change of date of birth recorded in the matriculation certificate and persuaded the concerned authority to decide the same so as to enable him to move the State Government and the High Court for making corresponding change in the date of birth recorded in his service book in terms of Para 1 of Annexure-A to Chapter II of the Punjab Civil Service Rules, Volume I. However, respondent No.1 waited for more than ten years after entering into service and submitted an application dated 27.10.1983 to the University for effecting change in the date of birth

recorded in the matriculation certificate by citing the school certificates as the basis for his claim.

14. The Syndicate of the University took about one year and three months to decide the matter in favour of respondent No.1 and the date of birth recorded in the matriculation certificate was changed from 27.3.1936 to 27.3.1938 sometime in January/February 1985. Thereafter, respondent No.1 submitted representation dated 22.2.1985 to the Registrar of the High Court seeking correction in the date of birth recorded in the service book. His plea was finally rejected in January 1993. It is thus evident that respondent No.1 applied for change of the date of birth recorded in his service book much beyond the time limit of two years specified in the rule.

15. The High Court or for that reason the State Government did not have the power, jurisdiction or authority to entertain the representation made by respondent No.1 after more than twelve years of his entering into service. Therefore, neither of them committed any illegality by refusing to accept the prayer made by respondent No.1 on the basis of change effected by the University in the date of birth recorded in his matriculation certificate. Unfortunately, the trial Court, the lower appellate Court and the learned Single Judge of the High Court totally misdirected themselves in appreciating the true scope of the embargo contained in the relevant rule against the entertaining of an application for correction of date of birth after two years of the government servant's entry into service and all of them committed grave error by nullifying the decision taken by the State Government in consultation with the High Court not to accept the representation made by respondent No.1 for change of date of birth recorded in his service book. All the courts overlooked the stark reality that respondent No.1 had made application for change of date of birth recorded in the matriculation certificate after more than ten years of his entry into government service and the decision taken by the Syndicate to accept his request did not give him any cause for filing application or making representation for change of the date of birth recorded in the service book.

16. This Court has time and again cautioned civil courts and the High Courts against entertaining and accepting the claim made by the employees long after entering into service for correction of the recorded date of birth. In Union of India v. Harnam Singh (supra), this Court considered the question whether the employer was justified in declining the respondent's request for correction of date of birth made after thirty five years of his induction into the service and whether the Central Administrative Tribunal was justified in allowing the original application filed by him. While reversing the order of the Tribunal, this Court observed:

> ***"7. A Government servant, after entry into service, acquires the right to continue in service till the age of retirement, as fixed by the State in exercise of its powers regulating conditions of service, unless the services are dispensed with on other grounds contained in the relevant service rules after following the procedure prescribed therein. The date of birth entered in the service records of a civil servant is, thus of utmost importance for the reason that the right to continue in service stands decided by its entry in the service record. A Government servant who has declared his age at the initial stage of the employment is, of course, not precluded from making a request later on for correcting his age. It is open to a civil servant to claim correction of his date of birth, if he is in possession of irrefutable proof relating to his date of birth***

as different from the one earlier recorded and even if there is no period of limitation prescribed for seeking correction of date of birth, the Government servant must do so without any unreasonable delay. In the absence of any provision in the rules for correction of date of birth, the general principle of refusing relief on grounds of laches or stale claims, is generally applied by the courts and tribunals. It is nonetheless competent for the Government to fix a time-limit, in the service rules, after which no application for correction of date of birth of a Government servant can be entertained. A Government servant who makes an application for correction of date of birth beyond the time, so fixed, therefore, cannot claim, as a matter of right, the correction of his date of birth even if he has good evidence to establish that the recorded date of birth is clearly erroneous. The law of limitation may operate harshly but it has to be applied with all its rigour and the courts or tribunals cannot come to the aid of those who sleep over their rights and allow the period of limitation to expire. Unless altered, his date of birth as recorded would determine his date of superannuation even if it amounts to abridging his right to continue in service on the basis of his actual age. Indeed, as held by this Court in State of Assam v. Daksha Prasad Deka a public servant may dispute the date of birth as entered in the service record and apply for its correction but till the record is corrected he cannot claim to continue in service on the basis of the date of birth claimed by him. This Court said: (SCC pp. 625-26, para 4) "

> ***'4. ... The date of compulsory retirement under F.R. 56(a) must in our judgment, be determined on the basis of the service record, and not on what the respondent claimed to be his date of birth, unless the service record is first corrected consistently with the appropriate procedure. A public servant may dispute the date of birth as entered in the service record and may apply for correction of the record. But until the record is corrected, he cannot claim that he has been deprived of the guarantee under Article 311(2) of the Constitution by being compulsorily retired on attaining the age of superannuation on the footing of the date of birth entered in the service record." (emphasis supplied)***

18. In Secretary and Commissioner, Home Department and others v. R. Kirubakaran (supra), this Court considered the question whether the Tamil Nadu Administrative Tribunal had the jurisdiction to entertain an application made by the respondent for correction of his date of birth just before superannuation. While answering the question in negative, the Court observed(SCC pp.158-59, para 7)

> ***"7. An application for correction of the date of birth should not be dealt with by the tribunal or the High Court keeping in view only the public servant concerned. It need not be pointed out that any such direction for correction of the date of birth of the public servant concerned has a chain reaction, inasmuch as others waiting for years, below him for their respective promotions are affected in this process. Some are likely to suffer irreparable injury, inasmuch as, because of the correction of the date of birth, the officer concerned, continues in office, in some cases for years, within which time many officers who are below him in seniority waiting for their promotion, may lose their promotions for ever. Cases are not unknown when a person accepts appointment keeping in view the date of retirement of his immediate***

senior. According to us, this is an important aspect, which cannot be lost sight of by the court or the tribunal while examining the grievance of a public servant in respect of correction of his date of birth. As such, unless a clear case, on the basis of materials which can be held to be conclusive in nature, is made out by the respondent, the court or the tribunal should not issue a direction, on the basis of materials which make such claim only plausible. Before any such direction is issued, the court or the tribunal must be fully satisfied that there has been real injustice to the person concerned and his claim for correction of date of birth has been made in accordance with the procedure prescribed, and within the time fixed by any rule or order. If no rule or order has been framed or made, prescribing the period within which such application has to be filed, then such application must be filed within the time, which can be held to be reasonable. The applicant has to produce the evidence in support of such claim, which may amount to irrefutable proof relating to his date of birth. Whenever any such question arises, the onus is on the applicant, to prove the wrong recording of his date of birth, in his service book. In many cases it is a part of the strategy on the part of such public servants to approach the court or the tribunal on the eve of their retirement, questioning the correctness of the entries in respect of their dates of birth in the service books. By this process, it has come to the notice of this Court that in many cases, even if ultimately their applications are dismissed, by virtue of interim orders, they continue for months, after the date of superannuation. The court or the tribunal must, therefore, be slow in granting an interim relief for continuation in service, unless prima facie evidence of unimpeachable character is produced because if the public servant succeeds, he can always be compensated, but if he fails, he would have enjoyed undeserved benefit of extended service and merely caused injustice to his immediate junior. (emphasis supplied)"

14. It is quite evident from the aforesaid exposition of law laid down by Hon'ble Apex Court that though employee is well within its right to get his date of birth corrected in record, but only explanation to this is that he/she needs to make an application for correction of age within reasonable period from the date of entring into service. Hon'ble Apex Court in the judgment referred hereinabove has categorically held that the law of limitation may operate harshly but it has to be applied with all its rigours and the Courts or Tribunals cannot come to the aid of those who sleep over their rights and allow the period of limitation to expire.

15. True, it is, that in the case at hand, none of the parties, be it petitioner or respondents, have placed on record rules governing the service conditions of the petitioner, from where it could be inferred that what is the prescribed period of limitation for moving an application for correction of date of birth, but even then this Court, cannot lose sight of the fact that application/prayer for correction of date of birth came to be submitted in the instant case after 37 years that too just 3½ months prior to his retirement. Hon'ble Apex Court has specifically held in judgment relied hereinabove that where no period of limitation is prescribed, application for correction needs to be filed by employee within a reasonable period. Since, in the instant case, petitioner besides failing to substantiate his claim for correction of date of birth, has approached this Court after inordinate delay, which in no circumstance can be condoned while considering the request of petitioner for correction of date of birth, especially when there is no explanation, if any, rendered on record by the petitioner qua inordinate delay. Otherwise also, dispute in question is pure question of fact, which cannot be looked into/adjudicated under Article 226 of the Constitution of India, more particularly when alternative remedy is available, as

has been held by Hon'ble Apex Court in ***State of Rajasthan vs. Bhawani Singh and Others, 1993 Supp (1) SCC 306:***

> ***"7. Having heard the counsel for the parties, we are of the opinion, that the writ petition was misconceived insofar as it asked for, in effect, a declaration of writ petitioner's title to the said plot. It is evident from the facts stated hereinabove that the title of the writ petitioner is very much in dispute. Disputed question relating to title cannot be satisfactorily gone into or adjudicated in a writ petition."***

16. Consequently, in view of detailed discussion made hereinabove as well as law laid down by Hon'ble Apex Court, we do not see any reason to exercise powers under Article 226 of the Constitution of India to undo the decision taken by the respondents, which otherwise appears to be based upon proper appreciation of Rules as well as law occupying the field. Present petition is dismissed.

17. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

****

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

Ridham (minor) through her mother Smt. Raman Kumari. ....Petitioner.

Versus

Dr. Vishal Dharwal ....Respondent.

Cr.MMO No. 74 of 2017
Decided on: 22.11.2017

Code of Criminal Procedure, 1973- Section 125- Maintenance- Held-oblivious of the fact that the mother is an earning hand – father possessing equal obligation towards the child as far as upbringing and maintenance is concerned- On facts findings of the Learned Courts below that the respondent father was liable to pay maintenance to the daughter- Upheld- Rather maintenance ordered to be enhanced from Rs.8,000/- to 12,000/- per month. (Para-12 and 13)

Code of Criminal Procedure, 1973- Section 125- Whether maintenance is to be granted from the date of filing of the application or from the date of passing the order- **Held**- that in the facts and circumstances of the case discretion can be exercised to grant maintenance from the date of filing the application- in case the delay in adjudication of the same is attributable to the respondent- maintenance ought to be ordered from the date of filing of the application and not from the date of order. (Para-18)

Cases referred:

Jaiminiben Hirenbhai Vyas and another Vs. Hirenbhai Rameshchandra Vyas, (2015) 2 SCC 385
Bhuwan Mohan Singh Vs. Meena and others, (2015) 6 Supreme Court Cases 353

For the petitioner. Mr. Dheeraj K. Vashisht, Advocate
For the respondent Mr. Surinder Kumar Suri, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J *(Oral)*

Petitioner before this Court is the minor daughter of respondent-Vishal Dharwal and Smt. Raman Kumari. She was born on 14.11.2007. An application was filed by the petitioner

through her mother, i.e., her next friend and natural guardian in the Court of learned Chief Judicial Magistrate Una, Distt. Una, H.P., under Section 125 of the Criminal Procedure Code (in short 'Cr.P.C.') praying for grant of maintenance in her favour from the respondent @ Rs.20,000/- per month as also amount of Rs.20,000/- as litigation expenses. Vide order dated 6.10.2015, Court of Judicial Magistrate 1st Class, (IV), Una, District Una, H.P. (hereinafter referred to as 'JMIC, Una') allowed the petition so filed by the present petitioner under Section 125 of Cr.P.C. in the following terms:-

> *"In view of my finding supra, present petition is, hereby, partly allowed. The respondent is directed to pay maintenance of RS. 8,000/- per month to the petitioner from the date of this order. The respondent is also directed to pay litigation expenses of these proceedings to the tune of Rs. 10,000/-. Copy of this order be supplied to the petitioner through her mother free of cost. Accordingly, the petition in hand stands disposed of. After doing needful, file be consigned to record room."*

2. This order was challenged by way of appeal by the present petitioner, inter alia, on the ground that the amount of maintenance was on a lower side and further the learned court had erred in not granting maintenance in favour of the petitioner form the date of filing of the petition.

3. Vide order dated 31.8.2016 so passed in Cr. Appeal/Revision No. 21/2016, learned appellate court dismissed the same by upholding the order passed by the Court of learned JMIC, Una both on quantum as well as to from which date the petitioner was entitled to maintenance.

4. These two orders stand assailed before this Court by way of present petition, inter alia, on the ground that the amount of Rs.8,000/- awarded as maintenance is meager and the same be accordingly enhanced and further that the amount of maintenance be ordered to be paid from the date of filing of the petition under Section 125 of Cr.P.C.

5. I have heard learned counsel for the parties and have also gone through the records of the case as well as judgments passed by learned courts below.

6. It is not in dispute that the earning of respondent at the time when the petition was filed under Section 125 of Cr.P.C. by the petitioner was more than Rs.40,000/- per month in his capacity as a government employee serving at Subsidiary Health Centre Batwara, Tehsil Mukerian, District Hoshiarpur (Punjab). It is also not in dispute that mother of the petitioner is also a government servant, who is serving as a doctor and her monthly income at the relevant time was more than Rs.58,000/- per month.

7. Before proceeding further, it is pertinent to mention that the finding returned by the Court of Judicial Magistrate 1st Class, Una to the effect that the petitioner was entitled for maintenance under Section 125 of Cr.P.C has not been assailed by the respondent neither he has assailed the amount of maintenance which stands awarded by the said Court.

8. A perusal of the order passed by learned Judicial Magistrate 1st Class, Una demonstrates that while awarding an amount of Rs.8,000/- as expenses it stood held by the said Court that there was nothing on record to show that respondent was contributing anything towards the maintenance of the petitioner and as the petitioner was a school going child and as none was dependent upon the respondent, he could easily spare Rs.8,000/- per month towards the maintenance of the petitioner.

9. Section 125 of the Cr.P.C, inter alia, provides that if any person having sufficient means neglects or refuses to maintain his minor child, then a Magistrate of 1st Class, may upon such proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of such child, as such Magistrate thinks fit.

10. Records reveal that the application for grant of maintenance under Section 125 of the Cr.P.C. was filed by the petitioner on 14.6.2011. Notice on the same was issued to the respondent No. 23.6.2011 for 17.8.2011. On said date, the respondent was not present, therefore, he was again ordered to be served for 19.10.2011. Again on 19.10.2011, respondent was not present and case was adjourned for 26.12.2011. On subsequent dates also, respondent was not present and on 7.5.2012 again Court directed the service of the respondent for 28.7.2012. On 30.10.2012 respondent put in appearance through his counsel and was granted time to file reply to the application.

11. Two issues which call for adjudication in the present petition are as to whether amount of Rs.8,000/- per month ordered by learned court below as maintenance in favour of the present petitioner is an adequate amount and as to whether learned court below erred in not granting maintenance from the date of filing of the application.

12. Undoubtedly, both the parents of petitioner are government servants. Whereas mother of the petitioner is stated to be a doctor, who earns monthly salary in excess of Rs.58,000/- per month approximately, her father is also a government employee, who at the time when the application was decided, was earning approximately an amount of Rs.40,000/- per month. It is a matter of record that respondent before this court, who is the father of the petitioner, had given his willingness to look after and maintain the petitioner if custody of the petitioner is handed over to him. It has also come on record as is evident from the orders which stand assailed before this court that respondent has no other liability save and except what he owes towards the upkeep of petitioner who is his minor child. The date of birth of the petitioner is 14.11.2007, meaning thereby as of now she is 10 years old. Statement of the mother of the petitioner which was recorded before the learned court below on 20.5.2014 demonstrates that at the relevant time, the petitioner was a student of second class and was studying in Chandigarh. This means that as of now, the petitioner should be undergoing her education at Chandigarh, has not been disputed before me.

13. In my considered view, petitioner is entitled for grant of maintenance which is befitting to confer upon her status of a child as if she was residing with both her parents. Though income of mother admittedly at the time when the application was decided by the learned court below was approximately Rs.58,000/- per month but then this court cannot lose sight of the fact that she has been single handedly taking care of the petitioner and the respondent owes an equal obligation towards the petitioner as far as her upbringing and maintenance is concerned. Therefore, in my considered view grant of maintenance of Rs.8,000/- per month by the learned court below is on a lower side. Petitioner is at least entitled for an amount of Rs.12,000/- per month from the respondent who happens to be her father. Such an amount is not only reasonable, but is not on the higher side from the perspective of the respondent also, because a father who is earning in excess of Rs.40,000/- per month is at least expected to spend an amount of Rs.12,000/- per month towards his only daughter especially when the said respondent has no other liability as are the findings returned by the learned courts below. Therefore while holding that the maintenance granted by learned court below in favour of the present petitioner is on the lower side, the same is enhanced from Rs.8,000/- to Rs.12,000/- per month.

14. Now this Court will deal with the issue as to whether the learned trial court erred in not granting maintenance from the date of filing of the application or whether the order so passed by learned trial court that maintenance be granted from the date of order is sustainable in the facts and circumstances of the case. As mentioned above also, records of the case demonstrate that application under Section 125 of Cr.P.C. was filed by the present petition before the learned trial court on 22.6.2011. Respondent appeared before the Court on 30.10.2012. It is pertinent to mention here that previous orders passed by the Court dated 17.8.2011, 19.10.2011, 26.12.2011 and 19.3.2012 demonstrate that it stands mentioned in these orders qua the presence of the respondent as under, “respondent not present”.

15. Be that as it may, after the respondent appeared before the Court on 30.10.2012, it took the Court almost three years to decide the application.

16. It has been held by Hon'ble Supreme Court of India in **Jaiminiben Hirenbhai Vyas and another Vs. Hirenbhai Rameshchandra Vyas**, (2015) 2 Supreme Court Cases 385 that Section 125 of the Cr.P.C. impliedly requires the Court to consider making the order for maintenance effective from either of the two dates, i.e., from the date of filing of the application or from the date of the announcement of the order having regard to the relevant facts. Hon'ble Supreme Court has further held that for good reason evident from its order, the Court may choose either date and that it was neither appropriate nor desirable that a Court simply states that maintenance should be paid from either of the date in matters of maintenance. Hon'ble Supreme Court has further held that as per Section 354(6) of Cr.P.C., the court should record reasons in support of the order passed by it, in both eventualities. The purpose of the provision is to prevent vagrancy and destitution in society and the court must apply its mind to the options having regard to the facts of the particular case.

17. Hon'ble Supreme Court of India in **Bhuwan Mohan Singh Vs. Meena and others**, (2015) 6 Supreme Court Cases 353 has held as under:-

> *"15. After referring to the decision in Krishna Jain, the Supreme Court adverted to the decision of the High Court of Andhra Pradesh in K. Sivaram v. K. Mangalamba wherein it has been ruled that the maintenance would be awarded from the date of the order and such maintenance could be granted from the date of the application only by recording special reasons. The view of the learned Single Judge of the High Court of Andhra Pradesh stating that it is a normal rule that the Magistrate should grant maintenance only from the date of the order and not from the date of the application for maintenance was not accepted by this Court. Eventually the Court ruled: (Shail Kumari Devi case, SCC p. 647, para 43)*
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> > *"43. We, therefore, hold that while deciding an application under Section 125 of the Code, a Magistrate is required to record reasons for granting or refusing to grant maintenance to wives, children or parents. Such maintenance can be awarded from the date of the order, or, if so ordered, from the date of the application for maintenance, as the case may be. For awarding maintenance from the date of the application, express order is necessary. No special reasons, however, are required to be recorded by the court. In our judgment, no such requirement can be read in sub-section (1) of Section 125 of the Code in absence of express provision to that effect."*
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> *16. In the present case, as we find, there was enormous delay in disposal of the proceeding under Section 125 of the Code and most of the time the husband had taken adjournments and sometimes the court dealt with the matter showing total laxity. The wife sustained herself as far as she could in that state for a period of nine years. The circumstances, in our considered opinion, required grant of maintenance from the date of application and by so granting the High Court has not committed any legal infirmity. Hence, we concur with the order of the high Court. However, we direct, as prayed by the learned counsel for the appellant, that he may be allowed to pay the arrears along with the maintenance awarded at present in a phased manner. The learned counsel for the respondents did not object to such an arrangement being made. In view of the aforesaid, we direct that while paying the maintenance as fixed by the learned Family Court Judge per month by 5th of each succeeding month, the arrears shall be paid in a proportionate manner within a period of three years from today."*

18. Coming to the facts of present case, in my considered view, it was a fit case where learned court below should have had ordered grant of maintenance from the date of application and not from the date of order. This Court is not oblivious to the fact that learned court below had the discretion to grant maintenance from either of the two dates, but taking into consideration the fact that the applicant before the Court was a minor daughter of the respondent

and further that respondent had no other obligation/liability and was gainfully employed as a government servant and earning monthly wages in excess of Rs.40,000/- per month, this very important aspect of the matter has escaped the learned trial court while granting maintenance from the date of application. Disposal of the application before the learned trial court itself took a considerable long time. Records of the learned trial court demonstrate that delay in adjudication of the same is also attributable to the respondent. Therefore also in my considered view, it was a fit case wherein the maintenance ought to have been ordered from the date of filing of the application and not from the date of order, as was done by the learned trial court. Petitioner being the minor daughter of the respondent was at least entitled for maintenance from her father under Section 125 of the Cr.P.C. from the date of filing of the application and in the absence of there being anything on record from which it can be inferred that the petitioner was having sufficient means to sustain herself during the said period, interest of justice demanded the grant of maintenance from the date of filing of the application. Even if the mother of the petitioner was gainfully employed and having reasonable income, then also, liability and the responsibility to maintain his daughter by providing her maintenance from the date of filing of the application under Section 125 of the Cr.P.C. was not whittled down.

Accordingly, in view of findings returned above, this petition is allowed. Order passed by the Court of learned Judicial Magistrate 1st Class, Court No. IV, Una, dated 06.10.2015, as confirmed by learned Additional Sessions Judge (1), Una, is modified to the extent that the petitioner shall be entitled for maintenance from the date, the application was so filed by her under Section 125 of Cr.P.C and further she shall be entitled for maintenance at the rate of Rs.12,000/- per month instead of Rs.8,000/- per month. Arrears shall be paid by the respondent in favour of the petitioner within a period of three months from today, failing which respondent shall be liable to pay simple interest @ 6% per annum from the date of passing of this judgment in favour of the petitioner. Petition stands disposed of in above terms. No order as to costs. Pending miscellaneous applications also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Courts on its own motion .....Petitioner.

Versus

State of H.P. & others .....Respondents.

CWPIL No.107 of 2017
Date of Decision: 23.11.2017

Constitution of India, 1950- Article 26- Public Interest Litigation- Two writ petitions titled as ***Goverdhan Singh versus State of H.P. and others*** and ***Amri Devi versus State of H.P. and others*** to restrain the respondents-authorities from taking any coercive action vis-à-vis the encroachment made by them over the government land- Since, numbers of people were found to have encroached upon the government land- Directions issue to the Deputy Commissioner to take following action against all encroachments;

(a) Enquire as to why the proceedings could not be completed or taken to its logical end.

(b) Wherever proceedings/appeals, save and except before this Court, if any, assailing the orders of demolition/ejectment, are pending, hearing is expedited and the Deputy Commissioner shall ensure that all steps for completion of such proceedings are taken within the next four weeks.

(c) Depute a special team consisting of the officials of I & P H, PWD, HPSEB and Revenue Department(s) for carrying out demolition of unauthorized structures, in all those case where no proceedings are pending before any authority.

(d) Electricity and water connections of such unauthorized structures be disconnected forthwith.

(e) Team so constituted shall ensure removal of all structures within a period of three weeks.

(f) Costs of removal of unauthorized structures shall be recovered as arrears of land revenue from the encroachers and the Deputy Commissioner shall ensure compliance of the order within a period of three weeks.

(g) If required, the Superintendent of Police shall depute adequate police force for executing the order passed by this Court.

As a sequel time sought and granted to the State for removal of the encroachment till 31st December, 2017 - After conclusion of the demolition of the encroachment Assistant Collector 1st Grade, Palampur directed to file affidavit of compliance. (Para-2)

For the Petitioner: Ms. Leena Guleria, Advocate, as Amicus Curiae.

For the Respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K.Verma, Deputy Advocate General, for the respondents-State.

The following judgment of the Court was delivered:

Per Sandeep Sharma, J. *(oral)*

Two Civil writ petitions bearing No.1137 of 2017-D titled as ***Goverdhan Singh versus State of H.P. and others*** and CWP No.1138 of 2017-D titled as ***Amri Devi versus State of H.P. and others***, came to be filed before this Court against the order, dated 19.08.2004, passed by Naib Tehsildar, Bhawarna, which was subsequently up held by Sub Divisional Collector, Kangra, seeking therein direction to restrain the respondents-authorities from taking any coercive action against the petitioners, on the basis of alleged encroachment made by them over the Government land.

2. During the proceedings of the case, it transpired that numbers of people have encroached upon the government land and as such, this Court after having taken note of affidavit filed on behalf of the Deputy Commissioner, Kangra at Dharamshala passed following detailed order:-

"Notice. Mr. Kush Sharma, learned Deputy Advocate General appears and accepts service of notice on behalf of the respondents.

Allegedly, order dated 19.8.2004, so passed by the Tehsildar, Palampur, directing removal of encroachment over the Government land, in relation to more than 11 persons, including that of the petitioner, has not been complied with. Also encroachment proceedings qua remaining 44 as also 55 encroachers have yet not been completed despite the action having been initiated in the year, 2004.

In these circumstances, we direct the Deputy Commissioner, Kangra at Dharamshala (respondent No.3), to forthwith take the following actions:-

(h) Enquire as to why the proceedings could not be completed or taken to its logical end.

(i) Wherever proceedings/appeals, save and except before this Court, if any, assailing the orders of demolition/ejectment, are pending, hearing is expedited and the Deputy Commissioner shall ensure that all steps for completion of such proceedings are taken within the next four weeks.

(j) Depute a special team consisting of the officials of I&PH, PWD, HPSEB and Revenue Department(s) for carrying out demolition of unauthorized structures, in all those case where no proceedings are pending before any authority.

(k) Electricity and water connections of such unauthorized structures be disconnected forthwith.

(l) Team so constituted shall ensure removal of all structures within a period of three weeks.

(m) Costs of removal of unauthorized structures shall be recovered as arrears of land revenue from the encroachers and the Deputy Commissioner shall ensure compliance of the order within a period of three weeks.

(n) If required, the Superintendent of Police shall depute adequate police force for executing the order passed by this Court.

Affidavit of compliance be filed within eight weeks."

3. In compliance to aforesaid directions, passed by this Court vide order dated 29.5.2017, Deputy Commissioner filed his affidavit indicating therein action taken by the authority concerned for removal/eviction of unauthorized occupants over the water canal commonly known as Kripal Chand and Diwan Chand Kuhals. This Court after having noticed that action for removal of encroachment with respect to atleast 10 persons is yet to be taken, Court directed that the status report/action taken report itself be treated and registered as a separate CWPIL for passing further orders. In the aforesaid background, present CWPIL came to be registered as CWPIL No.107 of 2017.

4. On 12.10.2017, learned Additional Advocate General, stated at the Bar that proceedings for ejectment stand initiated against the encroachers and hearing of these proceeding shall be expedited. Accordingly, this Court directed Assistant Collector 2nd Grade, Palampur, District Kangra, HP to conclude the proceedings, in accordance with law, within a period of four weeks. This Court while ordering for listing the matter on 23rd November, 2107, also directed the Assistant Collector 2nd Grade, Palampur, District Kangra, HP to remain present in Court on that day.

5. On 23.11.2017, Sh. Om Prakash, Assistant Collector, 1st Grade, Palampur, stated before the Court that the proceedings for removal of encroachment are pending and the next date fixed in all the cases is 27th November, 2017. He further assured this Court that proceedings shall be completed on or before 31st December, 2017.

6. In view of the aforesaid statement having been made by Assistant Collector 1st Grade, Palampur, we do not see any reason to keep the present petition alive as it has served its purpose. Accordingly, the present petition is disposed of with the direction to Assistant Collector 1st Grade, Palampur to complete the eviction proceedings qua encroachment on or before 31st December, 2017. After conclusion of aforesaid proceedings, concerned Officer i.e. Assistant Collector 1st Grade, Palampur shall file his affidavit of compliance, which in turn, shall be placed before this court for its perusal by the Registry of this Court.

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

Kashmiru Ram ...Petitioner

Versus

State of H.P.& others ...Respondents

Cr.MMO No. 181 of 2017
Decided on : 24.11.2017

Code of Criminal Procedure, 1973- Section 482, 173 and 210- Trial Court holding that the allegations made in the FIR only making out a case under Section 323 I.P.C- However, the Learned Trial Court taking cognizance upon a complaint relating to the same occurrence after adducing preliminary evidence. However, refusing to take cognizance upon the FIR- **Held**- the action of the Learned Trial Court was per-se illegal- the Court directed to take cognizance upon the report furnished by the I.O. under Section 173 Cr. P.C., keeping in view the mandate of Section 210 Cr.P.C. (Para-2)

For the petitioner : Mr. H.S. Rana, Advocate.
For the respondents : Mr. R.S. Thakur, Additional Advocate General, for respondents No. 1 to 3 with Sub Inspector, Dalip Singh, PP, Saproon.
Mr. Sudhir Thakur, Advocate, for respondents No. 4 and 5.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

FIR No. 253/8 of 30.11.2008, borne in Annexure P-1, appended to the instant petition, was lodged by the informant at Police Station, Sadar, District Solan, H.P. Upon the aforesaid FIR, being lodged at Police Station Sadar, District Solan, H.P., the Investigating Officer concerned, commenced investigations AND on conclusion of investigations, he filed a report under Section 173 Cr.P.C. before the learned trial Magistrate concerned.

2. The learned trial Magistrate on 21.6.2016, recorded an order (i) that with the solitary eye witness to the occurrence, proceeding to a place other than where he was residing, (ii) the MLCs not bearing consonance with the allegations made in the FIR, (iii) especially qua the accused inflicting injuries upon the complainant with sharp edged weapon, (iv) hence concluded that an offence under Section 324 IPC being not made out rather an offence under Section 323 IPC being made out. Furthermore, the learned trial Magistrate also concluded, that the allegations made in the FIR qua the accused, qua his committing an offence punishable under Section 506 of IPC, being also not made out. The reasons aforesaid assigned, by the learned trial Magistrate, for hers hence concluding that an offence under Section 506 IPC and the one under Section 324 IPC, being not made out against the accused, do not suffer from any illegality. Subsequent thereto, AND in consonance therewith, trial was to commence against the accused. However, subsequent thereto, upon the matter coming up on 2.2.2017 before the learned trial Magistrate, she thereat omitted to take cognizance upon the FIR rather contrarily, she took cognizance upon the complaint, besides enjoined the complainant to adduce preliminary evidence thereon. The aforesaid order is per-se illegal, given (i) upon furnishing of the apposite report by the Investigating Officer concerned before her, she was enjoined to charge the accused for commission of an offence under Section 323 IPC. Consequently, the impugned order is quashed and set aside. The learned Magistrate is directed to take cognizance upon the report furnished before her by the Investigating Officer under Section 173 Cr.P.C. Before parting, it, is deemed fit to extract the relevant, applicable hereat, provisions of Section 210 Cr.P.C.:-

> "**210. Procedure to be followed when there is a complaint case and police investigation in respect of the same offence.-** (1) When in a case instituted otherwise than on a police report (hereinafter referred to as a complaint case), it is made to appear to the Magistrate, during the course of the inquiry or trial held by him, that an investigation by the police is in progress in relation to the offence which is the subject-matter of the inquiry or trial held by him, the Magistrate shall stay the proceedings of such inquiry or trial and call for a report on the matter from the police officer conducting the investigation.
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> (2) If a report is made by the investigating police officer under section 173 and on such report cognizance of any offence is taken by the Magistrate against any person who is an accused in the complaint case, the

Magistrate shall inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report.

(3) If the police report does not relate to any accused in the complaint case or if the Magistrate does not take cognizance of any offence on the police report, he shall proceed with the inquiry or trial, which was stayed by him, in accordance with the provisions of this Code."

The Magistrates concerned are directed to bear in mind AND to, in future apply the mandate of the afore extracted relevant provisions, upon theirs' being seized with (a) FIR, (b) complaint, especially with both carrying therein same allegation(s)/offence(s). However, any departure therefrom shall be seriously viewed.

3. In view of the above observations, the instant petition is disposed of. All the pending application(s), if any, are also disposed of.

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

Daulat Ram ..... Petitioner

Vs.

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

CWP No. 10776 of 2012
Date of decision: 28.11.2017

Constitution of India, 1950- Article 226- Land Acquisition Act- Petitioner seeking acquisition of the remaining part of his land, which was earlier being wrongly shown in the possession of PWD- The petitioner had got the revenue entries corrected before the Collector (Settlement) and thereupon raised a claim for compensation for the said land under the Act- Admittedly, the remaining parcel of the petitioner's land had already been acquired- Respondents failed to acquire the land- hence, the writ petition- petition opposed, though the factual matrix was not denied – the respondent raised the objection that the claim was barred by delay and laches – **Held**- While exercising power under Article 226 of the Constitution if there was inordinate delay and that too unexplained, the High Court may decline to intervene- on facts claim held to be not barred by delay and laches- However, no rigid rule can be cast in a straightjacket formula for exercising such discretion. (Para-7 to 9)

Constitution of India, 1950- Article 226- Land Acquisition Act- Further held- that respondents should have gracefully acknowledged and conceded its mistake in light of the corrections made by the Settlement Collector- the principle relating to estoppel reiterated- State directed to follow the provisions of the H.P. State Litigation Policy, 2001 to the ensure unnecessary burden on the State exchequer and to avoid unnecessary and unproductive litigation- State directed to acquire the land. (Para-13 and 14)

Constitution of India, 1950- Article 226- Land Acquisition Act- The Chief Secretary to the Government of Himachal Pradesh also directed to issue instructions to all concerned to ensure that before the matters are instituted or defended in the Court, the provisions of the H.P. State Litigation Policy are adhered to and followed in its letter and spirit. (Para-15 to 19)

Cases referred:

Lindsay Petroleum Co. Vs. Prosper Armstrong (1874) 5 PC 221
Veerayeeammal Vs. Seeniammal 2002 (1) SCC 134
Seton Laing Co. Vs. Lafone 1887 (19) QBD 68

For the petitioner Mr. Bhupender Gupta, Senior Advocate, with Mr. Neeraj Gupta, Advocate.
For the respondents Mr. Neeraj Kumar Sharma, Deputy Advocate General.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral)

This writ petition has been filed with the following prayer:

"(a) Directing the respondents to initiate land acquisition proceedings with respect to Khasra No. 208/1, owned by the petitioner as envisaged under the provisions of Land Acquisition Act and after assessing the correct market value pay to the petitioner reasonable and just compensation in accordance with the provisions of the said Act."

Certain undisputed facts need to be noticed.

2. The petitioner is owner in possession of 3 plots of land measuring 4 bighas 2 biswas comprised in Khasra Nos. 113, 114 and 115 besides other land situated at Village and Mohal Pohal, Tehsil Kotkhai, District Shimla, H.P. The respondents intended to construct Gumma-Bakhol Road and for that purpose acquired land in the said village. This included some land of the petitioner that was acquired and finally award to this effect came to be passed in his favour on 19.8.2011 vide award No. 46 of 2011.

3. It appears that during the revenue settlement which took place in the said village, some of the land of the petitioner through which the road came to be constructed was denoted by Khasra No. 208 measuring 0-06-46 hectares and the same was duly reflected in the revenue record to be owned by the State of Himachal Pradesh and in possession of Public Works Department. However, as the land belonged to the petitioner, he filed an application for correction of the revenue entries on 2.9.2008 before the Collector Settlement, Shimla Division, Shimla and ultimately the revenue entries were ordered to be corrected with respect to Khasra No. 208. After the order of correction, Khasra No. 208/1 measuring 0-03-00 hectares was ordered to be recorded in the ownership of the petitioner and in possession of Public Works Department, whereas Khasra No. 208/2 measuring 0-03-46 hectares was ordered to be recorded in the ownership of the State of Himachal Pradesh and in possession of Public Works Department. But the fact remains that when notification under Section 4 was issued, the aforesaid land on account of wrong revenue entries made during the settlement, continued to be reflected in the name of the State Government and thus no compensation thereof was paid to the petitioner.

4. Thereafter the petitioner on the basis of the aforesaid correction approached the respondents with the request to acquire the land comprised in Khasra No. 208/1. However, as usual and on account of red-tapism the request so made was not acceded to, constraining him to file the instant petition.

5. Even though the respondents have filed their reply, but it would be noticed that the only defence taken by them to oppose the petition is the plea of limitation and acquiescence while the factual matrix as has been noticed above, has not been denied. Therefore, the only question that arises for consideration is whether the petition is in fact barred by delay and laches and further as to whether the petitioner is estopped from filing the instant petition.

6. At the out-set, I may observe that it does not behove the State to take such technical objections, more particularly, in light of the fact situation obtaining in the present case. Indubitably, the application for correction as filed by the petitioner came to be finally allowed by the Settlement Collector only on 23.8.2011. The petitioner thereafter made a request to the respondents to acquire the land which request was declined vide communication dated 3.11.2012 and the present petition was thereafter promptly filed on 14.12.2012. Therefore, it is not only

difficult to comprehend but even appreciate as to how the plea of laches or for that matter estoppel is available to the respondents.

7. It is also well settled that delay defeats equity. Laches or reasonable time are not defined under any Statute or Rules. "Laches" or "Lashes" is an old French word for slackness or negligence or not doing. In general sense, it means neglect to do what in the law should have been done for an unreasonable or unexplained length of time. What could be the laches in one case might not constitute in another. The laches to non-suit, an aggrieved person from challenging the acquisition proceedings should be inferred from the conduct of the land owner or an interested person and that there should be a passive inaction for a reasonable length of time. What is reasonable time has not been explained in any of the enactment. Reasonable time depends upon the facts and circumstances of each case.

8. Laches or undue delay, the blame-worthy conduct of a person in approaching a Court of Equity in England for obtaining discretionary relief which disentitled for grant of such relief was explained succinctly by Sir Barnes Peacock, long ago, in ***Lindsay Petroleum Co. Vs. Prosper Armstrong (1874) 5 PC 221*** thus:

> *"Now, the doctrine of latches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation, in which it would not be reasonable to place him if the remedy were after wards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute or limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as it relates to the remedy."*

9. The words "reasonable time", as explained in ***Veerayeeammal Vs. Seeniammal reported in 2002 (1) SCC 134*** is as follows:

> *"13. The word "reasonable" has in law prima facie meaning of reasonable in regard to those circumstances of which the person concerned is called upon to act reasonably knows or ought to know as to what was reasonable. It may be unreasonable to give an exact definition of the word "reasonable". The reason varies in its conclusion according to idiosyncrasy of the individual and the time and circumstances in which he thinks. The dictionary meaning of the "reasonable time" is to be so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case. In other words it means, as soon as circumstances permit. In P. Ramanatha Aiyaar's The Law Lexicon it is defined to mean:*
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> > *"A reasonable time, looking at all the circumstances of the case; a reasonable time under ordinary circumstances; as soon as circumstances will permit; so much time as is necessary under the circumstances, conveniently too do what the contract requires should be done; some more protracted space than 'directly'; such length of time as may fairly and properly, and reasonably be allowed or required, having regard to the nature of the act or duty and to the attending circumstances; all these convey more or less the same idea."*

10. Thus, what can be taken to be settled on the strength of the aforesaid exposition of law is that the power of the High Court to issue an appropriate writ under Article 226 of the Constitution is discretionary and the High Court while exercising such discretion does not

ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. If there is inordinate delay on the part of the petitioner in filing a writ petition and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief. However, this would be particularly so when the third party rights have been created. However, no rigid rule can be cast in a straitjacket formula for exercising discretion and granting relief in exercise of writ jurisdiction.

11. Reverting back to the facts, it would be noticed that even though the respondents have come up with a very strong plea of laches, whereas, the fact of the matter was that it ought to have been graceful enough to acknowledge and concede its mistake in light of the order of correction passed by the Settlement Collector dated 23.8.2011 particularly when one of their own officials had candidly acknowledged and admitted the title of the petitioner. A small acknowledgement on their part could have conveniently avoided the instant litigation.

12. Indubitably, the petitioner even after the order of correction passed by the Settlement Collector could not have directly filed a writ petition without first making a demand to the respondents which is essential prerequisite for issuing a writ of mandamus as it is only on refusal of such demand that one can file a writ petition. Admittedly, such refusal was communicated to the petitioner only on 3.11.2012 and the writ petition came to be filed within 40 days of its communication and was filed on 14.12.2012 and obviously, therefore, there is no delay or laches in filing of the writ petition.

13. As regards the plea of estoppel by conduct, certain basic conditions have to be satisfied and those have been succinctly stated in case of ***Seton Laing Co. Vs. Lafone reported in 1887 (19) QBD 68*** and are as under:

(i) Where a man makes a fraudulent misrepresentation and another man acts upon it to its true detriment;

(ii) Another may be where a man makes a false statement negligently though without fraud and another person acts upon it; and

(iii) There may be circumstances under which, where a misrepresentation is made without fraud and without negligence, there may be an estoppel.

(iv) There should be a statement made, which should have induced the other party to do an act which otherwise he would have abstained from doing though the said statement in some situations.

14. Bearing in mind the aforesaid exposition of law as also the test laid therein, I am at a complete loss to appreciate as to how even the plea of estoppel by conduct could have been raised by the respondents as none of the tests as set out above, are satisfied. After all, the question of estoppel arises only when the representor wishes to disavow the assumptions contained in his earlier representation and it is in these circumstances that Courts examine whether it would be unjust or unequitable to allow the representor to resile from his statement while this admittedly is not the fact situation obtaining in the present case.

15. It is, therefore, high time that before instituting or defending a litigation, the State first implements and follows the provisions of the H.P. State Litigation Policy, 2011 which shall not only ensure that there is no unnecessary burden on the State Exchequer, but would also ensure that the dockets of the Court are not unnecessarily clogged with unproductive and otherwise unavoidable litigation, which is one of the main objective of the Litigation Policy laid down in Clause 1.2 of the Policy which reads thus:

*"**1.2 Objective:***

The Policy outlines the broad guidelines on litigation strategies to be followed by the State Government or its agencies with a view to reduce litigation, saving avoidable costs on unproductive litigation, reducing avoidable load on judiciary with respect to government induced litigation and thus realising the

promise of Article 39A of the Constitution, which obligates the State to promote equal justice and provide free legal aid."

16. In light of the aforesaid discussion, obviously the respondents could not have refused to acquire the land of the petitioner. Consequently, the writ petition is allowed and the Land Acquisition Collector Sh. Rajesh Bhandari, who otherwise is present in the Court today, is directed to complete the entire acquisition proceedings before **31.3.2018**. It is made clear that since there is no dispute qua the title of the petitioner, who otherwise happens to be sole claimant, the Land Acquisition Collector is directed not to unnecessarily issue notice under Chapter IV of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (for short 'Act') and should straightway determine the market value of the land under Section 26 and thereafter determine the amount of compensation under Section 27 of the Act.

17. It goes without saying that while determining the compensation, the provisions of Sections 28 to 30 of the Act shall also be borne in mind by the Collector. Since no notice is to be issued to the petitioner, he is directed to appear in the office of the Land Acquisition Collector (SZ), Winter Field, Shimla at 11.00 a.m. on **18.12.2017.**

18. With the aforesaid observations, the writ petition is disposed of in the aforesaid terms, leaving the parties to bear their own costs. Pending application(s) if any, also stands disposed of.

19. Registry is directed to send a copy of this judgment to the Chief Secretary to the Government of Himachal Pradesh, who, in turn, is directed to issue instructions to all concerned to ensure that before the matters are instituted or defended in the Court, the provisions of the H.P. State Litigation Policy are adhered to and followed in its letter and spirit.

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

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

Cr. Appeal No. 717 of 2008
Decided on : 28.11.2017

Code of Criminal Procedure, 1973- Section 378- Sections 354, 323 read with 506 of IPC- Respondent acquitted for the aforesaid offences- appeal against acquittal- **Held**- the testimony of the prosecutrix contradicting the version borne in the FIR thereby causing a doubt to the very genesis of the prosecution version – No medical examination conducted corroborating the version of the prosecution- Hence acquittal affirmed. (Para-9 and 10)

For the appellant: Mr. V.S.Chauhan, Addl. A.G.
For the respondent: Mr. Arvind Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The instant appeal stands directed by the State of Himachal Pradesh against the impugned judgment rendered on 1.8.2008, by the learned Chief Judicial Magistrate, District Kinnaur at Reckong Peo, H.P. in Criminal Case No. 108-2 of 04, whereby the learned trial Court acquitted the respondent (for short 'accused') for the offences punishable under Sections 354, 323 and 506 IPC.

2. Facts in brief are that on 8.11.2004 at about 10.30 a.m. while Smt. Kamla Devi was sitting on the bench outside the shop, accused came to the spot and inquired from the complainant as to why she was laughing and caught Smt. Kamla Devi from the breast, torn her shirt, slapped her, when Smt. Kamla Devi raised alarm, her husband came to the spot and saved her. The matter was reported to the police. The police took into possession the torn shirt and after collecting evidence during the investigation challenged the accused for offences punishable under Section 354, 323 and 506 IPC.

3. Notice of accusation stood put by the learned trial Court to the accused for his committing offences punishable under Sections 354, 323 and 506 IPC to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 5 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded in which he pleaded innocence and claimed false implication. He did not choose to lead any evidence in defence.

5. On an appraisal of the evidence on record, the learned trial Court returned findings of acquittal in favour of the accused.

6. The learned Additional Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. The learned counsel appearing for the respondent has with considerable force and vigor contended qua the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

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

9. PW-4 prosecutrix, has, rendered communication(s) in FIR borne in Ext. PW 4/A of (i) on 8.11.2004 at about 10.30 a.m., when she was sitting on a bench outside the shop of her husband, thereat, the accused/respondent making his arrival, (ii) whereupon his questioning her about the reason for hers staring at him, (iii) in response thereto, she replied that she was not staring at him, (iv) subsequent thereto, she narrates of the accused clasping her, from, her breast besides his proceeding to slap her on her face, in sequel whereto, blood started oozing from her nose. She also communicates therein, that in the scuffle, her shirt comprised in Ext. PW1/A begetting tearing on its breast. (v) Thereafter, she narrates therein, of her husband Chander Singh interceding in the scuffle, which ensued inter-se her with the accused AND his hence rescuing her from the clutches of the accused. (vi) She also makes communication(s), in FIR borne in Ext. PW 4/A, of, Shankar Lal and other witnesses', eye witnessing the relevant incident. Her versions qua the occurrence comprised in Ext. PW4/A, would be construable to be both trustworthy besides inspiring, (a) upon evident occurrence, of, absolute concurrence inter-se the version(s) borne in Ext. PW4/A vis-à-vis her testification, (b) her testification in Court being bereft of any gross improvements besides embellishments vis-à-vis her previous statement recorded in writing, (vi) however, when the prosecutrix stepped into witness box, she made open digression(s) therefrom, especially when therein she omits to echo, (a) of the accused at the relevant time, staring at her, (b) in her examination-in-chief, she testifies, of, PW1 her husband, evacuating her, from the clutches of the respondent, whereas in the latter part of her cross-examination, she articulates of the accused after belaboring her, his fleeing from the site of occurrence, to the premises of a mechanic located in vicinity thereof. Conspicuously, hence she dispels the factum borne in her examination-in-chief, of her husband interceding in the relevant scuffle. The aforesaid contradictions inter-se the aforesaid testifications rendered by the

prosecutrix vis-à-vis the versions' qua the occurrence borne in FIR comprised in Ext. PW4/A, are not minimal rather are critical, (i) given theirs eroding the genesis of the prosecutrix case, of, PW1, the husband of the prosecutrix interceding in the scuffle, which, purportedly erupted inter-se the accused/respondent vis-à-vis the complainant, (ii) also, the testification rendered by PW-2, in corroboration, to, the testification of PW4 is also hence rendered frail besides his presence at the site of occurrence, is also dispelled. Even though, the purported independent witness, to the occurrence, render testification(s) qua the prosecutrix, at the site of occurrence being subjected to penal misdemeanor by the accused, whereupon, upon intercession(s) being made by her husband, hers being rescued from the clutches of the accused, (iii) yet their respective testifications qua the aforesaid fact, ARE for alike aforesaid reasons HENCE rendered enfeebled, given (iv) reiteratedly the prosecutrix in the last part of her cross-examination, making a disclosure, whereby, she dispels the presence of her husband at the site of occurrence, concomitantly, thereupon the testification(s) rendered by the prosecution witnesses, in purported corroboration vis-à-vis the testification, of PW-4 qua the material factum of presence of PW-2, at the site of occurrence are also ingrained with a vice of falsity. Corollary thereof is that the genesis of the prosecution case, is rendered vulnerable TO skepticism besides their presence at the site of occurrence is rendered suspect, thereupon no reliance can be placed upon the testification(s) of ALL the prosecution witnesses.

10. Be that as it may, accelerated momentum to the aforesaid inference, is galvanized by the prosecutrix remaining, not, medically examined, for hence making a firm inference, (a) of her testification carrying narrations, of, injuries being caused upon her in sequel to her being belabored by the accused, in sequel whereto blood oozing from her nose, dripping onto her shirt, hence staining it with blood marks, hence carrying an aura of veracity. Contrarily, this Court is constrained, to benumb her testification, imperatively, (b) when upon the shirt being produced in Court, the learned trial Court, not, recording any observation, of, it carrying any stains of blood nor its recording any observation, of, shirt Ext. PW1/A carrying tearing(s) upon the portion appertaining to breast thereof, (ii) rather its being observed, to beget tearings of its neck.

11. A wholesome analysis of the evidence on record portrays that the appreciation of evidence as done by the learned trial Court does not suffer from any perversity and absurdity nor it can be said that the learned trial Court in recording findings of acquittal has committed any legal misdemeanor, in as much, as, it having mis-appreciated the evidence on record or its omitting to appreciate relevant and admissible evidence. In aftermath this Court does not deem it fit and appropriate that the findings of acquittal recorded by the learned trial Court, merit, any interference.

12. In view of the above discussion, I find no merit in this appeal, which is accordingly dismissed and the judgment of the learned trial Court is maintained and affirmed. Record of the learned trial Court be sent back forthwith.

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

Ramesh @ Neetu & others .....Appellants.

Versus

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

Cr. Appeal No. 388 of 2006
Decided on : 29.11.2017

Code of Criminal Procedure, 1973- Section 374- Appeal against Conviction- A case was registered under Sections 307, 323 and 341 readwith Section 149 and 147 of I.P.C.- accused convicted for the offences punishable under Sections 323 and 341 of I.P.C. readwith Sections 147

and 149 of I.P.C. – On appeal conviction and sentence set aside- **Held**- name of some of the accused not borne in the FIR, Ex.PW-9/B- their names subsequently recorded by way of a supplementary statements of the victims/informant- independent witnesses not supporting the case of the prosecution – there was improvements and embellishments in the statements of the co-victims too, which renders the genesis of the prosecution case doubtful- accused acquitted. (Para-9 and 10)

Indian Evidence Act, 1872- Section 27- Further held- that inculpatory evidence recorded during custodial investigation in violation of Section 27 of the Indian Evidence Act renders the entire evidence bald and naked- Further Held- cannot be used against the accused and is neither admissible nor relevant. (Para-11)

For the appellants: Mr. Dinesh Thakur, Advocate, for appellants No. 1, 2 and 4 to 6 & Ms. Ritu Raj Sharma, Advocate, for appellants No. 3 and 7.

For the respondent: Mr. R.K. Sharma, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The instant appeal stands directed against the impugned judgment of 27.11.2006, rendered by the learned Additional Sessions Judge (Fast Track Court) Kangra at Dharamshala H.P., in Sessions Case No. 13-G/VII/05/03, S.T. No. 27 of 2005, whereby he convicted the appellants (hereinafter referred to as "accused") for theirs committing an offence punishable under Sections 147, 323, 307 and 341/149 of IPC also sentenced them as follows:-

> *"All the accused/convicts are sentenced for offence under Section 307/149 IPC to simple imprisonment for five years each and fine of Rs. 10,000/- each. In default they shall further undergo simple imprisonment for one year each. They are further sentenced for offence under Section 323/149 IPC to simple imprisonment for six months and fine of Rs. 1,000/- each and in default they shall further undergo simple imprisonment for one month each. They are further sentenced for offence under Section 341/149 IPC to simple imprisonment for one month and fine of Rs. 500/- each and in default they shall further undergo simple imprisonment for 10 days. In addition to this, they are further sentenced for offence under Section 147, IPC to simple imprisonment for one year and fine of Rs. 1,000/- each and in default they shall further undergo simple imprisonment for 10 days each. All the sentences shall run concurrent. The fine on its reralisation be disbursed as compensation to the injured Sunil Kumar. The period they remained in police as well as judicial custody, if any, shall be set off against the sentences awarded."*

2. Brief facts of the case are that on 18.2.2002, one Sunil Kumar accompanied by his cousin Shashi Bhushan was proceeding to Shimla in a bus known as Sharma Bus bearing registration No. HP-36-3905, which was plying from Dehra to Jawalaji via Deherian Muhal. It has been alleged that the bus was boarded by both of them. The bus was full of passangers. When it crossed Muhal the acused allegedly in furtherance of their common object stopped the bus and after entering inside the bus administered beatings to Sunil Kumar and Shashi Bhushan. Both of whom were dragged out and beatings were administered with cricket bat and wooden sticks used as wickets as well as fist and kick blows. Injured Sunil Kumar fell unconscious. Thereafter they were taken to Jawalaji hospital and from jawalaji hospital they were referred to SDH, Dehra and from Dehra injured Sunil Kumar was taken to Dharmsala and from Dharmsala he was taken to PGI, Chandigarh where he was operated upon for the injuries suffered by him. The police during interrogation also took into possession the bat and wickets. The medical certificates of both injured were also collected. As per the investigation conducted it was found by the police that case for offence under Sections 147, 149, 323, 307 and 341 IPC was made out. Hence the challan was prepared and presented in the Court. After the challan was

put up before the learned Addl. Chief Judicial Magistrate, Dehra after supplying of accused copies etc. it was concluded that the case is exclusively triable by the court of sessions. Hence it was committed for trial.

3. The accused stood charged by the learned trial Court for theirs committing offences punishable under Section 147, 149, 323 and 341 IPC to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 13 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded in which they pleaded innocence and claimed false implication. One of the accused tendered Mark-P Cash memo and closed the evidence. None of remaining accused led any defence evidence.

5. On an appraisal of the evidence on record, the learned trial Court returned findings of conviction against the accused for theirs committing offences punishable under Sections 147, 149, 323 and 341 of IPC.

6. The learned vice counsel appearing for the accused has concertedly and vigorously contended qua the findings of conviction recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather theirs standing sequelled by gross mis-appreciation, by, it of the relevant material on record. Hence he contends qua the findings of conviction warranting reversal by this Court in the exercise of its appellate jurisdiction and theirs standing replaced by findings of acquittal.

7. The learned Deputy Advocate General has with recorded by the Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference rather meriting vindication.

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

9. The anvil, for, testing the veracity(s) of the testification(s), rendered by the prosecutions' witnesses IS (i) of theirs deposing with absolute concurrence with their respectively recorded previous statements in writing, (ii) each deposing in conformity vis-à-vis the genesis of the prosecution case, as embodied in the apposite FIR, borne in Ext. PW9/B, (iii) their respective testifications' being bereft, of, any taint, of, theirs making gross embellishment(s) or critical improvement(s) vis-à-vis their respectively recorded previous statements in writing, (iv) in making the aforesaid discernments, an allusion is imperative to the apposite FIR, comprised in Ext. PW9/B, wherein it is echoed, of, the relevant occurrence taking place on 18.2.2002, also therein occur the names of Ramesh Kumar, Ashok Kumar, Ajay Kumar, Vijay Kumar alongwith with ascriptions' vis-à-vis them, of, theirs perpetrating an assault on the persons of both Sunil Kumar and Shashi Bhushan. The aforesaid assault is disclosed in Ext. PW9/A, to occur inside the bus. Also, therein, exist, the names of independent eye witnesses, (a) i.e. the driver and conductor of the bus bearing No. HP-36-3905, AND of one Usha Rani, a passenger occupying the aforesaid bus. However, both the injured witnesses PW-3 and PW-11, render testifications, in gross digression(s) therefrom (b) in as much as in their testifications' they contrarily echo of the relevant occurrence, occurring outside the bus, (c) moreover, the independent eye witnesses' to the occurrence, namely, one Usha Rani AND the driver of the bus, both in their respective testifications omit to lend support to the prosecution case, (d) rather despite the aforesaid prosecution witnesses' being declared hostile and theirs being subjected to cross-examination, by the APP concerned, yet theirs omitting to make any echoings therein, for hence succoring the charge, thereupon a conclusion is begotten (e) of their respective testifications' occurring in their respective examinations-in-chief, wherein they omit to lend support to the prosecution case, being creditworthy vis-à-vis the accused. The effect of the aforesaid improvement(s) and embellishment(s) respectively made by PW-3 and PW-11, both co-victims of the assault purportedly perpetrated on their respective persons, by the accused besides the effect of

independent eye witnesses to the occurrence NOT supporting the prosecution case is of, the charge against the accused standing not efficaciously proven.

10. The learned Deputy Advocate General has contended with much vigor, before this Court, that with the Doctor concerned proving his preparing the respective MLCs, of co-victims (a) MLCs whereof are respectively borne in Ext. PW2/B and in Ext. PW2/C, (b) also the injuries being vis-à-vis Sunil Kumar being divulged therein to endanger his life AND his also testifying of the injuries borne on the respective person of both co-victims being causable thereon by user of cricket bat and wooden wickets, recovery(s) whereof occurred under apt memos (c) thereupon all evident improvement(s) and embellishments, rendered by PW3 and PW11 in their respective testifications' vis-à-vis their previously recorded statements in writing also the effect of purported independent eye witnesses, resiling, from their respectively recorded previous statements in writing, NOT, detracting from the vigor of the prosecution case. The aforesaid submissions, would find force and command with this Court, only, upon evident non occurrence of the hereinafter extracted infirmities in the prosecution case, (a) in the FIR, the informant discloses, of, the assailant(s) being Ramesh Chand, son of Prakesh Chand, Ashok Kumar, son of Madan Lal, Ajay Kumar, son of Ramesh Kumar, Vijay Kumar @ Shittu, son of Ramesh Kumar and Anil Kumar, son of Om Prakesh, (b) whereas subsequent thereto, the Investigating Officer, by, belatedly recording the supplementary statements of the victims/informant, his proceeding to, arraign, along with the aforesaid, one Rakesh Kumar son of late Bakshi Ram and one Anil Kumar, son of Om Prakesh, (c) nowat, with both PW3 and PW11, PW3 in their respective cross-examinations, making disclosures, of theirs being previously aware, of the names and identities of all the accused, whereas theirs, not making a prompt disclosure, to, the Investigating Officer qua the involvement of all the accused in the relevant occurrence, (d) hence begets an inference of the co-victims striving to falsely implicate all the accused, in the relevant occurrence (e) Even if PW3, in sequel, to his being belabored by the accused, fell unconscious, hence was rendered incapacitated to promptly making apt communication, to, the Investigating Officer, especially vis-à-vis the names of all the accused, (f) also does not carry any effect, given, co-victim Shashi Bhushan, in his cross-examination making a vivid disclosure, of his previously holding knowledge of the identity(s) of all the accused, (g) whereupon, his omissions to initially in the FIR, make disclosure(s), qua the involvement of all the accused in the relevant occurrence, contrarily carries the inevitable effect, of hence fortification accruing vis-à-vis the hereinabove inference (e) of the subsequent inculpation of the accused concerned, through, subsequent belatedly rendered supplementary statements being hence engineered, by deployment of sheer contrivance by the Investigating Officer concerned besides by plain afterthought(s), (h) thereupon rendering the subsequent inculpation, of, the accused, not, named in the FIR besides also the inculpation in the relevant occurrence, of the accused named in the FIR, to beget stain(s) of suspicion. The effect of the aforesaid inference, of purported independent eye witnesses to the occurrence, not, supporting the prosecution case. AND, of, both the victims in their respective testifications making critical improvements besides gross embellishments, from, their respectively recorded previous statements in writing rather remains intact besides renders the genesis of the prosecution case to beget erosion.

11. Apart therefrom, under seizure memo Ext. PW10/A, Ext. P1, "bat" and under seizure memo Ext. PW10/B, Ext. P2 to P4 "wickets" stood respectively handed over by co-accused Vijay, Ajay and Anil, to the Investigating Officer. All the aforesaid purported weapons, of offence with purported user whereof, injuries were inflicted by the accused upon the victims, hence visibly came to be respectively handed over by them to the Investigating officer concerned, only during, the course of theirs suffering custodial interrogation. The aforesaid incriminatory piece(s) of evidence, constitute, confessional incriminatory evidence(s) vis-à-vis the accused, thereupon, for, all the aforesaid purported weapons of offence being construable to be relevant piece(s) of inculpatory evidence(s) besides theirs being amenable to imputation of credence rather peremptorily enjoined the Investigating Officer, to, within domain of Section 27 of the Indian Evidence Act, provisions whereof stand extracted hereinafter:-

> "27. **How much of information received from accused may be proved:** Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

prior thereto record the respective custodial confessional disclosure statement(s), of, each of the accused, with, communication(s) therein, in respect of their respective place(s) of keeping and hiding, by each of them. However, in the Investigating Officer concerned, prior to his purportedly effectuating recovery(s) of purported weapon(s) of offence, purportedly at the instance of each of the accused, effectuation(s) whereof respectively occurred under memo(s) Ext. PW10/A and Ext. PW10/B, he openly departed from the aforesaid injunction(s) of law, especially in respect of his prior thereto, (a) eliciting the custodial confessional statement(s) of each of the accused, in respect of their respective place(s) of keeping and hiding by each of them, (b) also in respect of his reducing into writing their relevant custodial confessional disclosures (c) besides his thereon obtaining the signature(s) of the accused AND of the witnesses thereto. The aforesaid departure(s) are grave, hence beget an open infraction, of the peremptory mandate borne in Section 27 of the Indian Evidence Act, whereupon the apposite recoveries are rendered construable to be bald besides naked, with a concomitant effect of hence the user in the relevant incident, of all purported weapons of offence, being fortifying dispelled, (d) especially when in respect of their user by the accused, the independent eye witnesses to the occurrence, omit, to lend, support to the prosecution case. Cumulatively, all purported recovery(s), fall outside the precincts of Section 27 of the Indian Evidence Act, hence are un-amenable, to any imputation of any credence thereon, rather the apt recovery(s) in proof of charges are neither admissible nor relevant piece(s) of evidence.

12. A wholesome analysis of evidence on record portrays that the appreciation of evidence as done by the learned trial Court, suffers, from a gross perversity and absurdity or it can be said that the learned trial Court in recording findings of conviction has committed a legal misdemeanor, in as much, as, its mis-appreciating the evidence on record or its omitting to appreciate relevant and admissible evidence. In aftermath this Court does deem it fit and appropriate to interfere with the findings of conviction recorded by the learned trial Court.

13. In view of above discussion, the appeal is allowed and the impugned judgment of 27.11.2006 rendered by the learned Additional Sessions Judge (Fast Track Court), Kangra at Dharamshala is set aside. The accused are acquitted of the offences charged. The fine amount, if any, deposited by the accused is ordered to be refunded to them. Bail bonds, if any, furnished by the accused are discharged. Records be sent down forthwith.

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

Amit Rangra .....Petitioner.

Versus

State of H.P. & anr. .....Respondents.

Cr.MMO No. 412 of 2017.
Date of decision: December 01, 2017.

Code of Criminal Procedure, 1973- Section 482- Quashing of FIR- Petitioner and respondent No.2 were classmate and in love with each other- They had physical relations well before marriage- Differences having been cropped up amongst them- an FIR came to be registered against the petitioner that he had been threatening the respondent No.2 to post her nude photographs on social media- Subsequently, marriage having been solemnized amongst them- the

petitioner's husband sought quashing of the FIR against him- **Held**- that both petitioner and the respondent having attained majority and thereupon having solemnized marriage, they could seek the quashing of FIR and the pendency of criminal proceedings would be nothing but an abuse of process of law - Solemnization of marriage voluntarily was a ground sufficient enough to quash the FIR- Consequently, FIR ordered to be quashed. (Para-3)

Case referred:
Jitender Kumar Sharma versus State of Another, 2010 (4) Civil Court Cases 432 (Delhi) (DB)

For the petitioner	Mr. Vijay Kumar Arora, Advocate.
For the respondents	Mr. M.A. Khan, Addl. AG for respondent No. 1. Mr. Dinesh Thakur, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

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

The present again is a case where the petitioner and respondent No. 2 being classmates were in love with each other. They even had physical relations also well before their marriage. Subsequently, on account of opposition of parents of respondent No. 2-complainant certain differences cropped up amongst them which seem to have led blaming each other including the alleged threatening by the petitioner to post nude photos of respondent No. 2-complainant on Social Media. It is under these circumstances FIR Annexure P-1 came to be registered at the instance of respondent against the petitioner.

2. Now the petitioner and respondent No. 2 had solemnized marriage with each other. The FIR came to be registered against the petitioner as the parents of respondent No.2-complainant were not in favour of her marriage with him. Now both are living as husband and wife. Respondent No.2-complainant as per her statement recorded separately is no more interested to prosecute the case registered at her instance against her husband-the petitioner. Being so, in the changed circumstances, no fruitful purpose is likely to be served to allow the criminal proceedings launched against the petitioner to continue. Any such efforts rather would tantamount to misuse of process of law.

3. Interestingly enough, the petitioner and respondent No. 2 both are major being 24 years of age. In the changed circumstances and they have solemnized marriage with each other allowing the criminal proceedings initiated against the petitioner-husband neither is in his interest nor in the interest of respondent No.2-complainant. They both are major, hence competent to take decision for them. The FIR Annexure P-1 is upshot of opposition of her parents to the marriage. This Court in ***Shishu Pal*** versus ***State of H.P. & others*** and its connected petition in a situation when the complainant –prosecutrix was minor, while placing reliance on the judgment of Delhi High Court in ***Jitender Kumar Sharma*** versus ***State of Another, 2010 (4) Civil Court Cases 432 (Delhi) (DB)*** has held that on solemnization of the marriage by the complainant with the accused allowing the criminal proceedings to continue would be nothing but an abuse of process of law. This judgment reads as follow:

> *"9. In the light of the given facts and circumstances, irrespective of the prosecutrix was below 18 years of age on the day of her elopement in the company of accused petitioner Shishu Pal and solemnization of marriage with him, in the considered opinion of this Court the present is a case where the FIR registered against the accused-petitioner and his co-accused and also consequential criminal proceedings deserves to be quashed for the reasons that no useful purpose is likely to be served by allowing the same to continue as the prosecutrix and the accused-petitioner Shishu Pal are happily married with each other and living in complete harmony and peace in the matrimonial home. The*

complainant is also satisfied with the cordial relations of the couple. Initial anguish was somewhat natural for the reason that in our society inter-caste marriages are still not accepted. The present, in the given facts and circumstances, is a case, where allowing the criminal proceedings against the accused petitioner to continue would amount to abuse of process of law for the reason that if the investigation conducted in the matter and evidence collected is taken as it is, the criminal case is not going to end with the conviction of the accused-petitioner because the prosecutrix and for that matter her father, the complainant may also not support the prosecution case. While arriving at such conclusion, this Court finds support from the judgment of a Division Bench of Delhi High Court in ***Jitender Kumar Sharma*** *versus* ***State & Another, 2010 (4) Civil Court cases 432 (Delhi) (DB)****. As a matter of fact, the facts in* ***Jitender's*** *case were identical to that before this Court because in that case also the age of the prosecutrix was 16 years whereas that of the accused 18 years. They having fallen in love, eloped together and got married, as per Hindu rites and customs in a temple. After registration of the case, the custody of the prosecutrix was entrusted to an NGO, namely* ***'Nirmal Chhaya'****, however, the Division Bench seized of the matter deemed it appropriate to hand over her custody to her husband, the accused, irrespective of he was also minor aged 18 years. The Division Bench in that case had also taken into consideration the fundamental right to 'life' and 'liberty' guarnted by Article 21 of the Constitution of India and also the provisions contained under the Hindu Marriage Act 1955 as well as Child Marriage Restraint Act, 1929 and the provisions contained under Section 6 of Hindu Minority and Guardianship Act, 1956 and held as under:-*

> *"22. A reading of the 1890 Act and the 1956 Act, together, reveals the guiding principles which ought to be kept in mind when considering the question of custody of a minor Hindu. We have seen that the natural guardian of a minor Hindu girl whose is married, is her husband. We have also seen that no minor can be the guardian of the person of another minor except his own wife or child. Furthermore, that no guardian of the person of a minor married female can be appointed where her husband is not, in the opinion of the court, unfit to be the guardian of her person. The preferences of a minor who is old enough to make an intelligent preference ought to be considered by the court. Most importantly, the welfare of the minor is to be the paramount consideration. In fact, insofar as the custody of a minor is concerned, the courts have consistently emphasized that the prime and often the sole consideration or guiding principle is the welfare of the minor.*
>
> *23. In the present case, Poonam is a minor Hindu girl who is married. Her natural guardian is no longer her father but her husband. A husband who is a minor can be the guardian of his minor wife. No other person can be appointed as the guardian of Poonam, unless we find that Jitender is unfit to act as her guardian for reasons other than his minority. We also have to give due weight and consideration to the preference indicated by Poonam. She has refused to live with her parents and has categorically expressed her desire and wish to live with her husband, Jitender. Coming to Poonam's welfare which is of paramount importance, we are of the view that her welfare would be best served if she were to live with her husband. She would get the love and affection of her husband. She would have the support of her in-laws who, as we have mentioned earlier, welcomed her. She cannot be forced or compelled to continue to reside at Nirmal Chhaya or some other such institution as that would amount to her detention against her will and would be violative of her rights guaranteed*

under article 21 of the Constitution. Neetu Singh's case (supra) is a precedent for this. Sending her to live with her parents is not an option as she fears for her life and liberty.

24. As regards the two FIRs which have been registered are concerned, we are of the view that continuing proceedings pursuant to them would be an exercise in futility and would not be in the interest of justice. Poonam has clearly stated that she left her home on her own and of her own free will. This cuts through the case of kidnapping and insofar as the offence punishable under section 376 IPC is concerned, the present case falls under the exception to section 375 inasmuch as Poonam is Jitender's wife and she is above 15 years of age. The allegation of criminal intimidation is also not sustainable at the outset. Hence, FIR No. 110/2010 u/s 363/376 IPC and FIR No. 177/2010 u/s 363/506 IPC (both of PS Gandhi Nagar, New Delhi) and all proceedings pursuant thereto are liable to be quashed. Since Jitender is less than 18 years of age, even the offence under Section 9 of the Prohibition of Child Marriage Act, which provides for the punishment of a male adult above 18 years of age, is not made out.

25. Before we conclude, we would like to point out that the expression 'child marriage' is a compendious one. It includes not only those marriages where parents force their children and particularly their daughters to get married at very young ages but also those marriages which are contracted by the minor or minors themselves without the consent of their parents. Are both these kinds of marriages to be treated alike? In the former kind, the parents consent but not the minor who is forced into matrimony whereas in the latter kind of marriage the minor of his or her own accord enters into matrimony, either by running away from home or by keeping the alliance secret. The former kind is clearly a scourge as it shuts out the development of children and is an affront to their individualities, personalities, dignity and, most of all, life and liberty. As per the 205th Report of the Law Commission of India, February 2008, child marriages continue to be a fairly widespread social evil in India and in a study carried out between the years 1998 to 1999 on women aged 15-19 it was found that 33.8% were currently married or in a union. In 2000 the UN Population Division recorded that 9.5% of boys and 35.7 % of girls aged between 15-19 were married [at p.15 of the Report]. Such practices must be rooted out from our social fabric. In the law commission reports on the subject as well as in the statements of objects and reasons behind the Child Marriage Restraint Act, 1929 and now the Prohibition of Child Marriage Act, 2006, the apparent target seems to be these unhealthy practices. However, we have, in our experience in the present bench, noticed a burgeoning of cases of missing daughters and married daughters detained by their parents. It is a serious societal problem having civil and criminal consequences. In countries like USA and Canada also there is the problem of teenage marriages. There many states have recognized teenage marriages provided the boy and girl are both above 16 years of age and the minor has his or her parents' consent. In some cases, consent and approval of the court is also required with or without the consent of the parents. Where the minor girl is pregnant, the marriage is usually permitted. There is a distinction between the problem of child marriages as traditionally understood and child marriages in the mould of teenage marriages of the West. India is both a modern and a tradition bound nation at the same time. The old and evil practices of parents forcing their

minor children into matrimony subsists alongwith the modern day problem of children falling in love and getting married on their own. The latter may have been occasioned by aping the West or the effect of movies or because of the independence that the children enjoy in the modern era. Whatever be the reason, the reality must be accepted and the State must take measures to educate the youth that getting married early places a huge burden on their development. At the same time, when such marriages to occur, they may require a different treatment. The sooner the legislature examines these issues and comes out with a comprehensive and realistic solution, the better, or else courts will be flooded with habeas corpus petitions and judges would be left to deal with broken hearts, weeping daughters, devastated parents and petrified young husbands running for their lives chased by serious criminal cases, when their 'sin' is that they fell in love.

10. Therefore, in ***Jitender Kumar's*** *case supra, the FIR registered under Section 363, 366 and 376 was ordered to be quashed and the couple i.e. accused-petitioner Jitender Kumar and prosecutrix, irrespective of minors were allowed to live as husband and wife in the company of each other. In similar set of facts and circumstances, the apex Court in* ***S. Varadarajan versus State of Madras, AIR 1965 Supreme Court, 942,*** *has concluded that no case under Section 363 and 366 is made out against the accused.*

11. Even a co-ordinate Bench of this Court in a recent judgment in ***Cr.MMO No.113 of 2016*** *titled* ***Rajinder Singh*** *versus* ***State of H.P. & Others*** *decided on 29.3.2017 in an identical case where the prosecutrix, belonging to a higher caste abandoned the company of her parents to join the company of her husband, the accused petitioner and solemnize marriage voluntarily with him, the Court after taking into consideration the law laid down by the apex Court has held as under:-*

"12. Thus, taking into consideration the averments and law, as discussed hereinabove, I find that the interest of justice will be met, in case, the proceedings are quashed, as the parties are living a peaceful life and the fact that proforma respondent No. 4, Sita Devi has married to the petitioner with her own consent, Marriage Registration Certificate (Annexure P-2), to this effect is duly placed on record. The allegation, as made in the FIR, does not disclose the commission of any offence against the petitioner. Since the complainant has now died and his legal heirs are not coming to the Court, despite service, it seems that they do not want to continue the criminal proceedings against the petitioner.

13. Accordingly, I find this case to be a fit case to exercise powers under Section 482 of the Code and accordingly F.I.R No. 277 of 2009, dated 09.10.2009, under Sections 363, 366 and 506 of the Indian Penal code, registered at Police Station, Manali, District Kullu, H.P., is ordered to be quashed. Since F.I.R No. 277 of 2009, dated 09.10.2009, under Sections 363, 366 and 506 of the Indian Penal code, registered at Police Station, Manali, District Kullu, H.P., has been quashed, consequent proceedings/Challan pending before the learned Judicial Magistrate 1st Class, Manali, District Kullu, H.P. against the petitioner, are thereby rendered infructuous. However, the same are expressly quashed so as to obviate any confusion."

4. In view of what has been said hereinabove, this petition succeeds and the same is accordingly allowed. Consequently, FIR No. 11 of 2017 registered against the petitioner at the instance of respondent No. 2 in Women Police Station, Dharamshala District Kangra is quashed and set aside. The pending criminal proceedings, if any, shall also stand set aside.

5. The petition is accordingly disposed of. Pending application(s), if any, shall also stand disposed of.

****

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

Puri Oil Mills Ltd. And another ....Petitioners.

Versus

State of HP and others. ... Respondents.

CWP No. 71 of 2011.
Decided on 1.12.2017.

Constitution of India, 1950- Article 226- Civil Writ Petition- Article 19 and 301 of the Constitution readwith Section 3 of the Essential Commodities Act- Petitioners filed the present petition seeking to challenge the subsidization scheme on mustered oil- As per the petitioners, respondents-State as per the scheme was providing edible oil including mustard oil to about 14 lac ration card holders @ Rs.50/- per liter per month later on reduced to Rs.45/- - The scheme directly interfered with the freedom of trade and business of the petitioner and, as such, was violative of Article 19 of the Constitution and further rendering Article 301 illusory- The scheme was also stated to be illegal as the Central Government had not delegated power to the State under Section 3 of the Essential Commodities Act to supply and distribute essential commodities on subsidized rates- While dismissing the writ petition **the High Court held**- that procurement on mustard oil for being sold through public distribution scheme does not infringe Article 19 of the Constitution, for it is not that petitioner had been totally debarred from selling their produce in the State of Himachal Pradesh – Even otherwise, mustard oil was being procured by the State by way of an open tender and the petitioner could well have chosen to participate in the process of procurement. (Para-9)

Constitution of India, 1950- Article 226- Civil Writ Petition- Article 19 and 301 of the Constitution readwith Section 3 of the Essential Commodities Act- Further held- that Article 301 of the constitution of India does confer constitutional rights but that is always subject to the other provisions of part XIII of the Constitution of India in relation to trade and commerce.

(Para-10)

Constitution of India, 1950- Article 226- Civil Writ Petition- Article 19 and 301 of the Constitution readwith Section 3 of the Essential Commodities Act- Further held – that the action of the respondents/State was not even illegal for want of delegation of powers by the Central Government- A statutory notification already stands issued by the State of Himachal Pradesh on 3.2.2004 under Section 5 of the Essential Commodities Act- the Central Government had already issued GSR 800 dated 9.6.1978 delegating powers on the respondents/State- Consequently, writ petition dismissed. (Para-12 to 15)

For the petitioners : Ms. Vandana Kuthiala, Advocate.

For respondents : M/s. Anup Rattan, Romesh Verma Addl. Advocate Generals, for respondent-State.

Mr. Ramesh Sharma, Advocate, for respondent No.3.

Mr. Desh Raj Thakur, Central Government Counsel for respondent No.4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.*(Oral).*

Moot issue subject matter of the present writ petition is as to whether subsidized scheme on mustard oil notified by respondents No.1 and 2 vide letter dated 2.4.2007, Annexure P-2, letter dated 2nd/4th April, 2007, Annexure P-3 and letter dated 6.8.2007, Annexure P-4 is violative of the statutory provisions of the Essential Commodities Act, 1955 as well as Part-III and XIII of the Constitution of India as also the Industrial Policy of the State of Himachal Pradesh. Petitioner No.1 is stated to be an ISO 9001 certified Company engaged in the business of manufacture and sale of mustard oil under the trademark/brand name 'P Mark'. It owns and operates three manufacturing units, i.e., one each in Damtal (Himachal Pradesh) Moga (Punjab) and Bahadurgarh (Haryana). Respondents No.1 and 2 primarily deal with demand and supply of various essential commodities in the open market as well as through public distribution system and the basic responsibility of respondent-department is to enforce various control orders issued under the Essential Commodities Act, 1955 for price stabilization and matter relating to weights and measures. Respondent No.3 which is a fully government owned Corporation stands assigned the task of acting as a central procurement agency for all controlled and non controlled essential commodities as identified by the Central/State Government under public distribution system at the wholesale level and further to distribute these commodities through District Cooperative Federations or the Tehsil Cooperative Unions, Fair Price Shops.

2. Vide letter dated 2.4.2007 respondent No.1 forwarded to respondent No.2 certain budgetary announcement made by Hon'ble the Chief Minister for the year 2007-08 for providing subsidized food grains dals and edible oils etc. to all 14 lac ration card holders of the State. In response respondent No.2 wrote a letter to the concerned officials for implementation of the said announcement vide letter dated 2nd/4th April, 2007, Annexure P-3. As per said announcement, edible oil including mustard oil were to be made available to all 14 lac ration card holders @ Rs.50/- per liter per month. Respondent No.2 vide letter dated 6.8.2007 (Annexure P4) informed all Deputy Commissioners in Himachal Pradesh, Resident Commissioner, Pangi at Killar/Addl. Dy. Commissioner, Kaza, Sub Divisional Officer (Civil), Killar, Bharmour and Dodra Kawar, Deputy Director, FCS & CA, Dharamshala and all District Controllers, FCS & CA, Himachal Pradesh that w.e.f. 1.8.2007 scale of edible oil stands increased from one liter to two liters per ration card for all categories and the rate of mustard oil was approved @ Rs.45/- per liter. This was followed by respondent No.3 floating tenders for procurement of 15 lac liters of mustard oil per month to be distributed through public distribution system to all the economic segments of society in the State of Himachal Pradesh. Petitioners represented against this, vide letter dated 6.9.2007 explaining therein as to how State subsidized schemes would adversely affect petitioners' business. As no response was received, accordingly petitioners again made a representation dated 7.11.2008. Case of the petitioners is that the State under the State subsidized scheme was to distribute mustard oil at a subsidized rate of Rs.50/-/45/- per liter per month to all 14 lac ration card holders w.e.f. 1.4.2007 and the same stood implemented by respondent No.2 vide notification dated 2.4.2007. As per petitioners on account the Subsidized Scheme of respondent-State, whereby it was making available 15 lac liters of mustered oil per month @ Rs.50/- per liter the same was adversely affecting their business, as the entire demand of edible oil stood met through the public distribution system (hereinafter referred to as 'PDS'). Thus by way of writ petition, petitioners assailed the State subsidized scheme of the government of Himachal Pradesh which had subsidized mustard oil @ Rs.50/- (45/-) per month to 14 lac ration card holders w.e.f. 1.4.2007. As per petitioners, the State subsidized scheme not only directly interfered with the freedom of trade and business of the petitioners in the State of Himachal Pradesh which was also violative of Article 19 of the Constitution of India and had also rendered Article 301 of the Constitution of India to be illusory. The same was also violative of Industrial Policy of the State whereby incentives were provided to the industry by the State. Further as per petitioners, the impugned act of the respondent-State was also illegal as it was the Central Government which was having power under Section 3 of the Essential Commodities Act

to control production, supply to distribution etc. of all essential commodities and the Central Government though could delegate its power to the State Government, however, in the present case no such delegation had been done by the Central Government in favour of the State under the Essential Commodities Act with regard to mustard oil for the purpose of subsidized rate.

3. Respondents No.1 and 2 in their response filed by respondent No.2 stated in the preliminary submissions that in view of price rise in the open market in respect of pulses, edible oil and salt etc., the State Government decided to provide six items, i.e., three kinds of pulses, two types of edible oil i.e., mustard and refined oil and iodized salt at subsidized rates to the ration card holders in the State for which budget of hundred crore was announced as subsidy. Initially mustard oil was provided w.e.f. 1.4.2007 at the rate of Rs.50/- per liter, however the price was further reduced to Rs.45/- per liter w.e.f. 1.8.2007 along refined oil @ Rs.40/- per liter. As per said respondents, the scheme was introduced in public interest on essential rates to the consumers for which State Government was bearing the burden of price in the shape of subsidy. It was denied by respondents that procurement and distribution of mustard oil through fair price shops had adversely affected the business of the petitioners. It was also mentioned in the preliminary submissions that if this was the case then petitioners should have participated in the tender process, as the procurement of mustard oil was by floating open tenders per month. It was further mentioned in the reply that Central Government under Section 3 of the Essential Commodities Act, 1955 had issued Public Distribution System (Control) Order 2001 (in short "PDS (Control) Order 2001") for the purpose of maintaining and distribution of specified articles as per which State Government was empowered under Section 5 of the Essential Commodities Act, 1955. It was also mentioned in the reply that it was incorrect on the part of petitioners to state that their representations were not responded to.

4. Averments specifically made with regard to delegation of power to the State Government in para 5 (1) of the reply are being quoted herein below for ready reference:-

> *"That the contents of this sub-para are partly admitted being facts on record. As regards to Section 5 of Essential Commodities Act, the State Govt. is authorized to exercise aforementioned powers only after the Central Govt. delegates these powers by issuance of a notification and without such notification being made in the r4ecord, the State Govt. does not have any authority, power or jurisdiction to perform the function enumerated in Section 3, it is submitted that the Central Govt. under Section 3 of the Essential Commodities Act, 1955 has issued the Public Distribution System (Control) Order, 2001 for the purpose of maintaining and distribution of Specified Articles in which State Govt. is empowered under Section 5 of the Essential Commodities Act, 1955. It is also submitted that in exercise of the powers conferred by Section 3 of the Essential Commodities Act, 1955 read with the Govt. of India in the late Ministry of Agriculture and Irrigation (Department of Food) Order G.S.R.-800, dated 9th June, 1978 and Ministry of Industries and Civil Supplies (Department of Civil Supplies and Co operation) Order S.O. 681(E) and 682(E) dated 30th November, 1974 and in pursuance of directions given in Clause 5 of Annexure to the Public Distribution System (Control) Order, 2001 issued by the Govt. of India, Ministry of Consumer Affairs, New Delhi vide G.S.R. 630(E), dated 31st August, 2001, the State Govt. Has made the Himachal Pradesh Specified Articles (Regulation of Distribution) Order, 2003 for maintenance of supplies and for securing equitable distribution and availability of some of the essential commodities at fair prices. This order has been published in the State Govt. Extraordinary Rajpatra on dated 3.2.2004. Copy of G.S.R. No. 800 dated 9.6.1978 is already enclosed with the Civil Writ Petition as Annexure P-12. Copies of S.O. 681(E) and 682(E) dated 30.11.1974 are enclosed as Annexure R-1 and Annexure R-2 with its true typed copies as Annexure R-1/A and Annexure R-2/A respectively. Copy relevant portion of the Public Distribution System (Control) Order, 2001 issued by the Government of India is also enclosed as Annexure R-3*

for kind perusal of this Hon'ble Court. Hence plea taken by the petitioners are wrong."

5. Respondent No.3 vide a separate reply also denied the allegations made in the writ petition. It was mentioned in the reply that sole aim of the petitioners was their profitability and they were least concerned about the benefits of general public at large which stood taken care of by the respondents. It was further mentioned in the reply that petitioners intended to create a monopoly by stating that supply of mustard oil at subsidized rate was illegal.

6. On record there is an affidavit dated 3.1.2017 filed by Under Secretary (Food, Civil Supplies & Consumer Affairs) to the Government of Himachal Pradesh, relevant portion of which is quoted here-in-below:-

"4. That the Central Government made "the Public Distribution System (Control) Order, 2001 under the powers conferred by Section 3 of the Essential Commodities Act, 1955 and Annex 5 Licensing of this order provides that State Governments shall issue an order under Section 3 of the Act for regulating the sale and distribution of the essential commodities.

5.That prior to promulgation of the Himachal Pradesh Specified Articles (Regulation of Distribution) Order, 2002, the matter was taken up with the Government of India vide letter No. FDS-F(10)3/92-11 dated 8.05.2002 stating therein that the Department of Food, Civil Supplies & Consumer Affairs, H.P. intends to promulgate the H.P. Specified Articles (Regulation of Distribution) Order, 2002 under Section 3 of the Essential Commodities Act, 1955 and as per directions given in clause 5 of Annex to the Public Distribution System (Control) Order, 2001 issued by the Government of India in order to regulate the smooth functioning of the 'Public Distribution System. A copy of the draft H.P. Specified Articles (Regulation of Distribution) Order, 2002 was also supplied to the Government of India. A copy of the letter dated 8.05.2002 is annexed as Annexure S-1.

6. That the Under Secretary, Government of India, Ministry of Consumer Affairs, Food and Public Distribution, (Department of Food & Public Distribution) Krishi Bhawan, New Delhi vide letter No. F.No. 9(10)2001-PD-11 dated 29.11.2002 has conveyed as under:-

"……that the concurrence of this department for notification of the proposed Himachal Pradesh Specified Articles (Regulation of Distribution) Order, 2002, is not required. However, in para 2 of the Order immediately preceding Part. I Preliminary, it may be mentioned that the Himachal Pradesh Specified Articles (Regulation of Distribution) Order, 2002 is being issued in pursuance of directions given in clause 5 of Annexe to the PDS (Control) Order, 2001".

A copy of Government of India letter dated 29.11.2002 is annexed as Annexure S-2.

7. That the Himachal Pradesh Specified Articles (Regulation of Distribution) Order, 2003 has been notified and implemented by the State Government only after having the consent/clarifications as above received from the Government of India."

7. There is also on record a supplementary affidavit of the said officer dated 27.4.2017, contents whereof are quoted hereinbelow:-

"1.That the above mentioned CWP is pending adjudication before this Hon'ble Court.

2. That this Hon'ble Court while hearing the matter on 24.04.2017 has issued directions to the replying respondents/Deponent to place on record the copies of Public Distribution System (Control) Order, 2001, H.P. Specified Articles (Regulation of Distribution) Order, 2003, the copy of the letter/proposal sent to Govt. of India

before issuance of H.P. Specified Article (Regulation of Distribution) Order, 2003, the letter of concurrence/clarification received from the Government of India, order/notification declaring Food Stuff as Essential Commodity and the order/notification declaring the Specified Articles by the State Government in the aforesaid Order by filing supplementary affidavit on or before 01.05.2017.

3. That the Central Government made "the Public Distribution System (Control) Order, 2001 under the powers conferred by Section 3 of the Essential Commodities Act, 1955 and Annex 5 Licensing of this order provides that State Governments shall issue an order under Section 3 of the Act for regulating the sale and distribution of the essential commodities. Copy of Public Distribution System (Control) Order, 2001 is annexed as Annexure S-1 for kind perusal of this Hon'ble Court.

4.That prior to promulgation of the Himachal Pradesh Specified Articles (Regulation of Distribution) Order, 2002, the matter was taken up with the Government of India vide letter No. FDS-F(10)3/92-11 dated 8.05.2002 stating therein that the Department of Food, Civil Supplies & Consumer Affairs, H.P. intends to promulgate the H.P. Specified Articles (Regulation of Distribution) Order, 2002 under Section 3 of the Essential Commodities Act, 1955 and as per directions given in clause 5 of Annex to the Public Distribution System (Control) Order, 2001 issued by the Government of India in order to regulate the smooth functioning of the 'Public Distribution System. A copy of the draft H.P. Specified Articles (Regulation of Distribution) Order, 2002 was also supplied to the Government of India. A copy of the letter dated 8.05.2002 is annexed as Annexure S-2 for kind perusal of this Hon'ble Court..

5. That the Under Secretary, Government of India, Ministry of Consumer Affairs, Food and Public Distribution, (Department of Food & Public Distribution) Krishi Bhawan, New Delhi vide letter No. F.No. 9(10)2001-PD-11 dated 29.11.2002 has conveyed as under:-

> *"……that the concurrence of this department for notification of the proposed Himachal Pradesh Specified Articles (Regulation of Distribution) Order, 2002, is not required. However, in para 2 of the Order immediately preceding Part. I Preliminary, it may be mentioned that the Himachal Pradesh Specified Articles (Regulation of Distribution) Order, 2002 is being issued in pursuance of directions given in clause 5 of Annexe to the PDS (Control) Order, 2001".*

A copy of Government of India letter dated 29.11.2002 is annexed as Annexure S-3.

6.That after the receipt of the concurrence/clarification from the Government of India vide letter dated 29.11.2002 the Himachal Pradesh Specified Articles (Regulation of Distribution) Order, 2003 has been notified and implemented by the State Government. Copy of the H.P. Specified Articles (Regulation of Distribution) Order, 2003 is annexed as Annexure S-4 for kind perusal of this Hon'ble Court.

7. That the Deponent Department declare the Specified Articles in exercise of the power conferred under clause 2(v) of H.P. Specified Articles (Regulation of Distribution) Order, 2003 vide Notification No. LA(F&S) 10/80-II-8640-8790 dated 23.03.2007 in which the Edible/Mustard Oil was notified as a Specified Article at Serial No.5 Copy of Notification dated 23.03.2007 is annexed as Annexure S-5 for kind perusal of this Hon'ble Court.

8. That as regards the Order/Notification regarding declaring food stuff as essential commodity is concerned, the food stuff, including oilseeds and oils are included in the schedule of Essential Commodities Act at serial No.3 read with

Section 2A. Copy of the relevant portion of the Section 2A and the schedule of the Act ibid is annexed as Annexure S-6 for kind perusal of this Hon'ble Court."

8. Before we address the issue as to whether the impugned act of the State is in violation of the Essential Commodities Act or not, we shall first answer as to whether the impugned act of respondent- State is violative of Article 19 and 301 of the Constitution of India or not.

9. In the present case, respondent-State came up with a scheme whereby through public distribution system for the year in issue it undertook to provide mustard oil to its ration card holders at a subsidized rate of Rs.50/- (45/-) per liters per month. It is clear from the reply so filed by respondents No 1 and 2 to the writ petition that mustard oil was being provided by government to the ration card holders in the State of Himachal Pradesh by way of subsidy meaning thereby that the burden of the subsidized rate of sale as compared to the sale of price of procurement of the mustard oil was being borne by the State. We fail to understand as to how this act of the respondent- State infringes Article 19 of the Constitution of India. It is not the case of the petitioners that they were debarred from selling their product in the State of Himachal Pradesh or the respondent-State had issued a direction that no one shall purchase mustard oil in the State of Himachal Pradesh which was being manufactured by the petitioners. Incidentally, it has come in the reply of respondent-State that the mustard oil was being procured by the State by way of open tenders every month and the petitioners have not even chosen to participate in the process of procurement of mustard oil.

10. India is a socialist country. In its endeavour to meet its constitutional obligations, respondent-State undertook to provide six items on subsidized rates. This also included mustard oil. Now if respondent-State undertook the exercise of supplying one or two liters of mustard oil per month at a subsidized rate to all ration card holders of the State, in our considered view, this act of the State in no manner infringes Article 19 of the Constitution of India. In our considered view, freedom granted under Article 19 of the Constitution of India is not so fragile so as to be shattered by an act of grant of subsidy by a State to its ration card holders in the matter of Essential Commodities. Article 19 of the Constitution of India confers a right to practice any profession, or to carry on any occupation, trade or business and the petitioners have not been able to make out that the act of the respondent-State violates Article 19 of the Constitution of India in any manner. Similarly Article 301 of the Constitution of India confers a constitutional right that subject to other provisions of part XIII of the Constitution of India trade, commerce and intercourse within the territory of India shall be free. Now this constitutional right conferred upon the petitioners has also not been demonstrated to have been infringed by the State. The State has in no manner abridged the right of trade, commerce conferred upon the petitioners by its act of providing subsidy on a few essential items including the mustard oil. Therefore, in our considered view there is no merit in the contention of the petitioner that the impugned act of the respondent-State violates Part III and XIII of the Constitution of India.

11. Now we will address the issue as to whether the act of respondent-State is in violation of the statutory provisions of Essential Commodities Act or not. On record there is an order dated 28.11.2003 issued by Food, Civil Supplies and Consumer Affairs Department, Government of Himachal Pradesh published in Extraordinary Rajpatra of Himachal Pradesh dated 3.2.2004 which has been issued in the name of the Governor of Himachal Pradesh in exercise of powers conferred under Section 3 of the Essential Commodities Act, 1955 read with the Government of India Order dated 9.6.1978 and Ministry of Industries and Civil Supplies (Department of Civil Supplies and Co-operation) Order dated 30.11.2014 and in pursuance of directions given in clause 5 of Annexure to the Public Distribution System (Control) Order, 2001 issued by the Government of India, Ministry of consumer Affairs, New Delhi dated 31.8.2001. This order has been issued by the State for the maintenance of supply and for equitable distribution and availability of some of the essential commodities at fair price shops. Distribution and supply of specific articles finds mention in para 2 of this order. Thus the same demonstrates

that in the State of Himachal Pradesh there is in force Public Distribution System (Control) Order 2001 which stands issued under the provisions of essential commodities act.

12. Section 5 of the Essential Commodities Act provides as under:-

"Delegation of powers.- the Central Government may, by notified order, direct that [the power to make orders or issue notifications under section3] shall, in relation to such matters and subject to such conditions, if any, as may be specified in the direction, be exercisable also by-

(a) Such officer or authority subordinate to the Central Government; or

(b) Such State Government or such officer or authority subordinate to a State Government,

as may be specified in the direction."

13. Allegations of the petitioners are that no delegation of power as is envisaged under Section 3 of the Essential Commodities Act has been made by the Central Government in favour of the State Government. To substantiate this, petitioners relies upon communication dated 26.4.2010 provided under Right to Information Act by Deputy Secretary to the Government of India & CPIO, which reads as under:-

"No. 19/3/2010-ECR&E
Government of India
Ministry of Consumer Affairs, Food & Public Distribution
Department of Consumer Affairs

Krishi Bhavan, New Delhi
Dated 26 April 2010.

To

M/s. Puri Oil Mills Ltd.,
302, Jyoti Sikhar Building,
8, District Centre, Janakpuri,
New Delhi-110058

Subject: Furnishing information under the provision of Right to Information Act, 2005.

Sir,

I am directed to refer to your letter number Nil dated 26.03.2010 on the subject cited above and to inform the reply of Point No.1 to 3 as under:-

Vide Central Order No. G.S.R.800 dated 9th June, 1978 (copy enclosed), the Central Government delegated powers under the Essential Commodities Act, 1955 to the State Governments.

However, as per the information provided by Directorate of Vanaspati, Vegetable Oils and Fats, Department of Food & Public Distribution in respect of point No.2 and 3, the Government of Himachal Pradesh has not been delegated powers for procuring mustard oil from the open market.

As regards point No4, Department of Food and Public Distribution has been requested to provide the information direct to you.

Yours faithfully,
Sd/-
(G.N.Singh)
Deputy Secretary to the
Govt. of India & CPIO Tel No.2338 8317"

14. Communication dated 26.3.2010 in response to which this information was provided to the petitioner is not on record.

15. Be that as it may, the contention of the petitioners that no delegation of powers by the Central Government under the Essential Commodities Act stood made in favour of the respondent-State stands belied from above communication itself, wherein it is categorically mentioned that Central G.S.R.800 dated 9.6.1978 Central Government has delegated powers under the Essential Commodities Act to the State Government. Distribution and supply of specified articles has been issued by the respondent-State in exercise of powers, inter alia, conferred upon the State vide order GSR 800 9.6.1978. Therefore, the contention of the petitioners that the supply of mustard oil by the State on subsidized rates through public distribution system was in violation of the provisions 3 and 5 of the Essential Commodities Act is without any basis. Incidentally respondent No.4, i.e., Union of India though has not filed any reply to the writ petition, but during the course of arguments learned Assistant Solicitor General of India has not supported the version of the petitioners nor it has been submitted on behalf of Union of India that the State Government had acted in the matter of providing mustard oil on subsidized rates without any delegation of power in this regard upon the State by the Central Government under the Essential Commodities Act. Therefore, we find no merit in the said contention of the petitioners.

16. We find that the petitioners have challenged the act of the respondent-State of providing mustard oil at a subsidized rates also on a ground that the State subsidy is being granted to the undeserving and affluent sections of society irrespective of the fact whether they require the same or not. Now in our considered view this is not a public interest litigation which stood filed by the petitioners as a *pro bono publico* against the pros and cons of providing essential commodities by the State at a subsidized rate. Besides this, even otherwise the petitioners who are the manufacturer of edible mustard oil have no locus to otherwise also to question the State government over a policy decision as to who are entitled for subsidized commodities which the State intends to provide to its ration card holders.

17. The allegation of impugned act of the State being in violation of its Industrial Policy could also not be substantiated during the course of arguments. Learned counsel for the petitioners could not draw our attention to any Industrial Policy so framed by the State whereby any assurance was given by the State to mustard oil manufacturers in the State that the State shall not provide mustard oil on subsidy under the Essential Commodities Act.

Therefore, in view of above discussion, in our considered view there is no merit in the present writ petition. Writ petition is accordingly dismissed. No order as to costs.

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

Sachidanand ....Petitioner.
Versus
Kailash Chand & others ...Respondents.

Civil Revision No.77 of 2017
Reserved on: November 10, 2017
Date of Decision: December 1, 2017

Himachal Pradesh Urban Rent Control Act, 1987- Section 25- Revision under Rent Control Act- Eviction sought by the landlord on account of arrears of rent as well as subletting- scope of interference in a petition under Section 25 and the revisional powers reiterated. (Para-8 and 9)

Himachal Pradesh Urban Rent Control Act, 1987- Section 14(2)- Revision under Rent Control Act- Subletting- The petitioner-tenant raising a plea that the sub-tenant was sitting as a salesman in the demised premises- However, as per evidence on record sub-tenant held to be in exclusive possession of the demised premises and running his business in his own name, which was proved on record by bills relating to purchase of goods and also receipts issued by the authorities under the Standard of Weights and Measures (Enforcement) Act, 1985- Ample evidence showing the sub-tenant having the bank accounts and revenue record showing him to be in exclusive possession- Sub-tenant did not even step into the witness box to dispute the same- **Held**- The tenant had parted away with the possession of the premises and forfeited his right of re-entry- Demised property held to be sublet. (Para-15 to 18)

Cases referred:
Maghi Ram v. Arya Samaj Lower Bazar, Shimla, 1992(2) Sim L.C. 393
Sham Sunder Mehra v. Mastan Singh and others, 1994(1) Sim.L.c. 171
Parvinder Singh v. Ranu Gautam and others, (2004) 4 SCC 794
Bharat Sales Ltd. v. Life Insurance Corporation of India, (1998) 3 SCC 1
Shama Prashant Raje v. Ganpatrao and others, (2000) 7 SCC 522
Joginder Singh Sodhi v. Amar Kaur, (2005) 1 SC 31

For the Petitioner : Mr. Harsh Khanna, Advocate.
For the Respondents : Mr. R.K. Bawa, Senior Advocate, with Mr. Ajay Kumar Sharma, Advocate, for respondents No.1 and 2.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

The authorities below have held petitioner Sachidanand (hereinafter referred to as tenant) to be in arrears of rent, w.e.f. November, 2008 till September, 2015, as also having sublet the tenanted premises, without the consent of the landlord-respondent Kailash Chand (hereinafter referred to as the landlord), to the sub-tenant Banarsi Dass.

2. Petition filed by the landlord, for ejectment on these two counts, stands allowed by the Rent Controller (III), Shimla, vide Order dated 10.9.2014, passed in Rent Petition (RBT) No.37/2 of 15/09, titled as *Kailash Chand & another v. Sachidanand & another,* as affirmed by the Lower Appellate Authority (IV), Shimla, vide judgment dated 29.12.2016, passed in Rent Appeal No.35-S/14 of 2015, titled as *Sachidanand v. Kishal Chand and others.*

3. Insofar as the question of non-payment of rent is concerned, one may only observe that by virtue of Section 14(2) of the Himachal Pradesh Urban Rent Control Act, 1987 (hereinafter referred to as the Act), if the tenant were to pay the amount so quantified by the Rent Controller, within the statutory period, the order of ejectment becomes in-executable. This is the position as per the law laid down by the Apex Court in *Madan Mohan versus Krishan Kumar Sood,* 1994 (Supp1) SCC 437.

4. Issue, which is contentious, is with regard to subletting.

5. Present petition filed by the tenant, and not the sub-tenant, lays challenge to the findings of fact recorded by the authorities below. Tenant's right to file the present petition emanates from sub-section (5) of Section 24 of the Act.

6. This Court is examining the record for the purpose of satisfying itself as to the legality or propriety of the orders passed by the authorities, established under the provisions of the Act.

7. The order of the authority attaches finality not to be called in question in any Court of law, except by the High Court in exercise of its revisional jurisdiction which can be either on an application filed by an aggrieved party or *suo motu* by the Court. The Court can call for and examine the records for "satisfying itself" about the "legality and propriety" of the "order" or the "proceedings". The High Court may pass orders as it may "deem fit".

8. What is the scope of interference in a petition seeking revision of order passed by the Rent Controller or Appellate Authority is now no longer res integra.

9. A five-Judge Bench of the apex Court reported in *Hindustan Petroleum Corporation Limited vs. Dilbahar Singh,* (2014) 9 SCC 78 has dealt with the issue and the findings can be summarized as under:

(i) The term 'propriety' would imply something which is legal and proper.

(ii) The power of the High Court even though wider than the one provided under Section 115 of the Code of Civil Procedure is not wide enough to that of the appellate Authority.

(iii) Such power cannot be exercised as the cloak of an appeal in disguise.

(iv) Issues raised in the original proceedings cannot be permitted to be reheard as a appellate Authority.

(v) The expression "revision" is meant to convey the idea of much narrower expression than the one expressed by the expression "appeal". The revisional power under the Rent Control Act may not be as narrow as the revisional power under Section 115 of the CPC but certainly it is not wide enough to make the High Court a second court of first appeal. While holding so the Court reiterated the view taken in *Dattonpant Gopalvarao Devakate vs. Vithalrao Maruthirao Janagawal,* (1975) 2 SCC 246.

(vi). The meaning of the expression "legality and propriety" so explained in *Ram Dass vs. Ishwar Chander,* (1988) 3 SCC 131 was only to the extent that exercise of the power is not confined to jurisdictional error alone and has to be "according to law".

(vii) Whether or not the finding of fact is according to law or not is required to be seen on the touch stone, as to whether such finding of fact is based on some legal evidence or it suffers from any illegality like misreading of the evidence; overlooking; ignoring the material evidence all together; suffers from perversity; illegality; or such finding has resulted into gross miscarriage of justice. Court clarified that the ratio of *Ram Dass (supra)* does not exposit that the revisional power conferred upon the High Court is as wide as an appellate power to reappraise or reassess the evidence for coming to a finding contrary to the findings returned by the authority below.

(viii) In exercise of its revisional jurisdiction High Court shall not reverse findings of fact merely because on reappreciation of the evidence it may have a different view thereupon.

(ix) The exercise of such power to examine record and facts must be understood in the context of the purpose that such findings are based on firm legal basis and not on a wrong premise of law.

(x) Pure findings of fact are not to be interfered with. Reconsideration of all questions of fact is impermissible as Court cannot function as a Court of appeal.

(xi) Even while considering the propriety and legality, high Court cannot reappreciate the evidence only for the purposes of arriving at a different conclusion. Consideration of the evidence is confined only to adjudge the legality, regularity and propriety of the order.

(xii) Incorrect finding of fact must be understood in the context of such findings being perverse, based on no evidence; and misreading of evidence.

10. On 9.8.2001, Sachidanand was inducted as a tenant in the premises, i.e. Shop No.21, Main Bus Stand, Shimla. On 5.11.2008, the ownership changed hands, with the landlord purchasing the tenanted premises vide sale deed (Mark 'X'). On 21.5.2009, the landlord filed a petition for ejectment.

11. Record reveals the tenant to have disputed the factum of subletting as also relationship of landlord and tenant.

12. On the issue of ownership and the relationship of landlord and tenant, this Court can safely hold the findings returned by the lower Appellate Authority, in Paras 21, 22 & 23, to be clearly borne out from the record. Original owner sold the demises premises to the landlord. Thus, the purchaser would squarely fall within the meaning of expression "landlord", so defined under Section 2(3) of the Act. He is, in law, entitled to receive the rent.

13. This, thus, takes the Court to the next question of tenant having sublet the premises to Banarsi Dass. Significantly, in response to the petition, jointly filed by the respondents therein, tenant admits the sub-tenant to be "sitting as his salesman". The admission is in the following terms.

> "It is pertinent to mention here that respondent no.1 is exclusive tenant of rented premises. Respondent no.2 is sitting as a sales man of respondent no.1 in his absence."

14. It is in this backdrop, one need to examine the propriety and/or legality of the orders passed by the authorities below. Can it be said that the tenant has sublet the premises?

15. Having heard learned counsel for the parties as also perused the record, this court, affirmatively, is of the view that tenant Schidanand has sublet the premises to sub-tenant Banarsi Dass. The tenant has parted away with the possession of the premises and forfeited his right of re-entry.

16. What is "subletting" is no longer res integra. A Coordinate Bench of this Court in *Maghi Ram v. Arya Samaj Lower Bazar, Shimla,* 1992(2) Sim L.C. 393, has observed as under:

> "4. Before dealing with this submission, it is necessary to refer to the relevant provisions of the Rent Act which is as under:
>
> "14. Eviction of tenants:
>
> (2) A landlord who seeks to evict his tenant shall apply to the Controller for a direction in that behalf. If the Controller after giving the tenant a reasonable opportunity of showing cause against the Applicant is satisfied:
>
> (i) xxx xxx xxx
>
> (ii) that the tenant has after the commencement of this Act without the written consent of the landlord:
>
> (a) transferred his rights under the lease or sublet the entire building or rented land or any portion thereof, or...."
>
> 5. By transferring his rights under the lease or sub-letting the building or portion thereof, the tenant parts with legal possession of the tenanted premises and creates sub-tenancy. In a number of its judgments, the Supreme Court of India has reiterated that in order to prove tenancy or sub-tenancy, two ingredients have to be established. Firstly, the tenant must have exclusive right of possession or interest in the premises or part of the premises in question and, secondly, that right must be in lieu of payment of some compensation or rent. (See : *Dipak Banerjee v. Smt. Lilabati Chakraborty*, 1987 AIR(SC) 2055, *M/s*

Shalimar Tar Product s Ltd. v. H.C Sharma and Others., 1988 AIR(SC) 145, and *Gopal Saran v. Satyanarayan*, 1989 AIR(SC) 1141.

6. In *Shalimar Tar Products Ltd v. H.C. Sharma (supra),* the Supreme Court has further laid down that "Parting of legal possession means possession with the right to include and also right to exclude others" which according to the Hon'ble Judges is a matter of fact By transfer of rights under the lease by a tenant or sub-letting of the entire building or part thereof, physical possession of the tenanted premises is parted with in such a manner that tenant is divested of his right to exclusive possession and enjoyment of the property. Keeping these principles, in view, the pleadings and the evidence on record of this case are to be assessed."

(Also: *Sham Sunder Mehra v. Mastan Singh and others,* 1994(1) Sim.L.c. 171)

17. While dealing with the very same provisions, the Apex court in *Parvinder Singh v. Ranu Gautam and others,* (2004) 4 SCC 794, has observed that "A lease of immovable property is transfer of a right to enjoy such property. Parting with possession of control over the tenancy premises by the tenant in favour of a third person would amount to tenant having "transferred his rights under the lease" within the meaning of Section 14(2)(ii)(a) of the Act".

18. The landlord establishing the factum of the tenant having parted with the exclusive possession of the demised premises in favour of a stranger and the tenant having no possessory or other control of the same, it would be open for the Rent Controller to draw the presumption, which the tenant necessarily must rebut.

19. Otherwise, what is "subletting", in reference to different legislations dealing with the laws, relating to tenancy, stands considered by the Apex Court in *Bharat Sales Ltd. v. Life Insurance Corporation of India,* (1998) 3 SCC 1; *Shama Prashant Raje v. Ganpatrao and others,* (2000) 7 SCC 522; and *Joginder Singh Sodhi v. Amar Kaur,* (2005) 1 SC 31.

20. In the instant case, from the statement of landlord (PW-1) and his supportive witness Kedar Sharma (PW-2), it stands established that the sub-tenant alone is in exclusive possession of the demised premises. He, in his own name, is running his business. Landlord has proved on record bills for purchase of goods from different vendors, as also receipt (Ex.PW-1/B), issued by the authority under the Standards of Weights and Measures (Enforcement) Act, 1985. Additionally, photographs, placed on record, indicate only the sub-tenant to be running the business from the demised premises. Not only that, the sub-tenant has paid the amount of fine, so imposed by the Chief Judicial Magistrate, vide receipt (Ex.PW-1/L). Also, there is evidence of Bank Account of the sub-tenant and other revenue record, establishing such fact.

21. Significantly, sub-tenant has not stepped into the witness box, out of fear of being confronted with such evidence, and the testimony of tenant (RW-1) is more on the issue of relationship of tenancy than the premises having been let out to the sub-tenant.

22. There is no evidence of the tenant carrying out his business from the premises and/or the tenant having engaged the sub-tenant as a salesman, and also the sub-tenant carrying on business activity for and on behalf of the tenant.

23. It is in this backdrop, this court is of the considered view that the findings returned by the authorities below are neither perverse nor illegal, warranting interference in the line of principles of law laid down in *Dilbahar Singh (supra).*

Hence, for all the aforesaid reasons, present petition is dismissed. Pending application(s), if any, also stand disposed of.

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

Shankar & Others ....Appellants-Defendants

Versus

Parkash Kaur & Others ....Respondents-Plaintiffs

Regular Second Appeal No.229 of 2006.
Judgment Reserved on: 21.11.2017
Date of decision: 01.12.2017

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal- Plaintiff filed a suit for permanent prohibitory injunction against the defendants for interfering in the suit land, the suit land being a shop in question- Defendants while contesting the suit denying that plaintiff had no concern with the land and shop of defendant No.1, which was situated in different khasra numbers- The learned Trial Court had dismissed the suit, while learned First Appellate Court had decreed the suit placing reliance upon demarcation reports Ex.PW-6/A and PW-6/B- On appeal the High Court upheld the judgment of the learned 1st Appellate Court holding- that even demarcation proceedings prepared during the proceedings conducted under Section 145 of the Cr.P.C. can be relied upon- The same cannot be simply ignored, if placed on record by the plaintiff if the same has been conducted in accordance with the law and the instructions of the Financial Commissioner. (Para-18 to 22)

For the Appellants: Ms.Megha Kapur Gautam, Advocate.
For Respondents: Mr.Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

This Regular Second Appeal filed under Section 100 of the Code of Civil Procedure is directed against the judgment and decree dated 16.03.2006, passed by learned Additional District Judge, Una, District Una, in Civil Appeal No.77/2002, reversing the judgment and decree dated 28.08.2002, passed by learned Sub Judge Ist Class-(II), Una, H.P., whereby suit of the plaintiff was dismissed.

2. Briefly stated facts of the case, as emerged from the record, are that Shri Sarwan Singh, the predecessor-in-interest of the respondents *(hereinafter referred to as the "plaintiff")* averred that he is owner in possession of the land measuring 3 Kanals 10 Marlas bearing Khewat No. 929 min, Khatauni No.1633, Khasra No.3196 (old No.9216/3203/1, measuring 2 Kanals) and Khewat No.929 min, Khatauni No.1631, Khasra No.3197 (old No.9217/3203/2), as per Jamabandi for the year 1986-87, situated in village Haroli, Tehsil & District Una, H.P. *(hereinafter referred to as the "suit land")* and has constructed his abadies and several shops over the same. It is averred by the plaintiff that he has leased one shop to defendant No.1 in Khasra No.3196 and the other shops are on lease with other persons. It is further averred that the defendants have started threatening to cause interference in the suit land and therefore, the plaintiff has prayed for grant of injunction restraining the defendants from interfering in the suit land or dispossessing the plaintiff and in the alternative suit for possession in case the plaintiff is dispossessed by the defendants during the pendency of the suit. In the aforesaid background, the plaintiff filed a suit for permanent injunction against the defendants.

3. Defendants, by way of detailed written statement, refuted the aforesaid claim having been put forth on behalf of the plaintiff and has taken the preliminary objections of maintainability, bar under section 57 of the H.P. Consolidation of Holdings and Prevention of Fragmentation Act, 1971. On merits, the defendants have alleged that they have no concern with Khasra No.3197. It is averred by the defendants that defendant No.1 is coming in possession of the land measuring 2 Kanalas comprised of Khasra No.9216/3203min as a tenant on payment of *'Chakota'* since long time and has also constructed his abadies over this land, which abuts the main Una-Haroli road and is valuable piece of land. It is further averred that defendant No.1 has also built four shops over this land and one of his son Lekh Raj is running a *maniari* shop and the remaining area is being used as *Bartan* and the plaintiff has no concern with this land and shop of the defendant No.1. It is also averred by the defendants that the land comprising of Khasra No.9216/3203/1 min has been shown as *"Kharkana"* since 1973 to 1986 in the revenue papers. It is the claim of the defendants that the plaintiff has got prepared a false Jamabandi for the year 1986-87 from the consolidation staff showing the abadi whereas, Khasra Girdawari shows the land to be vacant. As per the defendants, the *Tatima,* got prepared by the plaintiff*,* in which the *abadi* has been shown, is also false. With the aforesaid submissions, the defendants prayed for dismissal of the suit of the plaintiff.

4. By way of replication, the plaintiff, while denying the allegations made in the written statement, reaffirmed the averments made in the plaint and controverted the contrary averments made in the written statement.

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

> "1. *Whether the plaintiff is owner in possession of the suit property/land? OPP.*
>
> *2. Whether the suit is not maintainable in the present form? OPD.*
>
> *3. Whether the plaintiff has got no cause of action to file this suit? OPD.*
>
> *4. Whether the plaintiff has concealed true facts, if so, its effect? OPD.*
>
> *4-A. Whether this Court has no jurisdiction? OPD.*
>
> *4-B. Whether the plaintiff is entitled for the relief of permanent prohibitory injunction? OPP.*
>
> *5. Relief."*

6. Learned trial Court vide judgment and decree dated 28.8.2002 dismissed the suit of the plaintiff.

7. Being aggrieved and dissatisfied with the aforesaid judgment and decree passed by learned trial Court, plaintiff preferred an appeal under Section 96 of the Code of Civil Procedure in the Court of learned Additional District Judge, Una, who, taking note of the pleadings as well as evidence adduced on record by respective parties, allowed the appeal, set aside the judgment and decree passed by learned trial Court and decreed the suit of the plaintiff.

8. In the aforesaid background, appellants-defendants filed instant Regular Second Appeal, laying therein challenge to the judgment and decree passed by learned Additional District Judge, Una, whereby suit of the plaintiff was decreed, with a prayer to quash and set aside the same.

9. This Regular Second Appeal came to be admitted on the following substantial question of law:-

"(1) That the learned lower appellate Court has wrongly placed reliance upon the demarcation reports Exs.PW-6/A and PW-6/B, which are not in accordance with law and the same are in some other cases?"

10. Ms.Megha Kapur Gautam, learned counsel appearing for the appellants, contended that the judgment passed by learned first appellate Court is not sustainable in the eye of law being against law and facts involved in the present case and as such, the same deserves to be quashed and set aside. While referring to the evidence led on record by the respective parties, Ms.Megha Gautam, forcefully contended that learned first appellate Court, while reversing the findings returned by the learned trial Court, has failed to appreciate the evidence, be it ocular or documentary, led on record by the respective parties in its right perspective, as a consequence thereof erroneous findings to the detriment of appellants-defendants have come on record. She further submitted that appellants-defendants have been recorded as non-occupancy tenant in the land comprised in Khasra No.9216/3203 min, measuring 2 Kanals in the Jamabandi for the year 1973-74. She further stated that the land is recorded as *Gair Mumkin Abadi* and in the subsequent Jamabandies, Ex.D-1 to D-9, the aforesaid entry continued till 1986-87 and even subsequent Khasra Girdawari for the year 1981-86, Ex.D-6 further suggests that the entries are in favour of the appellants.

11. Ms.Megha Gautam, learned counsel, further contended that learned first appellate Court, while scrutinizing the evidence available on record, has failed to take note of the fact that the plaintiff changed his stand in the evidence from the pleadings and it is well settled by now that nobody can be allowed to plead his case beyond pleadings. Learned counsel further contended that bare perusal of documentary evidence available on record suggests that possession of the land in dispute is/was that of defendants and as such there is no occasion for the learned first appellate Court to grant injunction in favour of the plaintiff, who miserably failed to prove on record that he is in possession of the land in suit and as such impugned judgment passed by learned first appellate Court deserves to be quashed and set aside.

12. Ms.Gautam strenuously argued that learned first appellate Court has fallen into grave error by placing reliance upon demarcations reports Ex.PW-6/A and Ex.PW-6/B because same do not relate to the case in hand. She further stated that even otherwise aforesaid demarcation reports could not be looked into by the Court below as the same were not in accordance with law. With a view to substantiate her aforesaid arguments, she invited the attention of this Court to statement of PW-6 Dulo Ram, who in his cross-examination admitted that he had not given any intimation to any party and as such no reliance could be placed upon the aforesaid demarcation reports, which, in no terms, could be said to be carried out in terms of instructions issued by Financial Commissioner. Learned counsel further contended that demarcation report Ex.PW-6/B suggests that the same was conducted in proceedings under Section 145 of the Code of Criminal Procedure *(for short 'Cr.P.C.')* and as such same could not be taken into consideration by Civil Court while deciding present controversy.

13. Per-contra, Shri Ajay Sharma, learned counsel representing the respondents, while inviting the attention of this Court to pleadings adduced on record by the respective parties, contended that at no point of time objection, if any, came to be filed on behalf of the defendants against the aforesaid demarcation reports produced on record by the plaintiff. While inviting the attention of this Court to the judgment and decree dated 28.8.2002, passed by learned Sub Judge Ist Class, Mr.Sharma vehemently contended that bare perusal of the same clearly suggests that learned trial Court, while dismissing the suit of the

plaintiff, failed to take note of aforesaid material documentary evidence led on record by the plaintiff suggestive of the fact that there are three shops of the plaintiff over Khasra No.3197 on Una-Jejon road and there are also three rooms, which are in dilapidated condition and unfit for habitation. It clearly emerge from the perusal of aforesaid demarcation reports that boundaries of Khasra Nos.3196, 3197, 3195 and 3194/1 tallies with each other and on spot there exists Khasra No.3195, owned and possessed by Heeru, in between the land of the plaintiff and the land of the defendant and as such, the question of any boundary dispute alongside the Una-Jajon road between the parties does not arise. Mr.Sharma further contended that learned trial Court below, while ignoring valuable piece of evidence adduced on record by the plaintiff in the shape of demarcation report, proceeded to dismiss the suit merely on the statement of defendant, which was not sufficient to conclude that the plaintiff is not in possession of the suit land. Mr.Sharma further contended that Ex.PW-6/B, copy of report of Naib Tehsildar given to SDM, Una in a case filed under Section 145 Cr.P.C. also suggests that except one *pucca* shop of *maniari,* the possession on the remaining vacant land of Khasra No.3196 is of the plaintiff Sarwan Singh and, as such, learned trial Court erred in ignoring the aforesaid valuable piece of evidence adduced on record by the plaintiff. While inviting the attention of this Court to Ex.PW-10, copy of the order passed by SDM, Una, in the proceedings under Section 145 Cr.P.C., Mr.Sharma contended that those were discontinued in view of the pendency of the civil proceedings in the Court of learned Senior Sub Judge, Una, but the said suit filed by Shankar Dass against present plaintiff Sarwan Singh for injunction regarding Khasra No.3194/1 was dismissed in default, as is evident from Ex.P-11.

14. While concluding his arguments, Mr.Sharma, while making this Court to travel through the demarcation report, made serious attempt to persuade this Court that demarcation was conducted strictly in accordance with law, more particularly, as per the instructions issued by the Financial Commissioner and there is/was no requirement in law as such to produce the individual, who had given report as a witness, rather it was incumbent upon the opposite party, if aggrieved with the report to produce him as witness to elicit from him that demarcation was not carried out in accordance with law.

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

16. From the evidence available on record, be it ocular or documentary, it clearly emerge that there is no dispute qua the ownership and possession of the plaintiff over Khasra No.3197 and controversy *inter se* parties is only qua Khasra No.3196. It further emerge from the record i.e. pleadings as well as evidence adduced on record that Khasra No.3196 came to be carved out from old Khasra No.9216/3203, which further came to be split into different parcels of land, as is evident from the copies of Jamabandies Ex.P-1 to Ex.P-3, Ex.P-5 & Ex.P-6 as well as Ex.D-1, Ex.D-5 and the copy of Khasra Girdawari Ex.D-6. As per revenue record available on record, Khasra No.9216/3203 min, measuring 2 Kanals has been shown to be in the ownership of Smt.Sheela Devi etc. and in possession of Shankar Dass as non-occupancy tenant.Similarly, Khasra No.9216/3203/1 min, measuring 2 Kanals has been shown in the ownership of Smt.Sheela Devi etc. and in possession of present plaintiff Sarwan Singh as non-occupancy tenant, which means that both the parties were in possession of Khasra No.9216/3203, measuring 2 Kanals each. It also emerge from the record that person; namely; Heeru is in possession of Khasra No.9216/3203/2 and subsequently consolidation authorities gave this Khasra number a new number 3195. Copy of Misal Haquiat Istemal for the year 1986-87 Ex.D-2, further proves on record that Khasra No.9216/3203/8/3 min was replaced to that of new Khasra No.3194/1 min and the measurement of this land has been reflected as 2 Kanals, whereas kind of land has been mentioned as *Gair Mumkin Abadi* qua 0-10 Kanal and 1-10 Kanal as Kharkana in the

ownership of Smt.Sheela Devi etc. and in the possession of defendant Shankar Dass as non-occupancy tenant on payment of rent.

17. In the plaint, plaintiff claimed himself to be owner in possession of Khasra No.3196 (old Khasra No.9216/3203/1 min, measuring 2 Kanals) bearing Khewat No.929 min, Khatauni No.1633 and Khasra No.3197 (old Khasra No.9217/3203/2), Khatauni No.1634, total measuring 3 Kanals 10 Marlas, which shows that the plaintiff is claiming himself to be owner in possession of 2 Kanals of land from Khasra No.3196 and 1 Kanal 10 Marlas from Khasra No.3197 and the defendants have admitted the possession of the plaintiff over Khasra No.3197, measuring 1 Kanal 10 Marlas and, as such, dispute remains with regard to 2 Kanals of land with regard to Khasra No.3196, but perusal of copy of Misal Haquiat Istemal for the year 1986-87, Ex.D-3, clearly suggests that present plaintiff Sarwan Singh has been reflected as non-occupancy tenant of Khasra No.3196, measuring 2 Kanals and the kind of land has been mentioned as *Banzr Kadim* and *Gair Mumkin Abadi*. Similarly, Khasra No.9216/3203/2, which was lateron given new Khasra No.3195, is owned and possessed by Heeru, who has not been made a party and there is no dispute about the same. At the same time, perusal of copy of Aks Shajra Ex.P-4 and Ex.P-7 suggests that Khasra Nos.3196 and 3197, which are claimed to be owned and possessed by the plaintiff, are abutting to each other and Khasra No.3195 is adjoining to Khasra No.3196, whereas, Khasra No.3194/1, situated next to Khasra No.3195 also touches the Western side of Khasra Nos.3197, 3196 and 3195. The plaintiff in support of his claim has also placed on record site plan Ex.PW-4/A, perusal whereof suggests that Khasra Nos.3196 and 3197 are abutting the PWD road towards the Northern side, whereas, Khasra No.3194/1 is abutting the PWD road towards the Southern side of Khasra No.3195. The disputed shops over Khasra No.3196 are situated abutting the PWD road. The plaintiff also placed on record demarcation report Ex.PW-6/A suggestive of the fact that the PWD road is situated abutting Khasra Nos.3197 and 3196 towards the North Eastern side of Khasra No.3195. As per aforesaid report, Khasra No.3194/1 is abutting the PWD road towards the South Eastern side of Khasra No.3195.

18. In the demarcation report Ex.PW-6/A, it has been categorically stated that there are shops of the plaintiff over Khasra No.3197 on Una-Jejon road and there are also three rooms, which are on Khasra No.3196 and are in dilapidated condition. As per aforesaid report, the boundaries of Khasra Nos.3196, 3197, 3195 and 3194/1 tallies with each other and as such there is no question of any dispute about the boundaries alongside the Una-Jajon road between the parties. As per the report, no part of Khasra No.3194/1 alongside the road touches Khasra Nos.3196 and 3197, rather the same touches Khasra No.3194/1 only towards the Western side. Similarly, this Court finds from the record that the plaintiff also placed on record demarcation report Ex.PW-6/B, which was conducted in proceedings pending under Section 145 Cr.P.C. in the Court of SDM, Una, who directed the Naib Tehsildar to conduct the demarcation. In the aforesaid report, Naib Tehsildar specifically reported that as per the spot inspection, except one *pucca* shop of *maniari,* the possession on the remaining vacant land of Khasra No.3196 appears to be of the plaintiff Sarwan Singh.

19. True, it is, that aforesaid proceedings initiated by SDM, Una under Section 145 Cr.P.C., latron discontinued in view of the pendency of the civil proceedings in the Court of learned Senior Sub Judge, Una, but the said suit filed by defendant Shankar Dass against present plaintiff Sarwan Singh for injunction regarding Khasra No.3194/1, was withdrawn by defendant, as is evident from Ex.P-11, as such, it may not be sufficient to conclude that demarcation report mentioned above had not attained finality.

20. Leaving everything aside, there is no evidence adduced on record by the defendant to prove that demarcation, as relied upon by the plaintiff, was not carried out in accordance with law and more particularly instructions issued by the Financial Commissioner. Judgment passed by learned trial Court, whereby suit filed by the plaintiff came to be dismissed, nowhere suggests that learned trial Court took cognizance, if any, of the aforesaid demarcation report placed on record by the plaintiff. Learned trial Court, taking note of the fact that both the parties fought litigation before the quasi-judicial authority, simply ignored the demarcation report Ex.PW-6/A, placed on record by the plaintiff, by observing that same has not been conducted in accordance with law and instructions of the Financial Commissioner. It appears that learned trial Court before arriving at aforesaid conclusion failed to peruse the report Ex.PW-6/A and wrongly came to the conclusion that the parties were not present on the spot and PW-6 failed to take help of Musabi and other relevant documents, which are necessary for demarcation. Similarly, learned trial Court erred, while discarding the demarcation report Ex.PW-6/B, which was conducted in some criminal proceedings under Section 145 Cr.P.C., while observing that since revenue officer, who had conducted the demarcation, has not appeared into the witness box, no reliance can be placed on the demarcation report. Finding, if any, as returned by the learned trial Court qua the aforesaid demarcation reports placed on record by the plaintiff, is totally contrary to facts because bare perusal of demarcation report Ex.PW-6/A clearly suggests that demarcation was carried out strictly in accordance with law in the presence of both the parties and none of the parties raised objection, if any, with regard to mode and manner adopted by revenue officer, who otherwise before conducting demarcation, fixed three *pucca* points and thereafter carried out demarcation on the spot i.e. Khasra Nos.3196 and 3197. Similarly, perusal of Ex.PW-6/B suggests that revenue officer had carried out demarcation on the spot in terms of order passed by SDM, Una in the presence of the parties in accordance with law and, as such, there was no occasion for the trial Court to ignore the same while adjudging the dispute *interse* parties.

21. In both the aforesaid reports it has been categorically held that there are three shops of the plaintiff over Khasra No.3197 on Una-Jejon road and there are also three rooms, which are in dilapidated condition and unfit for habitation. Vide report Ex.PW-6/A, it has been categorically proved on record by the plaintiff that the PWD road is situated abutting Khasra Nos.3197 and 3196 towards the North - Eastern side of Khasra No.3195, whereas, Khasra No.3194/1 is abutting the PWD road towards the South -Eastern side of Khasra No.3195. Naib Tehsildar, in his report Ex.PW-6/B, has categorically held that as per the spot inspection, except one *pucca* shop of *maniari,* the possession on the remaining vacant land of Khasra No.3196 appears to be of the plaintiff Sarwan Singh. The aforesaid findings, returned by the Naib Tehsildar in his report Ex.PW-6/B, fully corroborates the version of the plaintiff as put forth in his plaint, plaintiff in plaint has repeatedly stated that he has rented one shop to the defendant. After having carefully perused the aforesaid reports, this Court has no hesitation to conclude that learned trial Court has fallen in grave error while discarding the demarcation reports Ex.PW-6/A and Ex.PW-6/B, which clearly suggest that the plaintiff is in possession of Khasra No.3196.

22. At this stage, it may be noticed that during the pendency of the present case before this Court, this Court vide order dated 2nd November, 2007, taking note of the submissions having been made by learned counsel representing the appellants-defendants that he is in possession of shop on Khasra No.3196, as shown in Annexure P-1, directed Tehsildar, Una, to visit the spot and ascertain as to whether the shop of the appellants, as shown in photograph Annexure P-1, is situated in Khasra No.3196. This Court specifically directed the aforesaid revenue officer to demarcate the land to ascertain the factual position, who in his report dated 29.1.2008, copy whereof is/was supplied to both the learned

counsel representing the parties, categorically stated/reported that as per spot inspection, appellant-defendant is in possession of one *pucca* shop of *maniari*, whereas possession of the remaining vacant land over Khasra No.3196 is of plaintiff Sarwan Singh. Subsequent demarcation report, given by the revenue officer in terms of order passed by this Court, fully corroborates the reports Ex.PW-6/A and Ex.PW-6/B submitted by the local commissioner placed on record by the plaintiff and as such this Court sees no illegality and infirmity in the judgment passed by the learned first appellate Court. The substantial question of law is answered accordingly.

23. Consequently, in view of the aforesaid detailed discussion, this Court sees no illegality and infirmity in the judgment passed by learned first appellate Court and, as such, the same is upheld and that of the learned trial Court is set aside. Hence, present appeal fails and the same is, accordingly dismissed.

24. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of H.P. .....Appellant.
Versus
Dhani Ram & another .....Respondent.

Cr. Appeal No. 245 of 2008
Decided on: 01.12.2017

Code of Criminal Procedure, 1973- Section 374- Appeal against Acquittal- Section 20 of Narcotic Drugs and Psychotropic Substances Act, 1985- Accused charged under the aforesaid section for having been found in exclusive and conscious possession of 850 grams of charas while travelling in a van on 25.9.2006 at about 8:15 AM, at crossing of a road at Batalghat: in the boot of the van- Subsequently, a challan having been presented- accused were acquitted- Hence, the present appeal- **The High Court held**- the only independent witness not supporting the prosecution case - He denied the search of the van in his presence, though he admitted the weighing of the contraband- Situs of recovery also held to be doubtful as-per the prosecution search of the vehicle took place near the shop of Vinod Kumar (PW-3), whereas as per PW-2 Dinesh Sharma, Photographer he was called at the place called Dam - prosecution case thus held to be doubtful - Recovery of the bag containing charas not proved by PW-2, the sole independent witness- Benefit of doubt given- upheld. (Para-14 and 15)

Code of Criminal Procedure, 1973- Section 374- Appeal against Acquittal- Section 20 of Narcotic Drugs and Psychotropic Substances Act, 1985- Further held- that though conviction can be based on the statement of the official witnesses, even if the sole independent witness has not supported the prosecution case, but, only if the statements of the officials inspire confidence- On facts held that there were discrepancies in the statements of the officials witnesses- Benefit extended to the accused- Consequently, acquittal upheld. (Para-19)

Cases referred:

State of Himachal Pradesh vs. Mehboob Khan, 2013(3) Himachal Law Reporter (FB) 1834
K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258
T.Subramanian vs. Stfate of Tamil Nadu (2006) 1 SCC 401
Chandrappa vs. State of Karnataka, (2007) 4 SCC 415

For the appellant: Mr. V.S. Chauhan, Addl. AG, with Mr. J.S. Guleria, Asstt. AG.
For respondent No. 1: Mr. Virender Thakur, Advocate.
For respondent No. 2: Mr. Surinder Saklani, 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 29.09.2007, passed by learned Sessions Judge, Solan, H.P., in Sessions Trial No. 3-S/7 of 2007, whereby the accused/respondents (hereinafter referred to as "the accused persons") were acquitted for the commission of offence punishable under Section 20(b)(B) of Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as "ND&PS Act").

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

On 25.09.2006, at about 08:15 p.m., police party laid a *nakka* at crossing of roads at Batalghati. A van, coming from village Batal, was stopped, in which two occupants (the accused persons) were sitting. The accused persons disclosed their names as Dhani Ram and Het Ram. Accused Dhani Ram was driving the vehicle. As per the prosecution, witnesses Shri Diwakar Dutt, who has his tea stall at Batalghati, and Shri Naveen, who was going on his scooter at that time, were associated by the police and in their presence the van was searched. During the search of the dicky of the vehicle, a plastic carry bag was recovered and on checking it was found containing two packets of *charas,* which was in the form of wicks. Police took photographs of the bag and thereafter the bag containing *charas,* was taken into possession in presence of the witnesses. Police weighed the *charas* through the weighing scale of one Vinod Kumar, who has his tea stall near the place of recovery, and on weighment, *charas* was found to be 850 grams. Two samples, each 25 grams, were sealed separately. The remaining contraband was sealed in a cloth parcel. The independent witnesses and accused signed the parcels and sample impressions. The parcels were taken into possession, vide seizure memo, which was signed by the accused and the witnesses. NCB form was filled in on the spot, seal 'A' was affixed and the seal after its use was handed over to Shri Diwakar Dutt. *Rukka* was prepared and sent to Police Station for registration of FIR. The vehicle, alongwith its documents and key, and recovered contraband was taken into possession vide separate seizure memos. The spot map was prepared and the statements of the witnesses were recorded. A special report was prepared, which was sent to Superintendent of Police, Solan. Sample of *charas* was sent to Forensic Science Laboratory, Chandigarh, for examination and the examination of sample revealed that it was of *charas.* After conclusion of investigation, *challan* was presented in the Court.

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

4. The learned Trial Court, vide impugned judgment dated 29.09.2007, acquitted the accused persons for the offence punishable under Section 20(b)(B) of the ND&PS Act, hence the present appeal.

5. The learned Additional Advocate General has argued the impugned judgment is based on hypothetical reasoning, surmises and conjectures and the learned Trial Court has failed to appreciate the evidence, which has come on record to its right perspective. He has further argued that the learned Trial Court without any plausible reason discarded the testimonies of the official witnesses, which is unreasonable and thus the impugned judgment is liable to be set-aside and the accused persons be convicted. Conversely, the learned counsel for respondent No. 1 has argued that out of two independent witnesses, one has gone hostile and another was not examined, thus the recovery of contraband does not stand proved. He has further argued that even the entire recovered substance has not been chemically examined. Learned counsel for

respondent No. 2 has argued that the prosecution has failed to prove the guilt of the accused and the appeal may be dismissed.

6. In rebuttal, the learned Additional Advocate General has argued that taking into consideration the photographs taken on the spot, which demonstrates that the accused persons were present there, it can be concluded that the contraband was recovered from their exclusive and conscious possession. He has further argued that the statements of the official witnesses prove the prosecution case, therefore, the appeal may be allowed and the accused persons be convicted.

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

8. PW-1, Shri Diwakar Sharma, who is an independent witness, deposed that on 25.09.2006 he was going towards Batalghati and police met him and told that they caught a smuggler. He has further deposed that police showed him a plastic bag containing *charas.* As per this witness, he did not want to become a witness, but police cited him as a witness. This witness was declared hostile and was subjected to exhaustive cross-examination. He, in his cross-examination, has deposed that another independent witness, Shri Naveen Kumar, was already with the police when he arrived on the spot of occurrence. He has further deposed that a photographer was called on the spot and he took photographs. Police brought weighing scale and weights from the shop of PW-3, Shri Vinod Kumar, and on weighment *charas* was found to be 850 grams. He has further deposed that police took 50 grams of *charas,* which was divided into two parts and sealed the same in a cloth parcel, which was sealed with seal impression 'A'. As per this witness, the remaining *charas* was in carry bag, which was sealed in a cloth parcel with the same seal. His signatures were obtained on the parcel as well as on the seal impression. *Charas* was taken into possession vide recovery memo, Ex. PW-1/C, which was signed by him, Shri Naveen Kumar and the accused persons. The van was also taken into possession by the police, vide memo, Ex. PW-1/D, which bears his signatures. He has further deposed that when he reached the spot, police and the accused persons were on the road, near the shop of one Vinod Kumar.

9. PW-2, Shri Divesh Sharma, deposed that he was called on the spot by the police. The police told him that they have caught persons with *charas.* He took photographs of the van and of the persons, which are Ex. P-4 to Ex. P-10, negatives whereof are Ex. P-11. This witness, in his cross-examination, has deposed that when he clicked photographs of the boot space of the van accused persons were sitting inside the vehicle. PW-3, Shri Vinod Kumar, deposed that on the relevant day, when he was closing his shop, the police came and asked for weighing scale and weights. As per this witness, the police asked for a weight of one kilo and they did not ask for lesser weights. This witness, in his cross-examination, has deposed that he had weights of 50 grams and 100 grams. He did not have weight of 500 grams. In his presence the *charas* was weighed. He denied that he gave to the police weights of 500 grams, 50 grams and 100 grams. He denied that police took 50 grams of *charas,* as sample and the same was divided into two parts, each 25 grams and sealed in a cloth parcel, sealed with seal 'A'. PW-4, Shri Suresh Kumar, is owner of van, having registration No. HP-01-0060. He has deposed that the above van, which was impounded by the police, was owned by him and accused Het Ram was his driver. As per this witness, the van was being plied as a taxi and it was booked from Dhami to Batal and then to Sunni. He issued certificate, Ex. PW-4/A. PW-5, H.C. Yoginder Singh, Reader to Superintendent of Police, Solan, deposed that on 26.09.2006, Constable Payare Lal, brought the Special Report to the office of Superintendent of Police, Solan, copy of which is Ex. PW-5/A. He handed over the original and copy thereof to Superintendent of Police, who after making endorsement, returned the copy to him.

10. PW-6, HC Ramesh Chand, deposed that on 25.09.2006, Constable Payare Lal brought *rukka,* Ex. PW-6/A, whereupon FIR, Ex. PW-6/B, was registered, which bears his signatures. He has further deposed that on 26.09.2006 SHO handed over to him a parcel, which was sealed with seal 'A' and two more sample parcels, said to be containing *charas,* which were

sealed with five and eight seals alongwith sample of seal and NCB form. He made entry qua the same in the *malkhana* register at Sr. No. 456/03, copy of which is Ex. PW-6/C. On 28.09.2006 he handed over, vide RC No. 76/06, the parcel of sample, sample of seal and NCB form alongwith copy of FIR and copy of seizure memo, for being deposited in CFSL, Chandigarh, to Constable Payare Lal, however, the same were returned owing to some objection. As per this witness, the constable re-deposited the above case property with him and he, after getting the objection removed, handed over the case property to constable, but again the same was not deposited and was returned to him again. On 03.10.2006, after getting the objection removed, the case property was again sent through Constable Payare Lal, vide RC Ex. PW-6/D, to CFSL, Chandigarh. As per this witness, after deposit of the case property, RC was handed over to him. Under his custody the case property remained intact.

11. PW-7, Constable Pyare Lal, deposed that on 25.09.2006 he alongwith other police personnel was present at Batalghati. They intercepted a van, having registration No. HP-01-0060. Two occupants were sitting in the vehicle and they disclosed their names as Het Ram and Dhani Ram from the dicky of the vehicle plastic carry bag was recovered, which was kept near the speaker. Two independent witnesses, i.e., Shri Naveen and Shri Diwakar Dutt were also associated and in their presence the carry bag was checked, which contained *charas.* The recovered material was smelled and tasted and found to be *charas*. As per this witness, the carry bag was left at the place where it was originally kept and a photographer was called, who took photographs of the vehicle. Subsequently, the carry bag was taken out from the van and then to the shop of Shri Vinod Kumar (PW-3), wherefrom weighing scale and weights were brought and the recovered *charas* was weighed, which was found to be 850 grams. Two samples, each 25 grams, were taken and sealed in separate cloth parcels, which were sealed with seal impression 'A' and the remaining *charas* alongwith the carry bag was sealed in a cloth parcel having same seal impression. The accused and the witnesses signed the parcels and sample of seal. Columns of NCB form, Ex. PW-8/C, were filled in on the spot and seal impression 'A' was affixed thereon. As per this witness, seal was handed over to witness Diwakar and *rukka,* Ex.PW-6/A, was sent, through Constable Payare Lal, to Police Station Arki, for registration of a case. After registration of the case, case file was handed over to him by Constable Payare Lal. Memo of identification of *charas*, Ex. PW-1/A, was prepared, which was signed by witnesses Shri Naveen Kumar and Shri Diwakar. Memo qua taking sample was also prepared, which is Ex. PW-1/B. As per this witness, seal impression 'A' was obtained on memo, Ex. PW-1/B. Van having registration No. HP-01-0060 was taken into possession vide memo, Ex. PW-1/D. He prepared the site plan, Ex.PW-8/D. Photographs of the proceedings were taken and statements of the witnesses were recorded. He prepared the special report, Ex. PW-5/A, which was sent to Superintendent of Police, Solan, through constable Payare Lal, and the receipt was handed over to him. After completion of the proceedings, he came back to Police Station alongwith the accused and case property was deposited with MHC alongwith the connected documents. After receipt of the report of the chemical examiner, Ex. PW-8/B, *challan* was presented in the Court. This witness, in his cross-examination, has deposed that police personnel checked about 9-10 vehicles. He denied that no weights of 500, 100 and 50 grams were given to him by Shri Vinod Kumar.

12. PW-8, Shri Sita Ram, the then SHO, Police Station Arki, deposed that information qua the arrest of the accused persons was given to the relatives of the accused vide memo, Ex. PW-8/H.

13. The above prosecution evidence, now needs to be analyzed on the touchstone of its veracity. As far as the testimony of PW-1, Shri Diwakar Sharma, is concerned, he has denied that recovery was effected in his presence. PW-3 has further denied that any weight was taken from him. He deposed that he was not having weight of 500 grams. Though, as per the prosecution case, the police took the recovered *charas* and weighed the same. The other independent witness, i.e., Shri Naveen, was not examined by the prosecution, being won over.

14. The evidence, which has come on record, does not prove the recovery of *charas* in presence of the independent witnesses on the spot at the relevant time, as PW-1, Shri Diwakar

Dutt, admitted his and the presence of other independent witness on the spot, but not in the manner as portrayed by the prosecution. PW-1 categorically deposed that when he reached the spot Shri Naveen Kumar was already there. The only independent witness examined by the prosecution, denied the search of the van in his presence, however, he admitted weighing of the contraband, taking of sample, making of the parcels and preparation of the documents. Thus, PW-1, Shri Diwakar Dutt, admits the prosecution case except recovery of bag from the van and if the testimony of this witness is seen as a whole, he, by no stretch of imagination seems to be assisting or helping the accused persons. Another discrepancy in the prosecution case is that as per the story of the prosecution search of the van was conducted on the spot near the shop of Shri Vinod Kumar where on one side of it there is a water tank. However, photographs, Ex. P-1, Ex. P-6 and Ex. P-7, depict that there is no water tank or any shop. The photographs only show a building adjacent to the road and a cemented pedestal. No crossing of the road has been shown. PW-2, Shri Divesh Sharma, Photographer, deposed that at about 08:00 p.m. police called him near Batalghati, at place known as Dam. Police told him that they caught persons with *charas*. He clicked photographs of the van and of the persons, which are Ex. P-1 to Ex. P10. This witness, in his cross-examination, admitted that there is dispensary near the Dam and residential houses near the dispensary. As per this witness, shop of Shri Vinod Kumar is at a distance of about half kilo meter from the dispensary. He clicked 3-4 photographs near the dispensary and subsequently went to the shop of Shri Vinod Kumar. When he reached the spot, all persons were standing on the road and none was in the van. The police asked the accused persons to sit inside the van and then he clicked the photographs. As per this witness, a packet was put inside the boot space of the van by the police and then he clicked the photographs. Subsequently, the packet was opened by the police and he was asked to click photographs. He has further deposed that when he came to Batalghati, PW-1, Shri Diwakar Dutt and Naveen Kumar came there subsequently.

15. The testimony of PW-2, Shri Divesh Sharma, demonstrates that the alleged vehicle had not been intercepted by the police as portrayed by the prosecution. PW-2 virtually supported the version of PW-1, Shri Diwakar Sharma, who is an independent witness that PW-1 and one Shri Naveen Kumar came on the spot afterwards. As per PW-1, when he reached on the spot, the police was already having a bag with them. Thus, the place of recovery of *charas,* is not the same as shown by the Investigating Officer in the site plan. In fact, it can safely be said that PW-1 was not present on the spot when the recovery was effected from the van. The material on record belies the prosecution story, qua the manner of recovery of *charas* from the accused persons.

16. Likewise, discrepancy is there qua weighing of the contraband. As per the testimony of PW-1, Shri Diwakar Dutt, for weighing the contraband police brought scale and weights from the shop of Shri Vinod Kumar (PW-3). He has further deposed that police separated 50 grams of *charas* and divided the same into two parts and sealed each part in a cloth parcel with seal impression 'A'. PW-3, Shri Vinod Kumar, deposed that the police came to his shop when he was closing the shop and took weighing scale and weights. Thereafter he went to his house for taking meal. He admitted that he had weights of 50 and 100 grams, but denied that he gave to the police weights of 500, 100 and 50 grams. This witness has also denied that the police took 50 grams of *charas* as sample and the same was divided into two parts, 25 grams each, which were sealed in a cloth parcel having seal impression 'A'. He has denied that the remaining *charas* was also scaled in a cloth parcel with same scale. In fact, PW-7, Constable Pyare Lal, and PW-8, SHO Sita Ram, have not stated about weighing the *charas* inside the shop, but the photographs demonstrate so. Thus, conclusively it can be held that there are number of discrepancies in the prosecution case, which makes it difficult to rely on the testimonies of the prosecution witnesses. Even if it is assumed that accused persons were the occupants of the alleged van, then also the recovery part of the prosecution case is highly doubtful. Thus, it cannot be held that 850 grams of *charas* was recovered from the conscious and exclusive possession of the accused persons.

17. At the same point of time, though the prosecution has failed to prove the guilt of the accused persons, as there is no evidence to show that the alleged recovery was effected from the conscious possession of the accused persons.

18. Hon'ble Larger Bench of this Court in ***State of Himachal Pradesh vs. Mehboob Khan, 2013(3) Himachal Law Reporter (FB) 1834,*** wherein it has been held as under:

> *"a. After taking into consideration Section 293 of the Code of Criminal Procedure, Sections 45 and 46 of the Indian Evidence Act and the Law laid down by the apex Court as well as various High Courts discussed in detail hereinabove, we conclude that on account of non-consideration of the same by the Division Bench, which has rendered the judgment in Sunil's case, correct law on the expert opinion and the reports assigned by the scientific expert after analyzing the exhibit has not been laid down.*
>
> *b. We further conclude that on account of non-consideration of various reports of the United Nations Office on Drugs and Crime including Single Convention on Narcotic Drugs, 1961 and to the contrary placing reliance on the text books, which basically are on medical jurisprudence, the Division Bench in Sunil's case failed to assign correct meaning to 'charas' and 'cannabis resin', the necessary constituents of an offence punishable under Section 20 of the NDPS Act.*
>
> *c. In view of the detailed discussion hereinabove, the Division Bench while deciding Sunil's case supra has definitely erred in taking note of the percentage of tetrahydrocannabinol in three forms of cannabis i.e. Bhang, Ganja and Charas and hence, concluded erroneously that without there being no reference of the resin contents in the reports assigned by the Chemical Examiners in those cases, the contraband recovered is not proved to be Charas, as in our opinion, the Charas is a resinous mass and the presence of resin in the stuff analyzed without there being any evidence qua the nature of the neutral substance, the entire mass has to be taken as Charas.*
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> *d. There is no legal requirement of the presence of particular percentage of resin to be there in the sample and the presence of the resin in purified or crude form is sufficient to hold that the sample is that of Charas. The law laid down by the Division Bench in Sunil's case that 'for want of percentage of tetrahydrocannabinol or resin contents in the samples analyzed, the possibility of the stuff recovered from the accused persons being only Bhang i.e. the dried leaves of cannabis plant, possession of which is not an offence, cannot be ruled out', is not a good law nor any such interpretation is legally possible. The percentage of resin contents in the stuff analyzed is not a determinative factor of small quantity, above smaller quantity and lesser than commercial quantity and the commercial quantity. Rather if in the entire stuff recovered from the accused, resin of cannabis is found present on analysis, whole of the stuff is to be taken to determine the quantity i.e. smaller, above smaller but lesser than commercial and commercial, in terms of the notification below Section 2 (vii-a) and (xxiii-a) of the Act.*
>
> *e. We have discussed the Single Convention on Narcotic Drugs, 1961 in detail hereinabove and noted that resin becomes cannabis resin only when it is separated from the plant. The separated resin is cannabis resin not only when it is in 'purified' form, but also when in 'crude' form or still mixed with other parts of the plant. Therefore, the resin mixed with other parts of the plant i.e. in 'crude' form is also charas within the meaning of the Convention and the Legislature in its wisdom has never intended to exclude the weight of the mixture i.e. other parts of the plant in the resin unless or until such mixture proves to be some other neutral substance and not that of other parts of the cannabis plant. Once the expert expressed the opinion that after conducting the required tests, he found the resin*

present in the stuff and as charas is a resinous mass and after conducting tests if in the opinion of the expert, the entire mass is a sample of charas, no fault can be found with the opinion so expressed by the expert nor would it be appropriate to embark upon the admissibility of the report on any ground, including nonmentioning 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."

19. In addition to non-sending of the whole of the recovered substance for chemical examination, as has been held in the law laid down by this Hon'ble Court in the case referred (supra), the prosecution has even failed to prove the recovery of *charas* from the conscious and exclusive possession of the accused persons, as the only examined independent witness has not supported the prosecution case and the prosecution did not examine the other independent witness. Though the conviction can be based on the statements of the official witnesses, if their statements are confidence inspiring, but in the present case, the statements of the official witnesses do not inspire confidence, as has been discussed hereinabove. The statements of the official prosecution witnesses are full of contradictions, so the only conclusion is that the prosecution has failed to prove the guilt of the accused persons beyond the shadow of reasonable doubts. Hence, there is no occasion to interfere with the well reasoned judgment of the learned Trial Court.

20. It has been held in ***K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258,*** that when two views are possible, appellate Court should not reverse the judgment of acquittal merely because the other view was possible. When judgment of trial Court was neither perverse, nor suffered from any legal infirmity or non consideration/mis-appreciation of evidence on record, reversal thereof by High Court was not justified.

21. 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.

22. 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."*

23. In view of the settled legal position, as aforesaid, and on the basis of material that has come on record, it is more than safe to hold that the prosecution has failed to prove the guilt of the accused persons and the findings of acquittal, as recorded by the learned Trial Court, needs no interference, as the same are the result of appreciating the evidence correctly and to its true perspective. Accordingly, the appeal, which sans merits, deserves dismissal and is accordingly dismissed.

24. In view of the above, the appeal, so also pending application(s), if any, stand(s) disposed of. Bail bonds are cancelled.

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

Kishori Lal .....Appellant.

Versus

State of Himachal Pradesh .....Respondent.

Cr. A No. 493 of 2016.
Decided on: 2.12.2017.

Code of Criminal Procedure, 1973- Section 374– Appeal against Conviction- Sections 376, 341, 323 and 506 of IPC- Accused convicted for having committed offences punishable under Sections 376, 341 and 323 of I.P.C and sentenced accordingly for different periods under the aforesaid sections, however, no case was found to be made out under Section 506 of I.P.C- Accused challenged the conviction and sentence- **The High Court on appeal held**- that no doubt that sole testimony of the prosecutrix can be made the basis of convicting the accused but the statement of the prosecutrix cannot be mechanically applied to the facts of the case- On facts held that the sole testimony of the prosecutrix cannot be made the basis of convicting the accused as her statement in the Court was different then what she had stated in the statement made under Section 164 Cr.P.C- Since, version of the prosecutrix in the Court is different from

her earlier statement under Section 164 Cr.P.C., **Further held** – that the sole testimony of prosecutrix does not inspire confidence, more so, keeping in view of the fact that the other independent witnesses and the medical on record does not substantiate the version of the prosecutrix. (Para-10 to 17)

Cases referred:
State of Punjab Vs. Gurmeet Singh and others, AIR 1996 SC 1393
Ranjit Hazarika Vs. State of Assam, (1998) 8 SCC 635
Vimal Suresh Kamble Vs. Chaluverapinake Apal S.P. and another, (2003) 3 SCC 175

For the appellant: Mr. Virender Singh Rathore, Advocate, Legal Aid Counsel.
For the respondent: Mr. Parmod Thakur, Addl. AG.

The following judgment of the Court was delivered:

Justice Dharam Chand Chaudhary, J (Oral).

Appellant Kishori Lal (hereinafter referred to as the accused) was booked by the police of Police Station Tissa, District Chamba for the commission of offence punishable under Sections 323, 341, 376 & 506 IPC vide FIR No. 24/2014 with the allegation that on 21.2.2014 around 11:00 AM at a place, namely, Village Dogru, he restrained the prosecutrix (name withheld) from going to her house at Village Birmohi, Tehsil Churah, District Chamba on way back from the shop of PW-5 Chuhdu Ram situated at Village Bahnota and dragged her inside the bushes where she was subjected to sexual intercourse against her will and without her consent. In this process, she also received multiple injuries on her person. On the completion of the investigation and filing report under Section 173 Cr.P.C., learned trial Judge has proceeded to frame charge for the offence punishable under Sections 323, 341, 376 & 506 IPC against him. The accused was tried for the offence he allegedly committed in the Court of learned Addl. Sessions Judge, Chamba and convicted for the commission of offence under Sections 323, 341 & 376 IPC, however, no case under Section 506 IPC was found to be made out against him, hence acquitted of the charge so framed against him. Consequently, he has been sentenced to undergo rigorous imprisonment for 7 years under Section 376 IPC with fine in the sum of Rs. 5,000/-, simple imprisonment for a period of 3 months under Section 323 IPC and simple imprisonment for a period of one month under Section 341 IPC vide impugned judgment dated 28.7.2016. Presently, he is lodged in jail and undergoing the sentence.

2. Aggrieved by the impugned judgment, the accused has questioned the legality and validity thereof on the grounds, inter alia that for want of cogent and reliable evidence, no findings of conviction could have been recorded against him. The sole testimony of the prosecutrix relied upon against him is not reliable and rather false which in the given facts and circumstances of this case could have not been made basis to record findings of conviction against him. The prosecutrix had relations with him which were known to each and everyone in the village. There was no question of she having been subjected to sexual intercourse by him without her consent and against her will. PW-2 Jagdei has categorically deposed that the prosecutrix was having relations with the accused. Her testimony has erroneously been brushed aside. The alleged place of occurrence is 2 km. from the house of the prosecutrix and as such she could have not been taken to such a distance forcibly by dragging. The prosecutrix was consenting party to sexual intercourse with him and the matter was reported by her to the police falsely when her husband came to know about it. The version of the prosecutrix that after purchasing household articles from the shop of PW-5 Chuhdu Ram she was on the way to her house, hardly inspire any confidence as the I.O. while in the witness box has stated that she was subjected to sexual intercourse at a place 2 km. away, that too in opposite direction from the house of the prosecutrix. The prosecution is stated to have failed to prove cogent and reliable

evidence to connect the accused with the commission of the offence and the findings to the contrary have been recorded on the basis of conjectures and surmises.

3. The grouse of the accused, therefore, in a nut shell, is that learned trial Court has erroneously relied upon the sole testimony of the prosecutrix which hardly inspire any confidence. The findings of conviction recorded against the accused are stated to be perverse, hence not legally sustainable.

4. The nature of the offence the accused allegedly committed is not only heinous but also grievous because he has not only restrained the prosecutrix from going to her house but also dragged her inside the bushes where she was subjected to sexual intercourse against her will and without her consent. The sexual assault has been committed upon the prosecutrix in the manner as claimed by the prosecution or not is, however, a question which need adjudication on appreciation of the facts and circumstances of this case and also the evidence available on record.

5. Before coming to the factual matrix and also the evidence produced by the prosecution, it is desirable to take note as to under what circumstances the offence punishable under Sections 323, 341 & 376 IPC can be said to be made out against an offender. An offence punishable under Section 323 IPC can be said to be made out if it is pleaded & proved that the accused has voluntarily caused hurt, simple in nature, on the person of the victim of the occurrence. An offence punishable under Section 341 IPC can be said to be made out if it is proved that someone restrained any person wrongfully in such a manner so as to prevent that person from proceeding beyond certain circumscribed limits.

6. Now, if coming to the commission of an offence punishable under Section 376 IPC since the prosecutrix herein is major, therefore, the prosecution was required to plead and prove beyond all reasonable doubt that alleged sexual act with her was committed by the accused against her will and without her consent.

7. Now if coming to the legal principles attracted in a case of this nature, in ***State of Punjab*** Vs. ***Gurmeet Singh and others, AIR 1996 SC 1393***, the Apex Court has held that the own statement of the prosecutrix if inspires confidence is sufficient to bring the guilt home to the accused. The apex Court in order to ensure that an innocent person is not implicated in the commission of an offence of this nature, while taking note of the judgment in ***Gurmeet Singh's*** case supra has however diluted the ratio thereof in ***Ranjit Hazarika*** Vs. ***State of Assam, (1998) 8 SCC 635*** and held that the statement of prosecutrix cannot be universally and mechanically applied to the facts of every case of sexual assault, as in its opinion, in such cases, the possibility of false implication can't also be ruled-out. Similar was the view of the matter taken again by the apex Court in V***imal Suresh Kamble*** Vs. ***Chaluverapinake Apal S.P. and another, (2003) 3 SCC 175***. While placing reliance on this judgment and the law laid down by the Apex Court in the judgment supra, this Court in ***Criminal Appeal No. 481 of 2009*** titled ***State of Himachal Pradesh*** V. ***Negi Ram***, decided on 27th May, 2016 has held as under:

> "15. Therefore, the legal position as discussed supra makes it crystal clear that irrespective of an offence of this nature not only grievous but heinous also, the Court should not got swayed merely by passion and influence only on account of the offence has been committed against a woman and rather keep in mind the cardinal principle of criminal administration of justice, that an offender has to be believed to be innocent unless and until held guilty by the Court after satisfying its judicial conscience on the basis of given facts and circumstances of each case as well as proper appreciation of the evidence available on record."

8. Now, if coming to the factual matrix, while the prosecutrix belongs to village Birmohi, the accused is resident of Village Padhar. Their area, however, falls under the same Tehsil i.e. Churah and even the police station i.e. Tissa is also the same. The prosecutrix in her statement Ext. PW-1/B recorded by Judicial Magistrate Ist Class, Chamba under Section 164 Cr.P.C. has disclosed two instances when she allegedly was subjected to sexual intercourse by

the accused against her will and without her consent. One of the incident as she disclosed pertains to 5-6 months prior to recording of her statement Ext. PW-1/B, on 9.4.2014 when one Jagdei (PW-2) called the prosecutrix to her house in the same village for night stay as her husband was out of station. The prosecutrix acceded to the request of said Jagdei. After having meal she came outside the house along with Jagdei to answer the call of nature in open. Outside the house, they allegedly went towards different directions to answer the call of nature. The place where she had been urinating, the accused allegedly hiding inside the bushes came out and caught hold of her from back. She picked up a stone, however, the accused twisted her arm and as a result thereof, the stone fell down. He gagged her mouth and forcibly subjected her to sexual intercourse. She was threatened not to disclose the incident to anyone and if she did so, would be done away with. Thereafter, he fled away from the spot. She also came inside the house and asked Jagdei as to why she ran away. Jagdei told that "I bind you in the name of your kids, if you disclose anything about the incident to anyone". Accordingly, she had not disclosed the incident to anyone.

9. It has also come on record in Ext. PW-1/B that about 1-1/2-2 months of the first incident, around 11-12:00 noon, on way back from the shop of PW-5 Chuhdu Ram situated at village Bahnota. When she reached at Bahnota Nallah, the accused appeared all of a sudden and restrained her from moving ahead. He asked her to sit with him. When she denied, he caught hold of her arm and took her inside the bushes by dragging from the path. She reminded him about the earlier incident and also that she pardoned him at that time and warned him not to indulge in any unlawful activity with her again. When she tried to contact her husband over cell phone, accused allegedly snatched her cell phone and threw the same. He threatened her and also administered beatings. In this process her clothes were torn and lost '*koka*' (nose pin) which fell there. She was forcibly subjected to sexual intercourse by him again. On the advise of former Pradhan, namely, Khem Singh (PW-7), she accompanied by her husband reported the matter to the police.

10. In her statement the first occurrence according to her was in "Bhado" i.e. in the month of July. The occurrence with her on the second occasion was on 10th day of "Falgun" which corresponds to February-March. Therefore, as per her testimony, she firstly was subjected to sexual intercourse in the month of July, 2010 and thereafter in the month of Feburary, 2011. The date of occurrence in the FIR Ext. PW-1/A is 21.2.2014. Anyhow, in her statement under Section 164 Cr.P.C., Ext. PW-1/B, she has neither disclosed that firstly she was subjected to sexual intercourse in the month of "Bhado" and on the second occasion in the month of "Falgun" and her version to this effect for the first time came in her statement recorded by learned trial Court.

11. As rightly argued by Mr. V.S.Rathore, Advocate, learned counsel representing the accused, it is only the own statement of the prosecutrix which has been relied upon by the prosecution and taken into consideration by learned trial Court while recording the findings of conviction against the accused. In the considered opinion of this Court, the same hardly inspires any confidence, hence on the basis thereof no findings of conviction could have been recorded against the accused for the reason that Jagdei (PW-2) has not at all supported the prosecution case to the effect that she was with her during that night and subjected to sexual intercourse by the accused at such a stage when went outside for urination in open. Therefore, the manner in which the prosecutrix was subjected to sexual intercourse on the first occasion in the manner as claimed by the prosecution is not at all proved on record. On the other hand, the version of Jagdei while in the witness box as PW-2 that the prosecutrix had affair with the accused has not been considered by learned trial Judge and rather brushed aside without recording any reason therefor. As per further version of PW-2 the affair of the prosecutrix and accused was known to everyone in the village. Not only this, but the accused used to visit the house of the prosecutrix in the absence of her husband during night time. She admitted that her house is surrounded by houses of Mohan Lal, Madho and Naklu Ram. Therefore, the prosecution story that the prosecutrix had gone to the house of PW-2 Jagdei during that night when subjected to sexual

intercourse by the accused for the first time cannot be believed to be true by any stretch of imagination.

12. Interestingly enough, not only the house of Jagdei is surrounded by the houses of Mohan Lal, Madho and Naklu Ram but as per own version of the prosecutrix her daughter was also present in the house who was cooking food. Therefore, when the daughter of Jagdei was present in the house, it can reasonably be believed that she was not in need of company of the prosecutrix in the so called absence of her husband from the house. As per the own admission of the prosecutrix in village Birmohi, there exists 7-8 residential houses and the population is 40-50 persons. She admits that there exists street lights, absolutely in order at village Birmohi. The house of Jagdei is adjacent to the road. Though, she denied the existence of toilet and bath room inside the house of Jagdei, however, the later while in the witness box as PW-2 has stated that the toilet and bath rooms are inside the house itself. The prosecutrix also volunteered that the toilet is down the house of Jagdei. The possibility of the toilet was available in the house itself cannot therefore be ruled out and as such, there was no occasion to the prosecutrix or Jagdei to have gone out to answer the call of nature in open.

13. The accused in support of his defence that prosecutrix having affairs with him used to give missed calls over his cell phone and in February, 2014, she gave 36 missed calls which includes 9 on the day of alleged occurrence i.e. 21.2.2014, questioned her in the cross-examination that her cell number is 82630 36816. The said question was answered by her in affirmative. She, however, expressed her ignorance that the cell number of the accused was 98178 71144. Anyhow, since the record pertaining to calls so made has not been produced and proved in accordance with law, therefore, her cross-examination to this effect is not of much help to the defence. However, in view of own conduct of the prosecutrix that the first instance was not reported by her to anyone, when allegedly subjected to sexual intercourse by the accused forcibly lead to the only conclusion that she had affair with the accused and therefore, the possibility of she had been giving missed calls to him also cannot be ruled out. Though, it is denied that in the village each and every one was well aware about their illicit relations, however, the plea so raised by the accused in his defence find corroboration from the testimony of PW-2 Jagdei. The evidence as has come on record reveals that she was subjected to sexual intercourse at a distance of 2 kms from her house which is in different direction from that of the shop of PW-5 Chuhdu Ram. It is so stated by the I.O. PW-14 Insp. Sharif Mohd. Even PW-5 Chuhdu Ram, the shop keeper has admitted that while coming from village Birmohi to his shop one has to take a turn from Suli mor. The other turn from Suli mor leads to village Dogru (the place of alleged sexual assault) which is situated 2-1/2 km.from Suli mor. If it is so and the prosecutrix was coming back to her house from the shop, she could have not been dragged by the accused to Dogru from Suli mor nor she had any occasion to take that other turn which otherwise would have not taken her to the house and rather to village Dogru (the place of occurrence) in different direction. Therefore, the possibility of she having accompanied the accused to have sexual intercourse with him at that place cannot be ruled out. It is proved that Police post is at Nakrod, which is nearer to the house of the prosecutrix than Tissa. It is not known as to why the information was not given to Police of police post Nakrod.

14. According to the prosecutrix, the injuries were received by her on foot and legs. The doctor while in the witness box as PW-3 has, however, noticed the injuries in the nature of abrasions over lower back region at level L-1 and L-2, *Sacro illiact* joint and 1 to 2 abrasions present over *coxyc*; single abrasion was there over her right knee, therefore, the medical evidence belies the version of the prosecutrix that she had received injuries on her legs and feet. The doctor in her cross-examination has rather stated that no injuries were there on the foot of the prosecutrix. Though, as per her version blood was oozing out of the injuries she received, however, in the opinion of the doctor, the injuries were in the shape of abrasions, bluish in colour.

15. Now, if coming to the medical evidence, as has come on record by way of the testimony of PW-3, in her opinion the prosecutrix was subjected to sexual intercourse. There is

no dispute about it because the accused has also admitted the same to be true and correct, however, according to him, the prosecutrix was a consenting party to such an arrangement. This witness in her cross-examination conducted on behalf of the accused has admitted that as per the history disclosed to her by the prosecutrix she herself was involved in sexual intercourse with the accused and it was not forcible sexual intercourse. True it is that as per the MLC Ext. PW-3/B, the prosecutrix has disclosed the history of forcible sexual intercourse with her by the accused. However, in the above referred statement PW-3 Dr. Suruchi Chauhan, in her cross-examination, has belied such recitals in the MLC. Therefore, the medical evidence is also not suggestive of that the present is a case of commission of forcible sexual intercourse with the prosecutrix.

16. True it is that Chuhdu Ram PW-5 and his wife Smt. Sito, both tells us that on 21.2.2014, during day time, the prosecutrix came to their shop and purchased household articles. Since Chuhdu Ram was not present in the shop and he was informed by his wife about the visit of prosecutrix to the shop, therefore, his evidence is hearsay. Interestingly enough, as per the version of the prosecutrix she had purchased pulses etc. from the shop whereas PW-6 Sito in her cross-examination has stated that the prosecutrix had purchased Ghee and sugar (gur). Otherwise also, even if it is believed to be true that the prosecutrix had visited the shop of PW-5 and purchased household articles, the same could have not been believed to arrive at a conclusion that on the way, accused prevented her from moving ahead and rather dragged her inside the bushes and subjected her to sexual intercourse.

17. The another material witness is PW-7 Khem Raj Ex-Pradhan of Gram Panchayat Lahsui. Though, he tells us that when on 21.2.2014 around 2:30 PM, the prosecutrix came to him and disclosed that the accused committed wrong act, torn her shirt. However, any such statement was made by him before the police, he expressed his ignorance about it in his cross-examination. Also that in his cross-examination, he avoided to answer the suggestions put to him by simply expressing his ignorance. His reply should have been either in “Yes” or “No”. Ignorance to the suggestions put to him shown by him lead to the only conclusion that he avoided to answer the suggestions so put to him intentionally and deliberately to the reasons best known to him. Therefore, the possibility of he having deposed falsely for some extraneous consideration cannot be ruled out.

18. The remaining prosecution witnesses i.e. PW-8 Pritam Singh, Secretary Gram Panchayat, PW-9 LC Nirmala Kumari, PW-10 HC Hakam Singh, PW-11 Const. Jamshed Beg, PW-12 HC Ashwani Kumar, PW-13 ASI Jagdish Chand and PW-14 Insp. SHO Sharif Mohd., are formal as their testimony would have provided link evidence had the prosecution otherwise been able to bring guilt home to the accused beyond all reasonable doubt. Being so, elaboration of the evidence as has come on record by way of their testimony would be nothing but overloading of the judgment unnecessarily.

19. In view of the reappraisal of given facts and circumstances of this case and also the evidence available on record, in the considered opinion of this Court, the prosecution has failed to prove its case against the accused beyond all reasonable doubt. Learned trial Court has misread, misconstrued and mis-appreciated the sole testimony of the prosecutrix while recording the findings of conviction against the accused. The impugned judgment has rather been based upon conjectures, hypothesis and surmises, hence perverse. The accused in the given facts and circumstances and the evidence available on record could have not been convicted for the commission of the alleged offence.

20. In view of what has been said hereinabove, this appeal succeeds and the same is accordingly allowed. Consequently, no case against the accused is made out under Sections 323, 341 & 376 IPC. He, therefore, is acquitted of the charge under Sections 323, 341 & 376 IPC. He is in jail and serving out the sentence. He be set free forthwith, if not required in any other case.

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

Amar Singh .....Petitioner/Plaintiff.
Versus
Shri Roop Singh .....Respondent/Defendant.

Civil Revision No.97 of 2016.
Reserved on: 29th N0vember, 2017.
Decided on : 5th December, 2017.

Code of Civil Procedure, 1908- Order 34 Rule 7- Suit for possession by way of redemption of mortgage of the suit property- The learned Trial Court dismissed the suit – The First Appellate Court allowed the appeal and pronounced decree for possession subject to payment of Rs.200/- as redemption money, payable within six months from the date of judgment - **Held**, that Order 34 Rule 7 CPC itself clearly provides for the extension of time period granted by the Court for payment of mortgage money by the concerned Court- Hence, no application of Section 148 CPC in such cases- the explanation of the plaintiff for non-depositing of the requisite amount that his counsel did not inform him about the same stand demolished from the record- non-deposit of redemption money is result of malafide and, as such, does not constitute sufficient reason within the meaning of said provisions for extending time- there is no merit in the instant revision- Revision dismissed. (Para-6 to 8)

Case referred:
P.R. Yelumalai versus N.M. Ravi, (2015)9 SCC 52

For the Petitioner : Mr. G. D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.
For the Respondent: Mr. K.D. Sood, Senior Advocate with Mr. Sanjeev Sood, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The plaintiff instituted a suit, under, the H.P. Debt Reduction Act, for possession by way of redemption of mortgage, of, the suit property AND for accounts. The plaintiff's suit was dismissed by the learned trial Court. Being aggrieved therefrom, the plaintiff instituted an appeal before the learned District Judge, Shimla, whereupon, the latter allowed the plaintiff's appeal and pronounced a decree for possession of the suit property, subject to payment of Rs.200/-, as redemption money, by the plaintiff, to the defendant/respondent herein. The learned District Judge, also directed that the aforesaid quantum of money, being liquidated by the plaintiff within a period of six months, period whereof was enjoined to commence, from, the date of the learned First Appellate Court, pronouncing its decision upon Civil Appeal No. 96-S/13 of 1999. Apparently, the aforesaid quantum of redemption money, remained unliquidated, by the plaintiff vis-a-vis the defendant, within, the time stipulated, in the verdict pronounced by the learned First Appellate Court.

2. Before proceeding to determine, the validity(ies) of the endeavours, made, by the plaintiff, to seek enlargement, of, the peremptory period, prescribed in the decree pronounced, by the learned District Judge, Shimla, (i) it would be necessary, to, allude to the trite fact, of, the defendant impugning, the judgement and decree, pronounced by the learned First Appellate Court, by his instituting, a Regular Second Appeal, before this Court, (ii) the aforesaid Regular Second Appeal bearing RSA No. 503 of 2002-G, being disposed off, by this Court under a pronouncement recorded, on, 02.03.2013. (iii) A perusal of the order sheets, of, the aforesaid RSA, disclose, of, the plaintiff being arrayed, as a respondent, in the aforesaid RSA, (iv) AND his

being initially represented on 14.11.2002, by his duly constituted counsel, (v) whereafter, upto a final verdict being pronounced, upon RSA No.503 of 2002, he stood represented by his duly constituted counsel. (vi) Since, the pronouncement, of, a verdict, upon, the apposite Civil Appeal No. 96-S/13 of 1999, by the learned First Appellate Court, upto, a decision being recorded by this Court, upon, RSA No. 503 of 2002-G, the plaintiff visibly failing, to liquidate the mortgage money vis-a-vis the defendant, (vi) obviously the mandated time prescribed, in the verdict pronounced by the learned First Appellate Court, expired, much prior to a final verdict being pronounced by this Court, upon, the aforesaid RSA. A perusal of the order sheet recorded, on 30.10.2012 in RSA No.503 of 2012-G, discloses, of, the counsel for the plaintiff/respondent being directed to make an ascertainment, whether the mortgage sum of Rs.200/-, being or not deposited by the plaintiff. On ascertainments, qua the aforesaid facet, being made by the counsel, for the plaintiff, the latter on 29.11.2012, purveyed an information vis-a-vis the Court, qua the mortgage money being not deposited. Consequently, an application seeking enlargement of time, for, depositing the mortgage money was instituted before this Court. However, relief upon the aforesaid application, stood declined, on the trite ground of it, being not, grantable by this Court, rather it being grantable by the court concerned, which had fixed the time for its deposit. Consequently, the learned District Judge, Shimla, who pronounced, a decree for possession, by way of redemption and had also assessed, the redemption/mortgage money, in a sum of Rs.200/- besides had prescribed a period six months, for its deposit, period whereof was mandated, to, commence, from, its making its rendition, upon, his being seized, with the apposite application, proceeded to decline the apposite relief to the plaintiff/petitioner herein. Consequently, the plaintiff/petitioner herein is aggrieved therefrom, hence, through the instant petition, concerts to beget its reversal.

3. The relevant hereat provisions, of, the CPC ARE borne in Order 34, Rule 7 of the CPC, provisions whereof stand extracted hereinafter:-

> **7. Preliminary decree in redemption Suit.-** (1) In a Suit for redemption, if the plaintiff succeeds, the court shall pass a preliminary decree—
>
> (a) ordering that an account be taken of what was due to the defendant at the date of such decree for—
>
> (i) principal and interest on the mortgage,
>
> (ii) the costs of suit, if any, awarded to him, and
>
> (iii) other costs, charges and expenses properly incurred by him up to that date, in respect of his mortgage security, together with interest thereon; or
>
> (b) declaring the amount so due at that date; and
>
> (C) directing—
>
> (i) that, if the plaintiff pays into court the amount so found or declared due on or before such date as the court may fix within six months from the date on which the court confirms and countersigns the account taken under clause (a), or from the date on which such amount is declared in Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10, together with subsequent interest on such sums respectively as provided in rule 11, the defendant shall deliver up to the plaintiff, or to such person as the plaintiff appoints, all documents in his possession or power relating to the mortgaged property and shall, if so required re-transfer the property to the plaintiff at his cost free from the mortgage and from all encumbrances created by the defendant or any person claiming under him or, where the defendant claims by derived title, by those under whom he claims, and shall also, if necessary, put the plaintiff in possession of the property; and
>
> (ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the plaintiff fails to pay, within such time as the court may fix, the amount adjudged due in respect of subsequent

costs, charges, expenses and interest, the defendant shall be entitled to apply for a final decree—

(a) in the case of a mortgage other than a usufructuary mortgage, a mortgage by conditional sale, or an anomalous mortgage the terms of which provide for foreclosure only and not for sale, that the mortgaged property to be sold, or

(b) in the case of a mortgage by conditional sale or such an anomalous mortgage as aforesaid, that the plaintiff be debarred from all right to redeem the property.

(2) The court may, on good cause shown and upon terms to be fixed by the court, from time to time, at any time before the passing of a final decree for foreclosure or sale, as the case may be, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

4. Upon their incisive besides circumspect readings, (i) thereupon, the judgment and decree rendered by the learned First Appellate Court, for, possession of the mortgaged property besides for its redemption, bears consonance, with, the mandate of sub-rule(1), to, Rule (7) of Order 34 of the CPC, comprised in its (ii) after it taking account(s), its mandating therein the mortgage money, (iii) also its specifying therein, the specific period, within, which, it was enjoined to be liquidated, by the plaintiff vis-a-vis the defendant. Since, the aforesaid mandate carried, in the operative part of the judgment and decree pronounced, by the learned First Appellate Court, hence falls within the domain of Order 34, Rule 7 of the CPC, (iv) thereupon, reiteratedly with the apposite statutory prescription(s), occurring, in the afore extracted provisions of the CPC, being visibly carried under the caption "preliminary decree", (v) thereupon their embodiment in the judgment and decree, rendered by the learned First Appellate Court, is, obviously, construable to render the apt condition precedent, to hence be a preliminary decree, (iv) sequel whereof, is of, upon the apposite deposit or liquidation(s) being made, the court concerned, being enjoined, to confirm and countersign, the compliant accounts taken, under, preceding therewith clause(s), thereafter, the Court concerned ensuring compliance, of, the further provisions embodied in sub-rule(1) to Rule 7 of Order 34 of the CPC, comprised in its ensuring delivery of possession of the suit property vis-a-vis the plaintiff.

5. The effect of the aforesaid discussion, is, of the apposite mandate, embodied, in the judgment and decree, pronounced by the learned First Appellate Court being construable to be a preliminary decree, (i) thereupon, the mandate, of, sub-rule (2), to, Rule 7 of Order 34, of the CPC, begets attraction, within ambit whereof, statutory leverage stands conferred upon the court concerned, to, upon (a) good cause being shown; (b) terms being fixed by the court concerned, from time to time or at any time, before passing, of, final decree, for foreclosure or sale, to extend time fixed, for payment of amount, found or declared due under sub-rule (1) or vis-a-vis the amount adjudged due in respect of subsequent costs, charges, expenses and interest. The aforesaid statutory provisions, encompass therewithin, A, self contained code, for, the relevant purpose, hence, oust the play of Section 148 of the CPC, (c) besides even beyond the apposite time prescribed , for, the relevant purpose, in the preliminary conditional decree, yet vest plenary power, upon, satiation(s) of their mandate, to enlarge the apt prescribed time. With a wide plenary statutory leverage, standing conferred, upon, the learned First Appellate Court, thereupon, the counsel for the petitioner herein contends (c) that the application for enlargement or extension of time, from, the one prescribed, in the operative part, of the judgment and decree, rendered by the learned First Appellate Court, being tenably grantable vis-a-vis the plaintiff/petitioner herein. (d) He contends that, the evident good cause, for his being entitled, to the mandate of the apposite sub-rule, is comprised, in, the factum of the petitioner, not, being apprised, by the counsel representing him, before the learned First Appellate Court, (e) of the period within which the mortgage money, was, to be deposited. (f) He also contends, that, given the pronouncement being made by this Court on 14.11.2002, whereby, this Court had stayed the operation and execution, of, the judgment and decree rendered in Civil Appeal No.96-S/13 of 1999, whereafter, with this Court, under, a pronouncement recorded on 27.02.2003, making the

aforesaid interim orders hence absolute, (g) thereupon, the plaintiff/petitioner herein being defacilitated, to, within the time prescribed in the judgment and decree rendered by the learned First Appellate, make deposit, of the mortgage money/redemption money, within, the period stipulated therein.

6. The aforesaid grounds, as reared, in the apposite application by the plaintiff/petitioner herein also theirs constituting a good and sufficient cause, for the relevant omission(s) made by the plaintiff, are per se stripped of their veracity, (i) given no apposite motions being made, since the commencement, of, six months from the rendition, made, by the learned First Appellate Court, AND upto the termination of the aforesaid period, (ii) though, the ground for the omission(s) of the plaintiff is anchored, upon, the counsel representing him before the learned First Appellate Court, not, apprising him about the peremptory necessity, of, his making the apposite deposit(s), yet tenacity thereof is ripped apart, by averments contained in his affidavit, comprised in Ex.AW1/A, averments whereof make, disclosure(s), (iii) of, his counsel apprising him, about, the learned First Appellate Court allowing his appeal, thereupon, his subsequent disclosure(s) therein, of, his counsel, not, communicating him, about, his liquidating mortgage money vis-a-vis the defendant, especially within, a period of six months, from, the date of the learned trial Court pronouncing, its apposite verdict, upon the apposite first appeal, (iv) are also per se contradictory vis-a-vis the earlier thereto articulation(s) borne therein, hence, are per se contrived. Moreover, the best evidence, for strengthening the aforesaid espousals reared by the plaintiff, in his affidavit, comprised in Ex.AW1/A, was, comprised in his placing, on record, (v) the apposite communication addressed to him, by his counsel, with revelations occurring therein, of its, not containing, any articulations, of, the dire necessity, of, his making the apposite deposits, within, the period stipulated in the apposite verdict pronounced, by the learned First Appellate Court, (vi) yet, all the aforesaid communication(s), occurring in the relevant communication(s) ensuing, qua the relevant facts, inter se the applicant/petitioner herein and his counsel representing him, before, the learned First Appellate Court, are evidently withheld, (vii) wherefrom it is befitting, to conclude, of, the applicant/petitioner herein, rearing a false plea in Ex.AW1/A, qua his relevant omissions, spurring from the counsel representing him, before, the learned First Appellate Court, not, awakening him, qua the dire necessity, of, his making deposit of mortgage money, within a period, of, six months, commencing from the date, of pronouncement, of the apposite verdict, by the learned First Appellate Court in the apposite civil appeal, rather his apprising him only about the fate of the appeal. (vii) Hence, his being precluded to make the apt deposit. The effect thereof, is, of the purported "sufficient cause" embodied in Ex. AW1/A, is shorn of its veracity. Contrarily, the relevant omission(s), of, the applicant/petitioner herein ARE ingrained with a pervasive vice, of deliberateness also are gripped with active malafides.

7. Be that as it may, even if, this Court, on 14.11.2002, had, temporarily stayed, the operation and execution of the impugned judgment and decree, order whereof, was, made absolute by this Court on 27.02.2003, (i) nonetheless, despite, this Court staying the operation and execution of the judgment and decree, rendered by the learned First Appellate Court, yet did not, relieve the plaintiff/petitioner herein, to while furnishing reply, to the apposite application, preferred by the defendant before this Court, wherein, he prayed for staying the operation and execution of the judgment and decree, rendered, by the learned First Appellate Court being stayed, to therein make a prayer, of, his being permitted, to conditionally deposit, the mortgage money, before the learned First Appellate Court. RSA No. 503 of 2002, instituted before this Court by the defendant, was barred by one day. A perusal of the reply furnished by the plaintiff/petitioner herein, to the defendant's application, for staying the operation and execution of the judgment and decree, rendered, by the learned First Appellate Court, was filed on 25.11.2002, hence, before expiry of a period of six months prescribed in the judgment and decree, rendered, by the learned First Appellate Court, for the plaintiff hence making the apposite deposit, (ii) thereupon, it was also open thereat, for the plaintiff to seek leave, of this Court, to permit him to conditionally deposit, the mortgage money comprised in a sum of Rs.200/-, before the learned First Appellate Court, even despite, this Court proceeding, to stay the operation and

execution of the judgment and decree impugned herebefore, (iii) conspicuously when it would make a palpable display of his bonafide(s), to beget compliance therewith, besides when it would also not impinge upon the factum, of, upon, the regular second appeal being dismissed by this Court, his being deprived, of, the benefits of the apposite decree, (iv) rather would obviate befallment, of, concomitant frustration(s) upon the plaintiff, arising from his being deprived to rear the fruits of the apposite decree, merely, for, his omitting to comply with the peremptory condition(s) embodied therein. Contrarily, a reading of the reply furnished by the plaintiff/petitioner herein, to the apposite application for stay, makes a disclosure, of, the plaintiff therein, on affidavit making disclosures, of, his depositing the mortgaged money, before the Court concerned. The aforesaid disclosure, on affidavit, is per se false, with a concomitant effect, of, its scoring off, the effects of all the espousal(s) canvassed by the applicant/petitioner herein, of his hence being constrained, by purported good and sufficient cause, to hence make the relevant omissions. Preponderantly, also with the apposite application, being preferred, much belatedly, rather during the pendency of a second appeal before this Court, is a grossly procrastinated attempt, bereft of any bonafides, hence, the leave sought therein, from, the learned First Appellate Court, for, enlarging the time, from, the one prescribed in the verdict rendered by the learned First Appellate Court, for, hence, the plaintiff/petitioner herein making the apt deposits, is also a specious concert, warranting invalidation, as aptly done by the learned First Appellate Court.

8. In aftermath, as mandated by the Hon'ble Apex Court in a case titled as ***P.R. Yelumalai versus N.M. Ravi, (2015)9 SCC 52,*** the relevant paragraph No.16 whereof is reproduced as under:-

> "16. Thus, in the present case, the plaintiff buyer has clearly defaulted on time of depositing as well as the mode of payment. The decree was self-operative and the suit stood dismissed for non compliance with the decree. Further, the plaintiff buyer also failed to make out a case for condonation of delay. In view of these findings, we are of the opinion that the questions formulated by the High Court in the order of remand are not required to be answered by the trial Court. Consequently, the appeal filed by the plaintiff buyer is dismissed and the appeal filed by the defendant seller is allowed. There shall be no order as to costs."
>
> (p..61)

wherein, it is mandated that, upon, the litigant concerned not meteing compliance, with, the peremptory conditions cast upon him, under the apposite conditional decree/preliminary decree nor his being entitled for enlargement or for extension(s) of time, hence, begetting the sequel of the apposite suit entailing dismissal. Consequently, thereupon the plaintiff's suit, begets, a conclusion of its warranting dismissal, upon, his failing to comply with the peremptory condition(s), of, the conditional preliminary decree.

9. For the foregoing reasons, there is no merit in the instant petition and it is dismissed accordingly. IN sequel, the impugned order is maintained and affirmed. All pending applications also stand disposed of. No costs. Records be sent back forthwith.

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

Col. Mehar Singh .....Appellant/defendant.

Versus

Sudesh Kumari .....Respondent/Plaintiff.

RSA No. 553 of 2006.
Reserved on : 20.11.2017.
Decided on: 5th December, 2017.

Specific Relief Act, 1963- Section 5- Plaintiff claimed possession after demolition of the super structure raised on the suit land alleging that possession was forcibly taken during the pendency of the suit filed for relief of permanent prohibitory injunction – The learned Trial Court and First Appellate Court decreed the suit adjudicating that defendant has encroached upon the suit land relying the demarcation report filed on the record- **Held**, that for conducting demarcation it was incumbent upon the concerned Revenue Officer to procure Aks Musabi wherefrom he was required to recognize the pucca points- The demarcation report does not reveal that Aks Musabi was available with the demarcating authority or he ascertained pucca points- Demarcation report is faulty and cannot be believed- Courts below erred in placing reliance on it- suit dismissed- Appeal succeeds. (Para-10 and 11)

For the Appellant: Mr. R.K. Gautam, Senior Advocate with Ms. Meghana Kapoor Gautam, Advocate.

For the Respondent: Mr. Vijay Chaudhary, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiff's suit for possession of suit khasra numbers was decreed by the learned trial Court also it pronounced a decree for demolition of the super structure raised thereon. The judgment and decree pronounced by the learned trial Court, stood, carried in appeal before the learned First Appellate Court, whereupon, the latter Court affirmed the judgment and decree recorded by the learned trial Court, upon, the aforesaid Civil Suit No. 46 of 2000. Being aggrieved therefrom, the defendant/appellant herein, has instituted the instant appeal before this Court, for his concerting to beget its reversal.

2. Briefly stated the facts of the case are that the plaintiff claimed decree for permanent prohibitory injunction restraining the defendant from encroaching upon the suit land or raising any construction as well as to change the nature of the suit land. It has been averred that the suit land was owned and possessed by the plaintiff. However, during the pendency of the suit some construction was raised regarding which prayer had been made that the decree for possession be passed in case any encroachment or construction is raised on the suit land by the defendant. The plaintiff claimed that the plaintiff was in peaceful possession of the suit land, but the defendant started interference and threatened to raise construction over the part of the suit land for which material was collected and arrangement for labourers to dig the land was also made. It is also averred that the defendant had forcibly taken possession of suit land and illegally raised construction of shed during the pendency of the suit, despite stay orders having been passed by the Court thereby decree for possession after demolition of the structure had also been prayed.

3. The defendant contested the suit and filed written statement, wherein he has taken preliminary objections qua maintainability, cause of action, estoppel, locus standi. On merits, it is claimed that the defendant has become owner by way of adverse possession. The defendant had asserted that the plaintiff is not owner nor was in possession of the suit land. It has been alleged that the defendant and Tarlok Chand purchased three kanals and 10 marlas of land from one Smt. Sarla Devi vide registered sale deed No.266 of 14.8.1972, out of khasra No.209. Mutation was also attested and the defendant came into its possession. Thereafter demarcation was also taken by the defendants. Since, the year 1972, the defendant never parted with possession of suit land and the possession was to the knowledge of Sarla Devi as well as that of plaintiff. It has been averred that the husband of plaintiff is serving in the Revenue Department, who got the land purchased and got the land of defendant included in the suit land by getting the Karukans changed and when came to the notice of defendant, he applied for the correction of karukans by moving an application which was dismissed. However, the matter is now pending before the Settlement Collector. It has also been averred that the husband of the

plaintiff was knowing that karukans had been got fictitiously and thereby he managed the sale deed in the name of his wife. However, despite that possession was never taken by her. The plaintiff after instituting the suit tried to take forcible possession of the suit land, whereby, the defendant completed the construction work in the year 1982-83 and the plaintiff be restrained from interfering over the suit land which is in possession of defendant by filing counter claim. It had been prayed that the decree be passed declaring the defendant to be owner in possession of the suit land and restraining the plaintiff from interfering over the peaceful possession of defendant over the suit land.

4. The plaintiff/respondent herein contested the counter claim filed by the defendant/appellant herein, by filing written statement/replication thereto, whereby it had been alleged that the defendant never came into possession of suit land but the possession was taken during the pendency of the suit. Thereby decree for possession had been sought. The claim of the defendant as asserted in the counter claim and written statement had been stated to be wrong.

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

1. Whether the plaintiff is entitled for injunction, as prayed for?OPP.

2. Whether the suit is not maintainable in the present form, as alleged?OPD.

3. Whether the plaintiff has no cause of action, as alleged?OPD

4. Whether the plaintiff is estopped by her act, conduct and acquiescence 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. Whether the defendant has become owner by way of adverse possession, as alleged?OPD.

7. Whether no valid title has been transferred to the plaintiff by Smt. Sarla Devi, as alleged?OPD.

8. Whether the defendant is in owner in possession of land, as alleged?OPD/Counter Claimant.

9. Whether the defendant is entitled for injunction as prayed for?OPD/Counter Claimant.

9(a). Whether the plaintiff is entitled for decree for possession of suit land by way of demolition, as alleged?OPP

10. 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 before the learned First Appellate Court, the latter Court dismissed the appeal and affirmed the findings recorded by the learned trial Court.

7. Now the defendant/appellant herein, has instituted the instant Regular Second Appeal before this Court wherein he assails the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission on 17.07.2006, this Court, admitted the appeal instituted by the defendant/appellant against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

e) Whether the Courts below have wrongly relied upon the demarcation report Ex.PW1/A which was not otherwise admissible in evidence, and as such, there has been misreading of evidence oral as well as documentary by the Courts of law?

Substantial question of Law No.1.

8. Both the learned Courts below placed implicit reliance upon demarcation report comprised in Ex.PW2/A, proven by PW-2. Upon theirs placing implicit reliance thereon, they proceeded to record concurrent affirmative findings qua the issue appertaining to the defendant/appellant making unauthorised construction upon the suit kahsra numbers, whereupon, they proceeded to decree the plaintiff's suit for possession.

9. Since, the substantial question of law appertains to the validity of demarcation report, borne in Ex.PW2/A, hence, this Court would proceed to determine the validity(ies), of imputation of reliance thereon.

10. A perusal of the testification rendered by PW-2, who prepared and proved Ex.PW2/A, reveals that at the time of his visiting the suit khasra numbers for his holding demarcation, of the contiguous estates of the contesting parties, the defendant/appellant not recording his presence before him. The evident absence, at the relevant time, of the defendant, at the relevant site also his obviously omitting to record his presence thereat before PW-2, hence naturally disabled him to purvey his consent to PW-2 qua the fixed recognizable points, wherefrom, PW-2, was enjoined to hold a valid demarcation, of the adjoining contiguous estates of the parties at contest. The presence of both the contestants, at the relevant site also before the Revenue Officer concerned, is imperative for hence ensuring that the demarcating officer, does not, hold tainted ex-parte demarcation proceedings, for determining the boundary(ies) of the adjoining respective estates, of the parties at contest. The conjoint presence of any the contesting parties, before the demarcating officer, also precludes the possibility of the latter proceeding to hold a partisan and tainted, demarcation, of the contiguous respective estates of the parties at contest. Since, the defendant, did not, evidently record his presence at the relevant site also obviously before the demarcating officer, at the stage contemporaneous to the latter holding demarcation of the contiguous respective estates of the parties at contest, thereupon, it is apt to conclude of the report, furnished by the demarcating Officer, borne in Ex.PW2/A, (a) being ridden with a stain of partisanship and its preparation being goaded by an oblique motive, to favour the plaintiff, (b) the demarcating officer, conducting demarcation of the suit khasra numbers, without his prior thereto ascertaining, from the relevant musabi, AND in presence of and with the consent of the defendant/appellant, the fixed recognizable points, wherefrom, he was enjoined to hold a valid demarcation, of the suit khasra numbers, (c) thereupon, his report borne in Ex.PW2/A is ridden with a vice of invalidity.

11. Even if assumingly, the presence of the defendant/appellant, at the apposite stage, was dispensable yet the demarcating officer was enjoined to in his report make a clear voicing that, he held the relevant demarcation, in consonance with the mandate of Chapter 10.3 of the Himachal Pradesh Land Records Manual, provisions whereof stand extracted hereinafter:-

> "10.3 Papers with application for demarcation: An interest person shall submit an application for demarcation in duplicate. The following documents shall be filed with the original application:-
>
> 1. A copy of latest jamabandi.
>
> 2. A copy of previous settlement map.
>
> 3. A copy of map prepared during consolidation, if consolidation operations have been conducted in the estate.
>
> 4. A copy of tatima shajra if the demarcation of sub-divided khasra number is involved.
>
> 5. Process fee as prescribed under the rules."

whereby, he is enjoined to thereat, carry, a copy of the previous settlement map or the Aks musabi. However, neither in his report borne in Ex.PW2/A nor in his testification, there occurs any articulation of his, at the relevant time, holding a copy of the previous settlement map/aks musabi, wherefrom, alone he was enabled to ascertain the fixed recognizable points, for his

thereafter being also enabled to borrow them, therefrom, whereafter, he was facilitated to relay them onto the contiguous suit khasra numbers, for his hence holding a valid demarcation thereof besides his preparing in consonance therewith a valid demarcation report. Moreover, a reading of his report also a perusal of his testification, also reiteratedly, does not, unveil that he, at the relevant time, carried the copy of the previous settlement map/aks musabi, thereupon, it is apt to conclude that he did not ascertain therefrom the fixed recognizable points, nor therefrom he made borrowings thereof, nor also he hence proceeded to relay them onto the relevant suit khasra numbers. In aftermath, the demarcation, of the contiguous respective estates of the contesting parties, is to be construed to be not held in accordance with the relevant cannons. Corollary whereof, is that the recitals borne, in Ex.PW2/A, were unamenable for imputation of sanctity thereon as inaptly done by both the learned Courts below. Accordingly, the aforesaid substantial question of law is answered in favour of the appellant and against the respondent.

12. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as well as by the learned trial Court are not based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court have excluded germane and apposite material from consideration.

13. In view of the above discussion, the instant appeal is allowed and the impugned judgments and decrees rendered by both the learned Courts below are set aside. Consequently, the suit of the plaintiff is dismissed. No costs. Decree sheet be prepared accordingly. All pending applications also stand disposed of. Records be sent back.

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

Parvinder Kumar .....Petitioner.
Versus
Sain Ram Jhingta & others .....Respondents.

Civil Revision No.40 of 2015.
Reserved on: 30.11.2017.
Decided on : 5th December, 2017.

Code of Civil Procedure, 1908- Order 6 Rule 17- Rent Petition- Amendment of pleadings- Defendant moved an application for amendment at first appellate stage adjudicating rent appeal under H.P. Urban Rent Control Act, 1987 pleading therein that he is occupying demised premises as a licencee – He can only be evicted in consequence of a decree of civil suit – **Held**- that defendant was aware of the facts sought be incorporated through amendment right from the beginning – He has not filed the application for amendment at the earliest stage as contemplated in proviso to Order 6 Rule 17 C.P.C.- The Competent Authority had already adjudicated his status as sub-tenant with valid written consent of the landlord, which finding has attained finality- the instant application lacks bonafide – petition dismissed. (Para-5 and 6)

For the Petitioners : Mr. G.C. Gupta, Senior Advocate with Ms. Meera Devi, Advocate.
For Respondent No.1: Mr. Ashok Sood, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The extant Civil Revision Petition is directed against the orders recorded by learned Appellate Authority on 19th March, 2015, upon Parvinder Kumar's (petitioner herein)

application, constituted therebefore, under the provisions of Order 6, Rule 17 of the CPC, wherein, it declined him leave to incorporate in his reply, averments (a) of, his occupying the demised premises as a licencee, (b) his being amenable to eviction therefrom, upon, the landlord concerned, instituting a civil suit for eviction against him. The aforesaid application was hence filed at a belated stage.

2. Before proceeding to determine, the validity of the impugned pronounced recorded by the learned Appellate Authority, it is imperative to extract all germane thereto facts; (a) of, the landlord in his apposite eviction petition, in apposite column No.16 thereof, declaring Parvinder Kumar, the petitioner herein, to be occupying, with his consent the demised premises as a subletee; (b) in reply thereto the aforesaid Parvinder Kumar, did not make any specific contention, for his hence repudiating the aforesaid declaration, occurring, in apposite column No.16 of the eviction petition. (c) Ex. AW1/E comprising a verdict recorded by the learned Appellate Authority in Rent Appeal No. 1-R/14 of 2012, wherein, landlord Sain Ram Jhingta and petitioner herein Parvinder Kumar, ARE respectively arrayed as appellant and respondent, making, a graphic declaration, in paragraph No.17, of Parvinder Kumar being a valid sub tenant in the demised premises, (d) given his occupation(s) thereof, as, a sub tenant being under a valid written consent of the landlord. (e) In paragraph No.17 of Ex.AW1/E, a pronouncement occurring, of, the aforesaid conclusion arising from the Appellate Authority concerned, making, an interpretation of the apposite rent deed, borne in Ex.PW4/A.

3. The aforesaid conclusions occurring in the afore-referred exhibits, were, contrarily strived to be ridden of their efficacy, by the aforesaid Parvinder Kumar, only during, the pendency of an apposite appeal before the learned Appellate Authority, directed, against the pronouncement recorded by the learned Rent Controller in Rent Petition No. 1-2 of 2013, (i) by his therebefore belatedly casting, an application constituted under the provisions of Order 6, Rule 17 of the CPC, wherein, he concerted, to obtain leave of the Appellate Authority concerned, to incorporate in his reply, Averments, (a) of his holding the demised premises as a licencee; (b) his landlord concerned being entitled to seek his eviction therefrom by instituting a regular suit, for possession before the Civil Court concerned.

4. The learned counsel appearing for the petitioner herein has with much fervor, made a vibrant espousal, before this Court that even if his application cast, under the provisions of Order 6, Rule 17 of the CPC, stood belatedly instituted before the learned Appellate Authority, (i) ipso facto, thereupon, the declining of relief to one Parvinder Kumar was not valid, given the leave as sought, for, incorporation in the apposite reply, filed by Parvinder Kumar, (ii) the aforesaid averments being just and essential for clinchingly resting the entire controversy(ies), emerging, inter se the parties at contest.

5. For testing the vigour of the espousal(s) addressed before this Court, by the counsel for the petitioner, extraction(s) of the provisions of Order 6, Rule 17 of the CPC is called for, provisions whereof extracted hereinafter:-

> **"17. Amendment of Pleadings.-** the Court may at any stage at the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:
>
> Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

Thereunder statutory empowerment, is bestowed upon courts of law, to permit incorporation of apposite amendment(s), in the pleadings of the litigant concerned, imperatively, when such amendment (a) would enable the court concerned, to, clinchingly determine the apt controversy(ies), erupting, inter se the litigants concerned; (b) the amendment(s) in respect of

incorporation(s) whereof, leave of the court concerned is sought, being necessary for determining the real question(s) in controversy. Bearing in mind the apt statutory principle(s) besides bearing in mind the principle(s) occurring in a catena of judicial verdicts, of liberality being grantable vis-a-vis the litigant(s) concerned, to, through amendments hence incorporate pleadings in the apposite written statement, thereupon, this Court for reasons ascribed hereafter, declines, vis-a-vis Parvinder Kumar, the petitioner herein, the relief of this Court, ordering, for quashing of the impugned order; (a) given, the controversy(ies), upon which, a clinching determination is enjoined besides when a concomitant imperative necessity is cast, upon, Courts, to grant leave for its incorporation, visibly appertaining to the status of one Parvinder Kumar in the demised premises; (b) the controversy(ies), in respect thereto, being rather earlier clinchingly rested besides judicially determined, under, verdict(s) pronounced by the learned Appellate Authority concerned, in a lis wherein both Parvinder Kumar and the Landlord were engaged, verdict whereof is borne in Ex.AW1/E, (c) wherein a graphic declaration is borne of Parvinder Kumar, occupying the demised premises, in the capacity of his being a sub tenant therein, tritely with the written consent of the landlord. (d) As aforestated with the learned Appellate Authority in paragraph No.17, of its pronouncement, comprised in Ex.AW1/E, making, an interpretation of rent deed borne inEx.PW4/A, thereupon, the endeavour made by the learned counsel, appearing for the petitioner herein, for , its being re-interpreted, by this Court, besides upon its apposite re-interpretation, its making revelations, of, Parvinder Kumar, occupying, the demised premises, as a licencee, is not permissible at all, (e) given hence the binding conclusive verdict borne in Ex.AW1/E, wherein, a clear declaration of the status, of Parvinder Kumar, in the demised premises is visibly borne, being thereupon impermissibly hence rendered nugatory. (f). The pronouncement made in Ex.AW1/E, acquires conclusive binding effect, with respect to the pronouncement made therein vis-a-vis the status of Parvinder Kumar, as a sub tenant in the demised premises, conspicuously, with the written consent of the landlord, significantly, hence the verdict borne in Ex.AW1/E is binding upon him, (g) whereupon he is estopped, to, alter his status therein, by his seeking leave of the Court, to, introduce in his reply to the apposite rent petition, an averment of his being a licencee in the demised premises. The aforesaid controversy with respect to the status of Parvinder Kumar, in the demised premises, being hence firmly rested by a judicial verdict borne in Ex. AW1/E, (h) thereupon, there is no surviving controversy in respect thereto inter se the contesting parties, (i) as a corollary , the imperative canon cast, in the substantive provisions of Order 6, Rule 17, of the CPC, whereby the Courts of law ARE permitted, to grant the apposite leave, to the litigant concerned, to incorporate in his pleadings, a contention not initially raised, standing anvilled (j) upon its incorporation being necessary for determining all the real question(s) or all controversy(ies) arising inter se the litigating parties, remains evidently not satiated, (k) given reiteratedly, the apt controversy iter se them, appertaining to the status of Parvinder Kumar, in the demised premises, being previously firmly rested, under, a clinching decision recorded, by the Appellate Authority concerned, decision whereof is borne in Ex.AW1/E, (l) also when the verdict borne therein, is binding upon Parvinder Kumar, thereupon, with no surviving controversy existing, in respect of the aforesaid facet, thereupon no leave can be granted to Parvinder Kumar, to, through, his deploying a stratagem, of, his instituting an application under the provisions Order 6, Rule 17 CPC, hence contrive to benumb its effect.

6. Furthermore, the mandate of the proviso engrafted underneath the substantive provisions of Order 6, Rule 17 of the CPC, proviso whereof stands extracted hereinabove, with utmost reinforced vigour, deprives, Parvinder Kumar, to, strive to obtain the leave of the Court concerned, for his incorporating in his reply, to, the apposite rent petition, averments which were not earlier reared therein, (i) reiteratedly when the plea(s) as strived to be now raised, appertain to controversy(ies) qua which a firm verdict isalready pronounced, (ii) conspicuously, when the aforesaid concert is belatedly made nor when it is espoused, in the apposite application, of, despite exercise of due diligence, Parvinder Kumar, being unaware of the previous verdict or of the apposite rent deed, (iii) significantly, hence with the mandate, of, the proviso occurring underneath Order 6, Rule 17, of the CPC, visiting its ill effect(s) upon the instant application, also when apparently, he was arrayed as a party in the previously pronounced verdict, besides when he omitted to assail it, renders it to acquire conclusivity, thereupon, also the findings occurring

in paragraph No.17 of Ex.AW1/E are binding upon him, leaving him incapacitated to at a belated stage hence benumb their effects.

7. 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 off. No order as to costs. Records be sent back forthwith.

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

Puneet Goel & another .....Appellants.
Versus
State of H.P. & others .....Respondents.

RFA No. 31 of 2011.
Reserved on : 24.11.2017.
Date of Decision: 5th December, 2017.

Land Acquisition Act, 1894- Section 18- Determination of market value of the land- Various parcels of land acquired for widening of Shimla-Mandi, National Highway-88 – Land Acquisition Collector assessed varying rates of compensation for lands bearing different classifications- **Held**, that when land is acquired for common purpose like for widening of National Highway, the factum that different parcels of land are of different and varying classifications in the revenue record becomes insignificant- uniform rate of compensation is liable to be given for every parcel of land notwithstanding contradistinct category- Land Acquisition Collector and 1St Reference Court committed impropriety in calculation of compensation- Rate of compensation for all categories of land shall be payable at the rate assessed by Land Acquisition Collector for land having description 'Bhakal Awal' along with all the statutory benefits qua interest etc- appeal allowed.

(Para-7 and 8)

For the Appellant(s): Mr. Sunil Mohan Goel, Advocate.
For the respondent(s): Mr. R.S. Thakur, Addl. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal is directed against the award pronounced by the learned Reference Court, upon, Land Reference Petition No. 1-S/4 of 2009, whereunder, the learned Reference Court, assessed market value of the land brought to acquisition, to fall in a sum of Rs.2,450/- per square meter also thereon it levied all the statutorily accruable benefits.

2. The respondent, under, a notification bearing No. PBW-(b)A(7)1-160/2006 of 14.05.2007, notification whereof was issued under Section 4 of the Land Acquisition Act (hereinafter referred to as the Act), hence, brought to acquisition the apposite land, measuring 64 square meters, for a public purpose, namely, for widening and construction of Shimla-Kangra, National High Way-88. Uncontrovertedly, the acquired land, in the apposite column of the jamabandi concerned, carries, the nomenclature of "Banjar Kadeem". The Land Acquisition Collector assessed in respect thereto compensation borne in a sum of Rs.1186.24 paise per square meter. In respect of Bakhal Awal land and in respect of Bakhal Doyam land, he proceeded, to, respectively assess market value(s) borne in sum of Rs.8,600.24 paise and in a sum of Rs.5,535.78 paise per square meter. The landowners/petitioners/ appellants herein, being, aggrieved therefrom hence reared a petition before the learned Reference Court, thereupon, the learned Reference Court, upon, considering the germane evidence adduced therebefore by the contesting parties made its valuation in a sum of Rs.2,450/- per square meter.

3. The enjoined legal parameters, for making valid determinations, of, market values, of acquired lands besides thereafter assessing a just and fair compensation in respect of their acquisition ARE (a) proximity in time angle inter se the issuance of the apposite notification vis-a-vis the execution(s) of the relevant sale exemplars AND (b) proximity in location angle inter se the lands brought to acquisition vis-a-vis the lands borne in the sale exemplars.

4. The impugned award recorded by the learned Reference Court, would, acquire a halo of validation, only when, upon, its incisive reading, disclosures emanate, of, the aforesaid legally enjoined parameters, being visibly borne in mind. The learned Reference Court, had, in computing the market value, of, the lands brought to acquisition, proceeded, to place implicit reliance, upon, Ex.PW1/A, exhibit whereof is a sale deed executed on 26.06.2004, (i) whereafter, it proceeded to make 10% accretion(s) for the year succeeding thereto, whereupon it computed its per square market value in a sum of Rs.2,023/- per square meter, (ii) whereafter it thereon added 10% appreciation for the second successive year(s), hence computed its per square meter market value in a sum of Rs.2,225/- and (iii) thereafter, it, for the year immediately preceding, the year of issuance of the apposite notification also added thereon 10% escalation, thereupon it reckoned the per square meter market value, of, the acquired land in a sum of Rs.2,450/-. The aforesaid manner of computation, of, the per square meter market value of the lands brought, to acquisition, is per se ridden with a gross infirmity, (iv) conspicuously, hence he blatantly infringed the legally approbated aforesaid twin parameters, for, hence his arriving at valid just and fair compensation, with, respect to the lands brought to acquisition. The reason for drawing the aforesaid inference, is marshalled from (v) the apposite notification being issued on 14.05.2007, whereas, Ex.PW1/A standing executed, three years, prior thereto, thereupon, the salient principle, of, it bearing proximity inter se the date of its execution vis-a-vis the date of issuance of the notification, remains visibly infringed. Even though, the subsequent parameter of proximity in location angle visibly ocurring inter se lands borne therein vis-a-vis the lands brought to acquisition, may stand satiated, also thereupon, satisfaction(s) of one of the twin enjoined parameters, for computing just and fair compensation, was, neither sufficient nor statutorily tenacious, nor on anvil thereof, the learned Reference Court, could, in the manner aforesaid, make, any valid determination, of, just and fair compensation vis-a-vis the lands brought to acquisition.

5. In making apt determination(s) qua the most befitting sale exemplar/documentary evidence, given, its, for all reasons ascribed hereinafter, hence, satiating the aforestated twin parameters, an allusion is imperative vis-a-vis the one borne in Ex.PW1/C. Ex. PW1/C was tendered into evidence by PW-1. During the course of his testification, he, articulates, of, the aforesaid exhibit comprising, an award pronounced by the Land Acquisition Collector concerned, whereunder, he determined compensation, for land acquired for construction of road from Shimla Chakkar to New Judicial Complex, whereunder, market values of acquired lands, classified, as Banjar Kadeem, is assessed in a sum of Rs.2,568.28 paise per square meter. He in his testification also rendered a communication of lands borne in Ex.PW1/C, holding proximity with the lands brought to acquisition hereat, besides has continued to testify (i) that in the vicinity of the lands brought, to acquisition, there existing a school and a bank. Consequently, in his testification, he voices, of, the lands brought to acquisition holding immense commercial value besides potentiality and in future, theirs holding abundant potential for rearing heavy pecuniary gains to him. During the course of his cross-examination, he was subjected to an ordeal of a rigorous cross-examination, for, belittling the efficacy, of, his articulations borne in his examination-in-chief, qua the inter se distance inter se the acquired land and the land acquired for construction of road for the judicial Court complex, in respect whereof an award comprised in Ex.PW1/C stood pronounced, being not more than a kilometer, yet the apposite suggestion in respect thereof put to him did not, sequel an apt befitting response from PW-1. Also the respondents, during, the course of adduction of their evidence, omitted to adduce any cogent evidence, wherein markings, with specificity occurred qua the exact distance inter se the lands brought to acquisition hereat vis-a-vis the lands acquired for construction of road, from, Chakkar to judicial court complex. Absence of adduction, of best befitting cogent documentary

evidence by the respondents, wherein candid, markings upsurged qua the intra se distance inter se the lands brought to acquisition hereat vis-a-vis the acquired lands in Ex.PW1/C, (i) hence fosters, an inference, of, the testification rendered by PW-1 of intra se distance inter se the lands brought to acquisition hereat vis-a-vis the lands borne, in Ex.PW1/C, being proximate, being amenable for imputation of credence thereon, (ii) thereupon, satiation of the imperative parameter, of, occurrence of proximity in location angle inter se the lands borne in Ex.PW1/C vis-a-vis the lands brought to acquisition hereat, is obviously begotten.

6. Even when the aforesaid para meter, of proximity in location angle inter se the land brought to acquisition vis-a-vis lands borne in Ex.PW1/C, begets satiation, the learned Reference Court appears, (i) to merely on anvil, of the apposite notification being issued, on 14.05.2007, whereas the notification for acquisition, of, lands borne in Ex. PW1/C, being issued, merely three months subsequent thereto, (ii) appears to have inaptly construed qua thereupon the parameter of proximity in time angle inter se the apposite notification hereat vis-a-vis the notification in respect whereof the award borne in Ex.PW1/C, stood pronounced, not begetting satiation, thereupon, it erroneously declined to place reliance thereon.

7. Dehors the above, besides dehors any apparent infirmities embodying Ex.PW1/B, yet would not forestall this Court to place reliance thereon, in making determination(s) of just and fair compensation vis-a-vis the land(s) brought to acquisition. The lands of the petitioners/appellants herein were brought to acquisition under an apposite notification, in respect whereof, award comprised in Ex.PW1/B was pronounced, rather renders the latter award to be apt parameter, for making valid determination(s) of just and fair compensation vis-a-vis the lands brought to acquisition. The Land Acquisition Collector concerned thereunder determined compensation qua the lands brought to acquisition, at diverse rate(s), vis-a-vis contradistinct/varying categories of land brought to acquisition, inasmuch as, qua Bakhal Aval land AND qua Bakhal Doyam Land, he determined compensation respectively in sum of Rs. Rs.8,600.24 paise and in a sum of Rs.5,535.78 paise, per square meter, whereas, for land(s) classified as "Banjar Kadeem and Ghasni", he proceeded to assess their market value, respectively in a sum of Rs.1,186.24 paise and in a sum of Rs.296.56 paise per square meter. The aforesaid diverse determination(s) of compensation amounts, for contradistinct categories of lands, is per se illegal, given a catena of judicial verdicts, making forthright pronouncements, (i) of, when acquired lands through carry different and varying classifications, whereas, they are acquired for a common purpose, (ii) the factum, of theirs bearing contradistinct nomenclature(s) in the apposite classification column of the revenue record , being insignificant, (iii) rather all contradistinct categories of lands being amenable to determination of uniform rate(s) of compensation. Thereupon, when uncontrovertedly, with acquired lands bearing varying categories/classifications, stand acquired for a common purpose, thereupon, bearing in mind the settled principles of law, of, lands upon their acquisition, for a common public purpose, as the lands in the instant case, stood acquired, for widening of Shimla-Mandi, National Highway-88, thereupon, the effect, of, theirs carrying distinct categorizations or varying classifications, hence waning, (iv) especially when in sequel, to, the completion of the public purpose for which the lands are acquired, inasmuch as on completion of construction of the public road, their diverse classifications and categorizations, hence losing, significance, (v) rather theirs acquiring a common/uniform potentiality, concomitantly, hence, necessitating assessment of uniform/common rates of compensation for each diverse category(ies) of acquired land(s). Obviously, thereupon uniform rates of compensation ought to be assessed, for, different categories of lands or lands bearing different classifications. Since, in contravention of the settled legal position, envisaging assessment of uniform rates of compensation qua lands bearing different categories/classifications, (vi) especially when lands bearing different classification, were, acquired for a common public purpose, the Land Acquisition Collector has proceeded to assess varying or distinct rates of compensation for lands bearing distinct categories or classifications, thereupon, he has irrevered the aforesaid principle of law, hence, both the Reference Court and the Land Acquisition Collector concerned, have committed an impropriety. The said impropriety needs to be undone.

8. Consequently, the instant appeal is allowed and it is held that the rate of compensation for all categories of land, including land(s) of the appellants herein, shall be at the rate assessed qua Bhakal Awal i.e. Rs.8,600.24 paise per square meter along with all the statutory benefits detailed hereinafter:-

(a) Interest at the rate of 12% per annum on the market value from the date of notification under Section 4 of the Act till the date of award under Section 23(1-A) of the Act.

(b) In addition to the market value, the appellants are held entitled to get solatium or compulsory acquisition charges at the rate of 30% on such market value as provided under Section 23(2) of the Act; and

(c) Interest at the rate of 9% per annum from the date of notification under Section 4 of the Act upto one year and thereafter, at the rate of 15% per annum, till payment is made in the Court as provided under Section 34 of the Act.

The impugned award is modified 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.

Randheer Sharma .....Petitioner.
Versus
State of H.P. & others .....Respondents.

Cr.MMO No. 122 of 2015.
Reserved on: 22nd November, 2017.
Date of Decision:5th December, 2017.

Indian Penal Code, 1860- Sections 143, 430, 447, 448, 120-B - **Scheduled Caste and Scheduled Tribes Prevention of Atrocities Act, 1989-** Sections 3(1) (5)/3(1) (13)/3(2) (7**)-Quashing of FIR**- Complainant preferred CWP before Hon'ble High Court in respect of the same allegations as alleged in the FIR- the present petitioner not arrayed as co-respondent in said CWP- Nothing on record supports the contention of the complainant that role of the petitioner entailing penal consequences came to his notice after filing CWP- **Held**- relying upon the law laid down in ***State of Harayana v. Bhajan Lal, AIR 1992, S.C., 604*** that where criminal proceedings are manifestly attended with malafide and FIR is result of manipulation and desire of wreaking vendetta in gross abuse of process of law, then such FIR needs to be quashed- accordingly, FIR quashed- Petition disposed of. (Para-3 and 4)

Case referred:
State of Harayana v. Bhajan Lal, AIR 1992, S.C., 604

For the petitioner: Mr. Ashok Sharma, Senior Advocate with Ms. Sukarma, Advocate.
For respondents No.1 to 3: Mr. Vivek Singh Attri, Addl. A.G.
For Respondent No.4: Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Through, the instant petition cast under the provisions, of, Section 482 of the Code of Criminal Procedure (hereinafter referred to as the Cr.P.C.), the petitioner prays for

quashing of FIR No. 57, of 17.09.2013, registered in Police Station Swarghat, District Bilaspur, H.P., under Sections 143, 430, 447, 448, 120-B of the IPC and Sections 3(1) (5)/3(1) (13)/3(2) (7) of the Scheduled Caste and Scheduled Tribes Prevention of Atrocities Act, 1989.

2. The aforesaid FIR, was, lodged in pursuance to orders pronounced upon a complaint, made on 14.12.2010 by complainant one Bir Singh, before the learned Magistrate concerned. In the FIR, allegations, are constituted against the petitioner, of, his making directions upon other accused, embodying therein ascription(s) vis-a-vis him of incriminatory roles, ascriptions whereof fall within, the domain of the apposite provisions of IPC, (I) the penally inculpable directions whereof are comprised in his ordering for theirs locking the pump house of the apposite water supply scheme, for hence depriving the complainant and other co-villagers, all of whom, belong to a scheduled caste community, from the benefit(s) of the water scheme. The aforesaid allegations, detailed, in the apposite FIR vis-a-vis the petitioner would carry prima facie credence also would stall this Court, from concluding that the prosecution of the accused, tantamounting to his being subjected to an ordeal of his facing unnecessary trial, or upon his being prosecuted, there being evident abuse of process(es) of law. Any conclusion, of, the prosecution, of, the accused/petitioner sequelling befallment upon him of unnecessary humiliation and harassment, besides the concert of the complainant, to ensure the prosecution, of the petitioner, tantamounting, to abuse of process of law, (i) would spur upon existence of material on record, revealing, that the allegations reared against the petitioner being a mere contrivance also theirs being engineered by sheer after thought. (ii) The relevant materials, for making discernment(s) qua the allegations constituted in the FIR, against, the petitioner, being a sequel, of, sheer contrivance besides being engineered by afterthought or active confabulations, hence theirs being ridden with a vice of falsity, (iii) whereupon, his prosecution is rendered construable to constitute abuse of process(es) of law, is comprised in CWP No. 2096 of 2010, CWP whereof stood instituted by the complainant before this Court on 12.05.2010, (iv) therein vis-a-vis all the alike therewith grievance(s) ventilated in the apposite FIR, no, ascription(s), is embodied, of any incriminatory role vis-a-vis the petitioner herein. Moreover, he has not been impleaded, as co-respondent in CWP No.2096 of 2010. Given the institution of CWP No.2096 of 2010, occurring, on 12.05.2010 and the petitioner herein being, not arrayed, as a co-respondent therein nor any ascription(s) of any incriminatory role(s) being ventilated therein vis-a-vis the petitioner, (v) also especially when all the grievance(s) ventilated in CWP No. 2096 of 2010, hold affinity vis-a-vis the grievance(s) ventilated in the apposite FIR. (vi) Consequently, the subsequent thereto, instituted complaint, on 14.12.2010, cast under the provisions of Section 156(3) of the Cr.P.C., before the learned Chief Judicial Magistrate, Bilaspur, H.P., in sequel, whereto, an order for registration of the FIR was made, (vii) wherein, ascription(s) of incriminatory roles are echoed vis-a-vis the petitioner herein, renders their incorporation therein vis-a-vis the petitioner, to be a sequel, of sheer afterthought, manipulation besides contrivance. Importantly also when CWP No. 2096 of 2010 stood instituted prior to the institution of the apposite complaint vis-a-vis grievance alike the ones borne in the apposite FIR, thereupon, the petitioner was enjoined to, in the aforesaid Civil Writ Petition, make vivid communication(s) vis-a-vis the incriminatory role, of, the petitioner in the relevant penal occurrence also was enjoined to array him, in the apposite CWP, as a co-respondent. However, he has omitted to make ascription(s), of, any incriminatory role vis-a-vis the petitioner herein, in the apposite CWP nor he therein impleaded him, in the array of co-respondents. Consequently, the subsequent thereto instituted complaint by the complainant, carrying ascription(s) therein, of, incriminatory role(s) vis-a-vis the petitioner herein also render open a conclusion, of embodiment in the complaint, of, ascription(s) of incriminatory role vis-a-vis the petitioner herein, being invented, merely for falsely implicating him, (viii) wherefrom, it is befitting to conclude that in case he is subjected to the ordeal of trial, he would be put to unnecessary humiliation and harassment AND also his prosecution would tantamount to gross abuse of process(es) of law.

3. Since, under Section 482 of the Cr.P.C., a plenary jurisdiction is vested in this Court, to, (i) in the event of proven abuse of process(es) of law also (ii) for forestalling any befallment of any unnecessary humiliation upon the aggrieved, (iii) besides when a close reading,

of the apposite material, on record, unveils of ascription(s) of penal misdemeanors vis-a-vis the petitioner/aggrieved, arising, from sheer invention besides contrivance, hence quash the apposite proceedings. Thereupon, with the germane apposite thereto aforestated material hence begetting satiation(s), thereof, hence constrains this court to allow the instant petition. Moreover, the principle(s)/guidelines appertaining to valid exercise of extraordinary powers vested under Section 482 of the Cr.P.C., stand expostulated, by the Hon'ble Apex Court, in a case titled as ***State of Harayana v. Bhajan Lal, AIR 1992, S.C., 604,*** the relevant paragraph No.108 whereof stands extracted hereinafter, within domain(s) whereof, also the relevant material hereat falls,:-

> "108. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decision relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.
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> 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 F.I.R. 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.
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> 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.
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> 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.
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> 5. Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused;
>
> 6. Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party;
>
> 7. Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

4. Furthermore, the effect(s) of the aforesaid inferences would stand effaced, if, evident material depicting qua the tangible reason(s), precluding, the complainant, to, in CWP No.2096 of 2010, hence make any ascription(s) vis-a-vis the petitioner herein, (i) rather his subsequently acquiring knowledge in respect of the penal misdemeanors, of the petitioner herein. However, a reading of the reply furnished by the State also readings of the material existing on record, does not, make any upsurging(s) (ii) of the complainant being earlier precluded, from,

obtaining knowledge of the incriminatory roles of the petitioner, especially at the stage of his filing the aforesaid CWP before this Court, (iii) hence his omitting to make ascription(s) therein vis-a-vis the petitioner also his hence omitting, to, array the petitioner herein as a co-respondent, in the apposite CWP. Consequently, the aforesaid omissions, on the part of the complainant, constrains an inference that he has subsequently levelled false allegations against the petitioner herein, also theirs being a sequel of his being prodded or actuated, (iv) wherefrom it is inevitable to conclude, that, the allegations levelled against the petitioner herein in the apposite FIR are a result of proactive manipulation(s), invention(s) and premeditation(s), besides are engendered by spite AND for wreaking vendetta upon the petitioner. Further more, as its natural corollary, it is apt to conclude that the prosecution of the petitioner would befall unnecessary humiliation and harassment, upon him, and also would result in gross abuse of process(es) of law.

5. For the foregoing reasons, the instant petition is allowed and FIR No. 57, of 17.09.2013, registered in Police Station Swarghat, District Bilaspur, H.P., under Sections 143, 430, 447, 448, 120-B of the IP and Sections 3(1) (5)/3(1) (13)/3(2) (7) of the Scheduled Caste and Scheduled Tribes Prevention of Atrocities Act, 1989, is quashed only qua the petitioner herein. Records be sent back forthwith. All pending applications also stand disposed of.

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

Rup Lal .....Appellant/Plaintiff.
Versus
Mast Ram & another .....Respondents/Defendants.

RSA No. 117 of 2006.
Reserved on: 1st December, 2017.
Decided on: 5th December, 2017.

Specific Relief Act, 1963- Section 5- Suit for Possession- Defendants encroached upon the part of the suit land by raising a retaining wall – encroachment depicted in tatima- suit was dismissed by the learned Trial Court as well as learned 1st Appellate Court on the ground that demarcation report in the consequence of which said tatima is prepared has neither been proved nor tendered in the evidence- **Held**, that evidence on record suggests that defendants have acquiesced the preparation of tatima and the validity of the demarcation report preceding the preparation of tatima – defendants thus, cannot raise objection qua non bringing of the demarcation report on record – in these circumstances, courts below erred in appreciating the evidence- appeal succeeds. (Para- 9 to 11)

For the Appellant: Mr. K.D. Sood, Senior Advocate with Rajneesh Lal, Advocate.
For the Respondents: Mr. Neeraj Gupta, 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, upon, the plaintiff's suit for possession of suit land, as delineated in the plaint, whereby, both the latter Courts' proceeded to dismiss the plaintiff's suit.

2. Briefly stated the facts of the case are that the plaintiff is owner of the suit land and the defendants have no rights, title or interest in the suit land and there is a house of the plaintiff over khasra No.576/313, which has been constructed by him about five years back. The plaintiff had left about four feet land for the purpose of passing he water of his house as well as

rainy water but the defendants raised construction in the suit land in his absence and they have constructed a danga over the same without the permission and consent of the plaintiff due to which the water has accumulated near the wall and is causing damage to the house of the plaintiff. The plaintiff asked the defendants to remove the danga so constructed by him in the suit land but of no use.

3. The defendants contested the suit and filed written statement, wherein, they have taken preliminary objections qua cause of action and estoppel. It has been stated that defendant No.1 purchased land comprising khasra No. 517/313/1, measuring 0-00-44 hectare from Sh. Balak Ram, which is adjoining to the suit land and the defendants have constructed danga in their own land during 1998 in the presence of the plaintiff and his family members. Patwari also called by the Pradhan and the said danga was constructed after demarcation in the year 1998 by the Patwari and Kanungo. Even Sub Divisional Magistrate has also visited the spot and got demarcated the land in which danga was found in the land of the defendants but the plaintiff has filed the present suit to harass the defendants.

4. The plaintiff/appellant herein filed replication to the written statement of the defendants/respondents herein, wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the plaintiff is owner of the suit land? OPP.
2. Whether the defendants have encroached upon the suit land? OPP.
3. Whether the plaintiff is entitled for decree of possession? OPP.
4. Whether the suit is not legally maintainable? OPD.
5. Whether there is no enforceable cause of action? OPD.
6. Whether the plaintiff is estopped to file the suit? OPD.
7. Whether the suit is hit by principle of acquiescence? OPD.
8. Relief.

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

7. Now the plaintiff/appellant herein, has instituted the instant Regular Second Appeal before this Court, wherein, he assails the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission on26.03.2007, this Court, admitted the appeal instituted by the plaintiff/appellant against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial question of law:-

a) Whether the two Courts below could not have passed the final judgment in the matter without affording an opportunity to the appellant plaintiff to seek demarcation of the boundary of the adjoining properties of the parties or to prove the report of demarcation, if some demarcation had already been carried out and both the parties were party to the demarcation application?

Substantial question of Law No.1.

8. The fulcrum, of, the entire controversies engaging the parties at contest, squarely rests, upon, the validity, of, tatima borne in Ex.PW2/A. Ex.PW2/A makes earmarkings, of, (i) upon khasra No.576/313/1, a, danga being erected by the defendants. Carving of the aforesaid apt decreeable khasra number, in Ex.PW2/A, is, from khasra No. 576/313, khasra number whereof, as divulged by the apposite jamabandi, comprised in Ex.P-1 is owned and possessed by the plaintiff. With the afore referred specific portion, of, khasra No.576/313 being evidently also

owned and possessed by the plaintiff AND its being encroached, upon, by the defendants, by theirs raising a danga thereon, may constitute evidence, of, probative vigour also in respect thereto, an executable decree was renderable. However, both the learned Courts below disimputed probative solemnity vis-a-vis Ex. PW2/A, (ii) solely on the ground of demarcation report, in sequel whereof it stood prepared, being neither tendered into evidence nor it being proved by its author. The validity of the reasons ascribed by both the learned Courts below, for theirs refusing to assign probative vigour, to Ex.PW2/A, is to be fathomed from the testification of PW-3 and DW-1.

9. PW-3 in his testification comprised in his examination-in-chief, make echoings of Ex.PW2/A, being prepared by the Patwari subsequent, to his holding demarcation. The counsel for the defendants held him, to a close scathing cross-examination, wherein affirmative suggestions were purveyed to him, (a) of the Tehsildar concerned being present at the relevant stage, of, his holding demarcation of the contiguous estates of the parties at contest, (b) affirmative suggestion whereof evinced an affirmative response from him. (c) A further affirmative suggestion was put, to, PW-3 by the learned counsel for the defendant, of his also accompanying the SDM concerned, at the time, when, the latter carried demarcation, of, the respective contiguous estates of the parties at contest, suggestions whereof evinced an alike affirmative respondent from PW-3. A communication also occurs in his testification, borne in his cross-examination, of, at the relevant time, of, his conducting demarcation, of, the contiguous estates of the parties at contest of (d) his carrying aks musabi and (e) his placing reliance thereon, for the relevant purpose AND (f) thereafter his holding an accurate demarcation. (g) He also echoes, in his cross-examination, of, his demarcation being affirmed by the Tehsildar concerned, besides he negatives the suggestion put to him, of, his demarcation holding variance, with, the demarcation previously conducted by the SDM concerned. In concurrence with the aforesaid, testification rendered by PW-3, recitals are visibly borne in Ex.PW2/A, of, the latter exhibit, being prepared in consonance with the demarcation held on 7.6.1999 by PW-3.

10. DW-1 in his cross-examination, makes, a disclosure, of, ademarcation being held on 12.06.2000, of, the contiguous estates of the plaintiff and the defendants AND in consonance therewith, he makes a disclosure therein, of a tatima being also prepared. However, the aforesaid purported demarcation held on 12.06.2000, of, the adjoining estates of the parties to the lis, has, not been adduced into evidence.

11. Nowat, bearing in mind the aforesaid relevant testifications rendered by PW-2 and DW-1, does constrain this Court, to conclude, of, in the learned Courts below refusing to ascribe evidentiary worth vis-a-vis Ex.PW2/A, (I) merely, on the ground of the demarcation report being neither tendered nor proven by PW-3, its author, thereupon, both being hence defacilitated to render a decree, for possession of the specific portion of khasra No.576/313, whereto a separate khasra No. 576/313/1 is ascribed, (ii) being hence for the hereinafter assigned reasons, grossly fallacious. (a) With Ex.PW2/A holding clear graphical recitals, of, its preparation being in consonance with the demarcation held on 7.6.1999 by PW-3; (b) PW-3 while stepping into the witness box, his corroborating the aforesaid note occurring in EX.PW2/A; (c) the counsel for the defendant while subjecting PW-3, to cross-examination, putting affirmative suggestions vis-a-vis him, of the demarcation conducted by him being affirmed by Tehsildar AND; (d) of, the Tehsildar accompany PW-3 at the stage of the latter holding demarcation, of the contiguous estates of the contesting parties; (e) of demarcation being held by PW-3, in consonance with his adhering, to, the apt recitals borne in the aks musabi, which he carried with him, at, the apposite stage of his holding demarcation of the contiguous estates, of, the parties at contest; (f) PW-3 negativing, a suggestion put to him, of, the demarcation conducted, by him holding variance with the prior thereto demarcation held by the SDM concerned. (g) Furthermore, the effect(s) of the defendants hence obviously acquiescing, to the veracity(ies), of, the aforestated apposite affirmative responses meted by PW-3 vis-a-vis in tandem therewith apposite affirmative suggestions, ARE, as a corollary thereof, (h) of the defendants obviously hence also acquiescing, to, the validity of the demarcation conducted by PW-3, besides given theirs not eliciting the demarcation report, prepared in sequel to the demarcation, conducted by the SDM concerned, for theirs hence

making a concert, to, bely the testification rendered by PW-3, in his cross-examination, of, the demarcation held by him, in consonance whereof Ex.PW2/A stood prepared, rather holding variance therewith. (i) Contrarily, with the defendants' counsel only mechanically concerting, to elicit from PW-3, of, Ex.PW2/A not holding concurrence with the apt demarcation held by the SDM concerned, rather fortifyingly impute(s) validation thereto. (j) Reitertedly, when it has not been demonstrably objected to nor when Ex.PW2/A is evidently, not, demonstrated to bear dis-concurrence therewith. In aftermath, when PW-3 makes, all the aforestated responses in his testification, thereupon, this Court conclude(s), of, the defendants acquiescing, to, the validity of preparation of Ex.PW2/A also its preparation being preceded, by a valid demarcation conducted by PW-3, of, the contiguous estates of the parties at contest. (k) Conspicuously, rather the defendants' counsel, not, yet making any concert, to elicit from PW-3 or from the plaintiff or from the records, the demarcation report, in sequel, whereof Ex.PW2/A was prepared by the patwari concerned, (l) especially given occurrence of a note therein, of, its preparation being sequelled, by PW-3 validly holding demarcation(s), of the contiguous estates, of, the parties at contest. Consequently, absence of the aforestated concert(s) by the defendants, to, confront PW-3 with the demarcation report prepared by him, rather theirs purveying vis-a-vis him, all the aforesaid apposite suggestion, whereto he purveyed affirmative responses, whereupon, he pronounced upon the validity of Ex.PW2/A besides qua validity(ies) of the demarcation conducted prior thereto by him, cannot, obviously at this belated stage, render them empowered, to make a frail effort, to, invalidate Ex.PW2/A, (m) merely, as untenably concluded by both the learned Courts below, of, the demarcation report prepared by PW-3 being neither tendered into evidence nor proven by him. Conspicuously, reiteratedly when all the aforesaid endeavours, despite, being available at the appropriate stage, to, the defendants, yet remaining omitted to be availed by them, (n) thereupon, they are estopped to invalidate Ex.PW2/A, solitarily, upon, demarcation report, evidently prepared, in consonance thereto, being not tendered into evidence. Accordingly, substantial question of law is answered in favour of the plaintiff/appellant and against the defendants/respondents. In view of the above, CMP No. 321 of 2006 and CMP No. 410 of 2006, are rendered infructuous, hence, are dismissed.

12. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as well as by the learned trial Court are not based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court have excluded germane and apposite material from consideration.

13. In view of the above discussion, the instant appeal is allowed and the impugned judgments and decrees rendered by both the learned Courts below are set aside. Consequently, the suit of the plaintiff is decreed and the plaintiff/appellant herein is held entitled for vacant of possession of suit land shown as Khasra khasra No. 576/313/1 in Ex.PW2/A, by way of demolition of the danga raised thereon. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back.

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

Saroj Kumari .....Petitioner.

Versus

Suresh Kumar & others .....Respondents.

Cr.MMO No. 14 of 2017.
Reserved on: 30th November, 2017.
Date of Decision: 5th December, 2017.

Code of Criminal Procedure, 1973- Section 482- Sections 471, 468 and Section 109 of the IPC- The allegation against the accused is that they prepared forged will of one Gian Chand- it

was contended that the validity of Will in question is pending adjudication before Civil Court and simultaneous institution of criminal proceedings in respect of same allegation is abuse of process of law- **Held**, relying upon the judgment of Supreme Court in **M.S. Sheriff and another versus State of Madras and others, AIR 1954 S.C. 397 that** criminal matter should be given precedence, if it is fair and just to do so in the given facts and circumstances- the mere fact that the civil proceedings are pending cannot create a bar in continuation of criminal proceeding in respect of the same matter- no merit in the petition- petition dismissed. (Para-5 and 7)

Cases referred:
Sardool Singh and another versus Smt. Nasib Kaur, 1987 (Supp) SCC 146,
M.S. Sheriff and another versus State of Madras and others, AIR 1954 S.C. 397

For the petitioner:	Mr. Dheeraj K. Vashisat, Advocate.
For respondents No.1:	Mr. Dinesh Chnder Sharma, Advocate.
	Respondents No.2 to 4 are ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Through, the instant petition, constituted under Section 482 of the Code of Criminal Procedure (hereinafter referred to as the Cr.P.C.), the petitioner prays, for quashing of summoning orders, of 28.09.2016, rendered in Case No. 430-1-2014, by, the learned Additional Chief Judicial Magistrate, Court No.1, Amb.

2. In the complaint lodged by one Suresh Kumar, therein penal ascription(s) occur, vis-a-vis the accused named therein, qua theirs committing offences punishable under Sections 471, 468 and Section 109 of the IPC, comprised in theirs with inter se collusion, hence, abetting the preparation of the purportedly forged Will, of, the deceased testator concerned. The aforesaid complaint was instituted on 19.08.2014.

3. Be that as it may, prior thereto, the complainant one Suresh Kumar along with one Ashok Kumar, instituted a Civil Suit, before, the learned Civil Judge, Sr. Division, Amb, District Una, claiming therein rendition of a decree, for, declaration of both along with the defendants therein, being jointly entitled to succeed to the estate of deceased, one Gian Chand. An averment is borne in the apposite plaint, appended with the instant petition, as Annexure P-1/T, of, the aforesaid deceased Gian Chand dying *ab intestato*. In the written statement instituted thereto, copy whereof is appended with the instant petition, as Annexure P-2, a contention was raised, of, deceased Gian Chand, rather executing a testamentary disposition qua his entire estate vis-a-vis the legatee named therein. Since the validity, of, the testamentary disposition executed by deceased testator Gian Chand vis-a-vis the legatee named therein, is the subject matter of a lis in the apposite Civil Suit, thereupon, a contention is reared by the counsel for the petitioner, that, the continuation of the criminal complaint instituted, by co-plaintiff Suresh Kumar, against the accused named therein, would tantamount, (i) to abuse of process of law, (ii) besides upon its being permitted to be continued and a decision being recorded by the Criminal Court concerned, qua the allegations reared therein being valid, (iii) thereupon, it may therefrom beget rendition(s) in conflict vis-a-vis the one as may ultimately emanate from the Civil Court concerned, (iv) besides may hence present the Civil Court concerned with a *fait accompli,* (v) especially upon the criminal Court, pronouncing a verdict prior, to a rendition being recorded, upon, the apposite civil suit, by the Civil Court concerned. Consequently, the learned counsel for the petitioner, prays, that the Civil Court alone is competent to pronounce, upon, the validity of the testamentary disposition, of, deceased testator Gian Chand AND subsequent thereto instituted complaint warrants its being quashed and set aside, it being an abuse of process(es) of law.

4. In making the aforesaid submission, the learned counsel, for the petitioner has placed reliance, upon a decision rendered by the Hon'ble Apex Court, in a case titled as ***Sardool Singh and another versus Smt. Nasib Kaur, 1987 (Supp) SCC 146***, relevant paragraph No.2 whereof reads as under:-

> "2. A civil suit between the parties is pending wherein the contention of the respondent is that no Will was executed whereas the contention of the appellants is that a Will has been executed by the testator. A case for grant of probate is also pending in the court of learned District Judge, Rampur. The civil court is therefore seized of the question as regards the validity of the Will. The matter is sub judice in the aforesaid two cases in civil courts. At this juncture the respondent cannot therefore be permitted to institute a criminal prosecution on the allegation that the Will is a forged one. That question will have to be decided by the civil court after recording the evidence and nearing the parties in accordance with law. It would not be proper to permit the respondent to prosecute the appellants on this allegation when the validity of the Will is being tested before a civil court. We, therefore, allow the appeal, set aside the order of the High court, and quash the criminal proceedings pending in the court of the Judicial Magistrate, First Class, Chandigarh in the case entitled Smt. Nasib Kaur v. Sardool Singh. This will not come in the way of instituting appropriate proceedings in future in case the civil court comes to the conclusion that the Will is a forged one. We of course refrain from expressing any opinion as regards genuineness or otherwise of the Will in question as there is no occasion to do so and the question is wide open before the lower courts.

He submits that when therein, the Hon'ble Court, was engaged with a factual scenario besides with the pronouncement made therein, specifically appertaining, to, (i) an eventuality, of, the Civil Court concerned, being beset, upon, determining the validity of execution(s) of the testamentary disposition of the testator concerned, (ii) thereupon, in consonance therewith ANY continuation, of criminal proceedings against the accused, for, theirs purportedly fabricating the apposite testamentary disposition, in respect of validity whereof, civil proceedings are yet pending, being both impermissible besides invalid.

5. However, the aforesaid submission addressed before this Court, is, controvered by the learned counsel appearing for the respondent/complainant, by his placing reliance, upon, a decision rendered by the Constitution Bench, of, the Hon'ble Apex Court in a case titled as ***M.S. Sheriff and another versus State of Madras and others, AIR 1954 S.C. 397,*** the relevant paragraphs No.14, 15 and 16 whereof stand extracted hereinafter:-

> "14. We were informed at the hearing that two further sets of proceedings arising out of the same facts are now, pending against the appellants. One is two civil suits for damages for wrongful confinement. The other,is two criminal prosecutions under Section 344, I.PC., for wrongful confinement, one against each Sub-Inspector. It was said that the simultaneous prosecution of these, matters will embarrass the accused.
>
> But after the hearing of the appeal we received information that the two criminal prosecutions have been closed with liberty to file fresh complaints when the papers are ready, as the High Court records were not available on the application of the accused As these prosecutions are not pending at the moment, the objection regarding them does not arise but we can see that the simultaneous prosecution of the present criminal proceedings out of which this appeal arises and the civil suits will embarrass the accused. We have therefore to determine which should be stayed.
>
> 15. As between the civil and the criminal proceedings we are of the opinion that the criminal matters should be given precedence. There is some difference of opinion in the High Courts of India on this point. No hard and fast rule ban. be laid down but we do not consider that the possibility of conflicting decisions in the civil and criminal courts is a relevant consideration. The law envisages such an eventuality

when it expressly refrains from making the decision of one court binding on the other, or even relevant, except for certain limited purposes, such as sentence or damages. The only relevant consideration here is the likelihood of embarrassment.

16. Another factor which weighs with us is that a civil suit often drags on for years and it is undesirable that a criminal prosecution should wait till everybody concerned has forgotten all about the crime. The public interests demand that criminal justice should be swift and sure; that the guilty should be punished while the events are still fresh in the public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial. Another reason is that it is undesirable to let things slide till memories have grown too dim to trust.

This,however, is not a hard and fast rule. Special considerations obtaining in any particular case might make some other course more expedient and just. For example, the civil case or the other criminal proceeding may be so hear its end as to make it inexpedient to stay it in order to give precedence to a prosecution order of under section 476. But in this case we are of the view that the civil suits should be stayed till the criminal proceedings have finished." (p--399)

The visible guiding underscoring(s) existing therein, qua the permissibility of staying of criminal proceedings against the accused, appertaining to cause(s) of action or a subject matter, in respect whereof Civil proceedings, ARE also reared by the aggrieved concerned, ARE (a) likelihood of embarrassment of the accused in criminal proceedings' (b) when civil and criminal proceedings occur in contemporaneity, precedence being given to criminal proceedings; (c) the possibility of conflicting decision(s) being rendered by Civil and Criminal Courts concerned; (d) demand of public interest, that, criminal justice should be swift and sure; (e) that, the guilty should be punished, while, the events are still fresh in public mind AND it being undesirable, to let things slide till memories have been grown, too dim, to trust.

6. Bearing in mind, the aforesaid principles encapsulated in the afore extracted relevant paragraphs of the verdict rendered by the Hon'ble Constitution Bench, of the Apex Court, in Sheriff's case (supra), (i) obviously with its ensuing, from a Bench strength, holding, a Bench strength of Hon'ble Judges, numerically higher vis-a-vis the Bench strength, of, Hon'ble Judges, which rendered the verdict in Sardool Singh's case supra, relied upon by the learned counsel for the petitioner herein, thereupon, (ii) with the verdict rendered by the Constitution Bench, of, the Hon'ble Apex Court, remaining, visibly not considered by the Bench of the Hon'ble Apex Court, which delivered a verdict in Sardool Singh's case (supra), (iii) whereas, a catena of judicial verdicts rendered by the Hon'ble Apex Court, expostulating, of (iv) judicial propriety desiring, of, previous verdict(s) rendered by a Bench of the Hon'ble Apex Court, holding, a Bench strength, of, Hon'ble Judges, numerically higher vis-a-vis the Bench strength, of, Hon'ble Judges of the Apex Court, rendering a verdict subsequent thereto, being binding upon the latter bench strength, of, Hon'ble Judges of the Hon'ble Apex Court, holding, a Bench strength, of, Hon'ble Judges of the Hon'ble Apex Court, lesser in numerical strength vis-a-vis the Bench strength, of, Hon'ble Judges, of the Hon'ble Apex Court, which rendered the earlier binding verdict, in Sheriff's case (supra), (v) Thereupon the verdict rendered by the Hon'ble Constitution Bench, of, the Hon'ble Apex Court, hence holds both binding clout AND sway vis-a-vis the extant appertaining therewith conundrum, (vi) even though, the issue engaging the Hon'ble Apex Court, in Sardool's case (supra), directly appertains, to the issue at hand, yet with the earlier binding verdict rendered, by the Constitution Bench of the Hon'ble Apex Court in Sheriff's case (supra), wherein, stand expostulated, the binding principles, enjoined to be borne in mind, by Courts of law, in making determination(s), with respect to the validity of continuation of criminal proceedings, holding therein, a subject matter in respect whereof civil proceedings, are in progress in simultaneity, thereof hence, obviously warrants deference, being meted thereto.

7. Be that as it may, with grave allegations being ventilated in the criminal complaint, instituted by co-plaintiff one Suresh Kumar, vis-a-vis the validity, of the testamentary

disposition, executed, by one Gian Chand and when amongst the accused named therein, are marginal witnesses thereto, (i) thereupon, the mere fact, of, a civil suit pending before the Civil Court concerned, wherein, the issue appertains vis-a-vis the validity of, an alike, therewith testamentary disposition, besides is alike therewith qua its being or not fabricated, by the accused named in the criminal complaint, arrayed as defendants therein, (ii) does not, preclude this Court, to order for proceedings in the complaint, being permitted to continue in simultaneity therewith. Also continuation, of proceedings in the complaint, in contemporaneity, with, proceedings in the civil suit, would not beget any entailment, of, any embarrassment, of, the accused named therein, (iii) especially, when at this stage, there is no cogent evidence of the allegations reared, in the complaint being untenable or being devoid of any merits or theirs being raised frivolously. Contrarily, the handwriting expert concerned, after, making the apt comparison(s), of the admitted signatures of the deceased testator, with, the latter's disputed signatures, occurring, upon, his testamentary disposition, would pronounce, upon, the validity of the allegations, reared by the complainant, (iv) thereupon, rather when rendition(s), of, opinion(s) by the expert concerned, may also be binding upon the Civil Court concerned, for its making a pronouncement, with respect to the validity of execution, of, the testamentary disposition, of, one Gian Chand, (iv) thereupon, there would, not be, any occasion, of, conflicting decisions being recorded, upon, the relevant factum probandum, by, the Criminal Court AND by the Civil Court, given both subject to just exceptions, being enjoined to revere the opinion, of, the expert concerned, opinion whereof comprises, the best evidence, for resting the controversy(ies), qua validity or invalidity, of the apt testamentary disposition. Reiteratedly, when the handwriting expert concerned, on, making comparison(s) of the relevant disputed signatures, with, relevant admitted signatures, of the deceased testator, would, opine upon the trite fact, of the relevant testamentary disposition being or not forged, (v) thereupon, hence, the aforesaid endeavour, ought not to be frustrated, merely, on the ground, of, the accused being purportedly embarrassed, rather, any baulking of criminal proceedings, would frustrate, the accused named in the criminal complaint, being punished, upon, the apposite best evidence being purveyed by the handwriting expert, (vi) elicitation(s) whereof from him, are, yet not existing on record, thereupon, also for resting the entire issue, the apt elicitation from him are imperative, dehors simultaneous continuation of both civil and criminal proceedings, significantly when apt termination(s) whereof would be dependent upon his opinion.

8. Upon an incisive scrutiny, of, the relevant case law, the only exception vis-a-vis there being, no bar against simultaneity, of, occurrence of criminal proceedings AND, of, civil proceedings IS (i) verdict(s) recorded by the Civil Court concerned, upon, titles AND entitlements, of, the concerned qua property(ies) of any genre being binding upon criminal courts, (ii) AND continuation of criminal proceedings qua alike therewith subject matter or qua title(s) or entitlement(s) vis-a-vis all property(ies), of, any genre being impermissible, till, a clinching conclusive verdict, emanates, from the Apex Court. (ii) Conspicuously, when verdicts, of, civil Court(s) qua titles or entitlements vis-a-vis property(ies) of any genre, emanate, prior to commencement of criminal proceedings AND before their termination.

9. 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 is maintained and affirmed. All pending applications are also dismissed. No costs. Records be sent back.

10. The Registry is directed to within one week circulate copies, of, this verdict, to all subordinate Courts and report compliance to this Court.

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

State of H.P. .....Appellant/Defendant No.2.
Versus
Sant Ram and others .....Respondent.

RSA No. 493 of 2008.
Reserved on : 25.11.2017.
Decided on : 5th December, 2017.

Specific Relief Act, 1963- Section 38- Permanent Prohibitory Injunction- Plaintiffs claimed themselves to be 'bartandaran' qua suit land having rights of grazing cattle, cutting grass etc. – Defendant No.2/State recorded as owner of the suit land leased out the suit land on 4.12.1998 to defendant No.1- Mutation attested in consequence thereof- **Held**, that rights of Bartandari are indefeasible customary rights vested in plaintiffs- State could not have alienated the suit land without giving the plaintiffs right of hearing and without considering the objections of the plaintiffs thereto- Simple order that plaintiffs be dispossessed from the suit land is insignificant, unless, it is established that order was implemented and possession was actually delivered to the defendant/State - no merit in the appeal- Appeal dismissed. (Para-9 to 11)

For the Appellant: Mr. R.S. Thakur, Addl. A.G.
For Respondents No.1 & 2: Mr. Surender Verma, Advocate.
For Respondent No.3: Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs instituted a suit against the defendants, claiming therein a decree for declaration to the effect that lease deed of 4.12.1998 be declared as wrong and illegal as also for permanent prohibitory injunction. The suit of the plaintiffs, for permanent prohibitory injunction, stood partly decreed by the learned trial Court. In an appeal carried therefrom, by the defendant No.2/appellant herein, before the learned First Appellate Court, the latter Court dismissed the appeal, whereupon, it concurred with the verdict recorded by the learned trial Court. In sequel thereto, defendant No.2/appellant herein, is driven to institute the instant appeal herebefore.

2. Briefly stated the facts of the case are that the plaintiffs have been coming in possession of the land comprising Khewat No.587 min, Khatauni No.876 min, khasra No.3480, measuring 1415 sq. meters, situated in mauja Sundernagar/26/8, Teh. Sundernagar, District Mandi, H.P. The plaintiffs have been enjoined rights of cutting grass, lopping branches of trees, grazing cattle over the suit land since the time of their ancestors. The plaintiffs are agriculturists and as such they are having rights of grazing cattle, cutting grass and lopping branches of trees over the suit land. It is further asserted that defendant No.2 had leased out the suit land in faovur of defendant No.1, Puran Chand on 4.12.1998 without the permission of the plaintiffs and giving them notice and thereafter mutation No.1392 was also attested illegally. The said lease deed of 4.12.1998 is illegal, null and void as the same is defeating aforementioned rights of the plaintiffs over the suit land. On 19.3.2001, the defendants threatened to raise construction over the suit land. The plaintiffs sought a decree for declaration that the lease deed of 4.12.1998 be declared wrong and illegal and that the defendant be restrained from interfering with the rights of the plaintiffs over the suit land.

3. The defendants contested the suit and they filed separate written statements. Defendant No.1 in his written statement, has taken preliminary objections qua maintainability, non service of notice under Section 80 of the CP and estoppel. On merits, it is pleaded that

defendant No.2 had legally leased out the suit land in favour of defendant no.1 by executing a legal and valid lease deed and since then defendant No.1 was coming in possession of the same. The plaintiff have no right, title or interest over the suit land. The defendant No.1 had paid price of all trees standing over the suit land and that the plaintiffs were illegally interfering with his possession over the suit land. It is further asserted that defendant No.1 had started running an Educational Institution on the suit land for the benefit of general pubic. Defendant No.2 being owner of the suit land was competent to lease out the same in favour of defendant No.1.

4. Defendant No.2 in its written statement has taken preliminary objections. On merits, it is submitted that defendant No.1 is the owner of the suit land which has been legally leased out in favour of defendant No.1 and thus defendant No.1 was coming in possession of the suit land. It is further asserted that Devi Dass, father of the plaintiffs had encroached upon the suit land, who was legally ejected from the same by Settlement Officer vide order dated 17.7.1979 passed in file No.2954. The suit land was given on lease to defendant No.1 for a period of 45 years on annual rent of Rs. 3, 17,316/-. The plaintiffs have no right, title or interest over the suit land. Defendant NO.2 also refuted the case of the plaintiffs and prayed for dismissal of the suit.

5. The plaintiffs/respondents herein filed replication(s) to the written statement(s) of the defendants, wherein, they denied the contents of the written statements and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the plaintiffs along with others have grazing rights over the suit land comprising in khasra No.3480, as alleged, if so its effect? OPP.

2. Whether the lease with regard to suit land executed by defendant No.2 in favour of defendant No.1 is wrong, null and void, as alleged?OPP.

3. Whether mutation concerning the lease is also wrong, null and void, as alleged?OPP.

4. Whether the plaintiffs are entitled to the relief of permanent prohibitory injunction against the defendants, as alleged?OPP.

5. Whether the suit is not maintainable in the present form?OPD.

6. Whether the suit is bad for non compliance of provisions of Section 80 C.P.C.?OPD.

7. Whether the plaintiffs are estopped by their act and conduct from filing the suit?OPD.

8. Whether the suit is bad for non joinder of necessary parties?OPD.

9. Whether the father of the plaintiffs namely Devi Ram was in unauthorised possession of the suIt land and he was evicted vide order dated 17.7.1979, as alleged?OPD.

10. Relief.

7. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court partly decreed the suit of the plaintiffs/ respondents herein. In an appeal, preferred therefrom by the State of H.P./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 State of H.P./appellants herein, has instituted the instant Regular Second Appeal before this Court, wherein it assails the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court, admitted the appeal instituted by the appellant against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether the findings of learned Appellate Court qua lease deed Ex.DW2/A are sustainable in the eyes of law?

b) In case the lease deed is held to be valid, whether relief of injunction could be granted vis-a-vis the plaintiffs/respondents?

Substantial questions of Law No.1 and 2:

9. Suit khasra No.3480, measuring 1415 sq. meters, as divulged by Ex.,P-1, exhibit whereof is a jamabandi apposite to the suit land, is recorded to be owned by the State of Himachal Pradesh, (i) whereas, the estate right holders are recorded to be holding "bartandari" rights thereon. In the remarks column of Ex.P-1, an entry is borne of the predecessor-in-interest of the plaintiffs, holding, right to cut grass, grown upon the suit khasra number. Subsequent thereto, under Ex.DW2/A, a lease deed with respect to the suit khasra number, was ,executed inter se the authorised official, of the State of Himachal Pradesh vis-a-vis the competent signatory of defendant No.1. Since, Ex.P-1, is the copy of the jamabandi, preceding the execution of Ex.DW2/A, inter se the competent signatory of State of Himachal Pradesh and the competent signatory of defendant No.1, hence, reflections occurring therein, of, the predecessor-in-interest of the plaintiffs, one, Devi Ram, enjoying the rights to cut grass, growing upon the suit khasra number, enjoy a presumption of truth. The aforesaid exercise of "baratndari' rights, upon the suit khasra number(s), by the predecessor-in-interest of the plaintiffs was an indefeasible customary right vested therein, in him, (i) whereupon, the State of Himachal Pradesh, was, precluded to alienate the suit khasra number, vis-a-vis contesting defendant No.1, by its executing lease deed Ex.DW2/A vis-a-vis defendant No.1. Execution of Ex.DW2/A, would acquire formidable validity, when preceding therewith, the aforesaid Devi Ram was evidently heard AND also his objections were elicited vis-a-vis the execution of Ex.DW2/A, whereafter, his objections were pronounced, to be untenable, (ii) thereafter, State of Himachal Pradesh proceeding to execute lease deed borne in Ex.DW2/A vis-a-vis the contesting defendant No.1. However, no evidence has been adduced on record, wherein any graphic display occurs, of, preceding the execution of Ex.DW2/A, defendant No.2 inviting the objections of Devi Ram, the predecessor-in-interest of the plaintiffs nor obviously the latter projected his objections thereto, nor obviously any order invalidating his objections was pronounced. Contrarily, since preceding therewith, the predecessor-in-interest of the plaintiffs, stand reflected in Ex.P-1 to be holding "baratandari" rights, upon the suit land, rather rendered them to enjoy a presumption of truth, whereupon, hence, the subsequent thereto, execution of a lease deed vis-a-vis the suit khasra number inter se the State of Himachal Pradesh and defendant No.1, was, obviously stained with a vice of its infracting the principle(s) of natural justice, thereupon, also it begets a concomitant vice of invalidation.

10. Even though, the aforesaid reflections occurring in the jamabandi apposite to the suit land, prepared in the year 1994-1995, yet the effect(s), of the afore referred apposite reflections occurring therein, besides, the presumption of truth enjoyed by them, was concerted, to be displaced by the defendants (i) by theirs placing reliance upon Ex.D-1, exhibit whereof is a rapat, manifesting the factum, of, in pursuance to anorder recorded on 17.7.1979, in proceedings drawn against the predecessor-in-interest of the plaintiffs, one Devi Ram, against his making unauthorised encroachment upon the suit khasra number, thereupon hence, his being evicted from the suit khasra number. Even though, a presumption of truth is attached to Ex. D-1, it being prepared by a public officer in discharge of public function(s), yet the aforesaid presumption, would acquire, fortified vigour only upon (a) the order referred therein being adduced on record; (b) officials, who implemented the aforesaid order stepping into the witness box; (c) witnesses, qua delivery of possession from the predecessor-in-interest of the plaintiff vis-a-vis the defendant concerned, being examined. However, all the aforesaid pieces of evidence, for enhancing, the presumption of truth concerted to be ascribed to Ex.D-1, remains not adduced into evidence. Consequently, any corrections in consonance therewith, made, in the revenue records concerned, is also insignificant, (d) rather when the jamabandi apposite, to the suit land, appertaining to the years much subsequent, to Ex.D-1, jamabandi whereof is comprised in Ex.P-1, AND it appertains to the year 1994-95, hence, immediately prior to the execution of the apt

lease deed, (e) rather makes contrary thereto reflections, of, the predecessor-in-interest, of the plaintiffs holding "baratandari" rights upon the suit land, rather fortifyingly enhances the vigour of the aforesaid inference, of, presumption of truth enjoyed by Ex. D-1, AND by any jamabandi prepared in consonance therewith, being hence firmly eroded. In aftermath, no reliance is amenable to be placed on Ex. D-1. Since, the predecessor-in-interest, of, the plaintiffs, is, in the remarks column of Ex. D-1, hence recorded to be solitary person, enjoying "baratandari" rights upon the suit land, hence, with other co-villagers, obviously not along with him, enjoying the apposite rights, thereon, (i) thereupon it was not enjoined upon the plaintiffs, to on behalf of other co-villager purportedly holding "baratandari" rights upon the suit khasra number, also implead them as co-plaintiffs, (ii) nor hence they were enjoined to make an averment of theirs on behalf of other co-villagers, who purportedly along with them enjoy "baratandari" rights over the suit land, hence, instituting a representative suit.

11. The upshot of the above discussion, is that the predecessor-in-interest of the plaintiffs and thereafter the plaintiffs, have, by adducing overwhelming evidence, comprised in the evidence of the plaintiffs', corroborated by the evidence of the Lamberdar of the village, besides by Ex. P-1, hence, proven, of theirs holding settled possession, upon, the suit land, thereupon, the decree of injunction concurrently recorded by both the learned Courts below in favour of the plaintiffs, does not, suffer from any any vice of any mis-appreciation of material on record.

12. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court are based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court have not excluded germane and apposite material from consideration. Accordingly, the substantial question of law are answered, in favour of the respondents/plaintiffs and against the appellant.

13. In view of above discussion, the present Regular Second Appeal is dismissed. In sequel, the judgments and decrees rendered by both the learned Courts below are maintained and affirmed. 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.

Subhash Chand .....Petitioner/Plaintiff.

Versus

Ishwar Dass .....Respondents/Defendants.

Civil Revision No. 42 of 2017.
Reserved on: 30th November, 2017.
Decided on : 5th December, 2017.

Code of Civil Procedure, 1908- Order 41 Rule 22- Section 5 of Limitation Act- Case of the plaintiff's for declaration and possession of the suit land decreed- directed to pay ad valorem court fee vis-à-vis subject matter of suit- Defendant preferred appeal along with an application under Section 5 of Limitation Act- Plaintiff preferred cross-objections – Application filed by defendant under Section 5 of the Limitation Act was dismissed for no-prosecution- **Held**, as per mandate of Order 41 Rule 22(4) of CPC cross-objections are maintainable and shall be decided by the Court, even if original appeal is withdrawn or dismissed in default, however original appeal must be registered for the application of this provision of law- Dismissal of application under Section 5 of Limitation Act implies that the appeal preferred by the defendant was never registered- Accordingly, cross-objections must also fail- Further, held that plaintiff could not have

filed application under Section 148 of CPC for extending time to comply with the conditions of the decree as well as cross-objections challenging those conditions- no merit in the appeal- Appeal dismissed. (Para-4 to 7)

For the Petitioners : Mr. Ajay Sharma, Advocate.
For the Respondent: Mr. Surinder Saklani, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The extant petition stands directed against the impugned order recorded, on 02.12.2016, by the learned Addl. District Judge-I, Kangara at Dharamshala in CMA No.27-D/2016.

2. The plaintiff's suit for declaration, injunction and possession vis-a-vis the suit property, was, decreed by the learned trial Court. However, the decree rendered by the learned trial Court was made subject to the plaintiff affixing court fee ad valorem vis-a-vis the value of the suit property, in respect whereof, a decree for possession was rendered. Any default, on the part of the plaintiff, to comply with the aforesaid condition, was, in the operative part of the judgment and decree, rendered by the learned trial Court, hence pronounced to entail dismissal, of, the plaintiff's suit.

3. The aggrieved defendants' reared an appeal therefrom, before the learned First Appellate Court. However, the defendants' appeal being time barred, it was accompanied by an application, constituted under the provisions of Section 5 of the Limitation Act. Notice of the application, constituted under the provisions of Section 5 of the Limitation Act, was, ordered to be issued upon the plaintiff/cross-objector AND it was served upon the latter on 11.10.2007. However, the application constituted, under provisions of Section 5 of the Limitation Act, bearing CMA No. 117 of 2007, stood on 5.7.2008, hence dismissed in default. After service of notice, of application aforesaid being effected, on 11.10.2007, upon, the plaintiff/cross-objector, the plaintiff instituted cross-objections, to, the yet unregistered appeal preferred by the aggrieved defendants, against, the judgment and decree, recorded by the learned trial Court upon his suit. The plaintiff's cross-objections, came to be instituted, within, one month of his being served, with a notice vis-a-vis the defendants' application, cast under the provisions of Section 5 of the Limitation Act, application whereof was appended with the yet unregistered Civil Appeal, (i) wherein, they sought condonation, of, delay in theirs belatedly preferring, an appeal before the learned First Appellate Court, against, the judgment and decree rendered by the learned trial Court. As aforestated, the defendants' apposite application, cast under the provisions of Section 5 of the Limitation Act, was, dismissed in default on 5.7.2008, (ii) consequently, the time barred appeal instituted by the aggrieved defendants before the learned First Appellate Court, thereupon *ipso facto* also entailed the ill consequence of its suffering its dismissal. Conspicuously, also unless an affirmative order, was pronounced, upon, the aggrieved defendants' application, instituted before the learned First Appellate Court, application whereof, was, cast under the provisions of Section 5 of the Limitation Act, obviously, hence, rendered the defendants' appeal to remain unregistered besides rendered it to be mis-constituted.

4. Nowat, the effect of the dismissal, of the defendants' application, constituted under the provisions of Section 5 of the Limitation Act, with all sequelling effects, of, its also begetting dismissal of the defendants' appeal, reared before the learned First Appellate Court, (i) does also have, a bearing upon the maintainability, of the cross-objections, reared by the plaintiff/cross-objector vis-a-vis the conditional affirmative pronouncement, recorded upon his civil suit. (ii) The effect(s) besides bearings, of, the dismissal of the defendants' application, cast under the provisions of Section 5 of the Limitation Act, application whereof was appended with their, yet unregistered appeal, constituted before the learned First Appellate Court, upon the plaintiff's cross-objections, instituted within 30 days, of his receiving notice of the aforesaid

application, (iii) is to be fathomed, from, the apposite thereto provisions borne, in Order 41, Rule 22 of the CPC, provisions whereof stand extracted hereinafter:-

> **22. Upon hearing, respondent may object to decree as if he had preferred separate appeal.-** (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the court below in respect of any issue ought to have been In his favour; and may also take any cross objection] to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one months from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow:
>
> [Explanation: A respondent aggrieved by a finding of the court in the judgment on which the decree appealed against is based may, under this rule, file cross objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or In part, in favour of that respondent.]
>
> **(2) Form of objection and provisions applicable thereto—**Such cross objection shall be in the form of the memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.
>
> (3) Omitted
>
> (4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or Is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the court thinks fit,
>
> (5) The provisions relating to appeals by indigent persons shall, so far as they can be made applicable, apply to an objection under this rule.

5. The relevant sub-rule 4 to Rule 22 of Order 41, enumerates therein the peremptory statutory condition(s), (i) whereupon, despite, the aggrieved litigant's appeal, before the Court concerned, being withdrawn or dismissed in default, (ii) nevertheless, enjoins the Court concerned, to proceed to hear and determine the aggrieved litigants' concerned cross-objections, instituted before the Court concerned. A deep incisive reading, of the phraseology occurring therein, especially "of the original appeal, is withdrawn or dismissed in default", unravels that (iii) the aggrieved litigant's appeal preferred before the Appellate Court concerned, necessarily enjoining its being numbered, in the apposite register maintained by the court concerned, whereupon, alone, the litigants' concerned, appeal would accrue thereon, the further statutory consequence, (iv) of, "its being withdrawn or its being dismissed in default", besides with befallment, of, the aforesaid ill-fates upon the litigants' concerned appeal, would, yet render the cross-objector's cross-objections being enjoined to be heard and determined by the learned First Appellate Court. However, reemphasingly further more, rather the aggrieved litigant's appeal, obviously, is to be properly constituted, besides even if it is preferred by the litigant concerned, beyond, the prescribed period of limitation, (v) yet the apposite delay in its preferment thereat, is enjoined to be condoned, whereafter, it is enjoined to be registered in the apposite register maintained, at the Court concerned, for the apt purpose, whereafter, it would be construable to be a properly constituted appeal, (vi) besides thereafter alone, valid pronouncement(s) of its being withdrawn or dismissed in default would occur. Contrarily, hereat the aggrieved defendants' appeal reared, against, the judgment and decree rendered, by the learned trial Court, was visibly outside the period of limitation, prescribed for its institution before the learned First Appellate Court, (vii) thereupon, it was accompanied by an application constituted, under the provisions of Section 5 of the limitation Act, application whereof was dismissed in default on 5.7.2008. (viii) Conspicuously hence, the aggrieved defendants' appeal neither remained registered nor hence

was properly constituted, (ix) thereupon, within, the ambit of sub-rule 4 to Rule 22 of Order 41, of the CPC, no valid orders, were pronounceable thereon vis-a-vis its withdrawal or qua its being dismissed in default nor any of the aforesaid orders evidently are pronounced thereon. (x) Significantly, thereupon, the learned First Appellate Court, was not entailed, with any dire legal obligation(s), to, nevertheless, hear the plaintiff's cross-objections, even if, they stood filed within 30 days, from, his being served with a notice upon the defendants' application, constituted under the provisions of Section 5 of the Limitation Act. The effect of the aforesaid discussion, is, of the impugned order, not suffering from any gross illegality or impropriety.

6. The apposite affirmative conditional decree rendered vis-a-vis the plaintiff/cross-objector, was, a conditional decree, (i) condition whereof is comprised in the learned trial Court, fastening an obligation upon the decree holder/plaintiff, to affix court fee ad valorem vis-a-vis the value of the suit property, qua whereof, a decree whereof for possession was rendered, (ii) also when the plaintiff/cross-objector, had evidently constituted an application, before, the Court concerned seeking enlargement of time, for his meteing compliance, with the mandate of the conditional decree, whereon , findings adversarial to the plaintiff stood recorded, yet, the orders rendered therein are not shown to be assailed. Moreover, as displayed by Ex. RW2/A, the application preferred by the plaintiff/cross-objector, under, the provisions of Section 148 of the CPC, wherein, he sought relief for time being extended vis-a-vis him, for his meteing compliance, with the condition precedent(s), for his deriving benefits, of, the affirmative decree pronounced vis-a-vis him, stood visibly dismissed. Consequently, the aggrieved litigant therefrom, may avail, his legal remedy, of, assailing the aforesaid order, before the competent Court of law, rather his pressing for his mechanically raised cross-objections vis-a-vis the conditionally decree, being adjudicated upon. However, yet the cross-objector/plaintiff, rears, vis-a-vis the affirmative pronouncement recorded by the learned trial Court, upon his apposite suit, trite objections, vis-a-vis the validity of the conditional mandate occurring therein, (iii) wherein, he is enjoined, to, upon the plaint hence affix, court fee ad valorem vis-a-vis the value of the suit property, in respect whereof a decree for possession was rendered, efforts whereof are hence grossly untenable. Apart therefrom, the plaintiff/cross-objector, does not, rear any objections vis-a-vis the affirmative pronouncement recorded by the learned trial Court, upon, his apposite suit. However, as aforestated, the plaintiff also instituted an application, cast under the provisions of Section 148 of the CPC, wherein, he sought extension of time, for, his meteing compliance with the mandate, of, the conditional decree, rendered by the learned trial Court, upon, his civil suit, application whereof stands dismissed, (iv) the effect of the plaintiff casting, the aforesaid application, is, of its casting its concomitant ill effect(s), upon, his cross-objections, wherein, he has reared objections vis-a-vis the validity of the conditions, fastened upon him, under, the affirmative conditional decree rendered by the learned trial Court, (v) ill effect(s) whereof, is/are comprised in the plaintiff, thereupon, hence acquiescing to the mandate of the condition precedent(s) enjoined upon him, for his hence taking the benefit(s) of the conditional decree, besides his being estopped also from his rearing per se mechanical cross-objections vis-a-vis the condition precedent(s) embodied in the apposite affirmative conditional decree.

7. Even if, the aforesaid expostulations are imperative, as they, pronounce, upon, the bonafides of the plaintiff, to rear cross-objections, despite his, instituting an application, before, the learned trial Court, cast under the provisions of Section 148 of the CPC, whereupon, he sought extension of time, for his begetting compliance, with, the mandate of the affirmative conditional decree, (i) whereupon hence, he is construed to affirmatively waive, his right(s), to rear cross-objections thereto. Nonetheless, for affording the fullest adjudication, with its widest amplitude vis-a-vis the validity(ies), of his staking a claim, through, his application bearing CMPA No.27-D/2016 instituted by him, before the learned First Appellate Court, wherein he sought, relief, of, his objections being treated as an appeal, specifically within, the ambit of Order 41, Rules 1 and 2 of the CPC besides has sought relief, of the apposite delay in preferment thereto, being condoned, the apposite hereinafter facts enjoin allusion thereto, (a) the aforesaid application, being instituted on 23.07.2008 and (b) its institution evidently occurring subsequent, to, the defendants' application constituted, under the provisions of Section 5, of, the Limitation

Act, standing dismissed in default on 5.7.2008, (c) an affirmative order could be validly pronounced upon the aforesaid application, only upon, evident good sufficient cause demonstrably precluding, the plaintiff to, earlier thereto, rear his cross-objections/appeal. (d) With an affirmative conclusion being recorded by this Court qua the untenability of the cross-objections reared by the plaintiff, without, the aggrieved defendant's appeal being property constituted, (e) thereupon, with this Court concluding of the learned First Appellate Court, being not, also enjoined to make any adjudication upon the plaintiff's cross-objections, (f) thereupon, also when, despite, the plaintiff in his deposition making a communication, of, his being purveyed a copy of the judgment and decree rendered, by the learned trial Court, on 3.9.2007, hence when, dehors the aggrieved defendants' instituting or not instituting, an appeal against the verdict adversarial pronounced vis-a-vis them, by the learned trial Court, (g) he hence could well have instituted an appeal, for, assailing the apposite mandate, of the affirmative conditional decree, pronounced vis-a-vis his suit, by the learned trial Court. However, the plaintiff's/cross-objector's failures in doing so, contrarily, also his filing mis-constituted cross-objections vis-a-vis the grossly mis-constituted aggrieved defendants' appeal, directed, against the judgment and decree rendered by the learned trial Court. (h) Rather, the plaintiff preferring, to, seek extension of time, from the Court concerned, for his begetting compliance vis-a-vis the mandate of the conditional decree, time whereof was declined to him, (i) therefrom, it is rather befitting to conclude, of, his acquiescing to the mandate of the affirmative conditional decree pronounced, upon his suit by the learned trial Court. In sequel, his espousal in the apposite application is rather grossly malafide, also though the mandate, of, the provisions, wherewithin, the application is cast, does empower the Appellate Court, to make a pronouncement in consonance therewith, (j) yet with a rider of demonstrable evident good cause, precluding the aggrieved plaintiff, to, within time, institute an apposite appeal before the learned First Appellate Court, (k) contrarily, when no good cause is evidently demonstrated hereat rather when the espousal(s) of the cross-objectors/plaintiff, is grossly malafide, (l) thereupon, the plaintiff's/cross-objector's, endeavour to, through the application preferred subsequent, to the dismissal in default of the aggrieved defendants' application, constituted under Section 5 of the Limitation Act, hence claim, that, his mis-constituted cross-objections, be treated as an independent appeal, in its entirety ARE abortive mechanism(s) deployed by him.

8. For the foregoing reasons, there is no merit in the extant petition and it is dismissed accordingly. In sequel, the impugned order is maintained and affirmed. However, liberty reserved to the plaintiff/petitioner herein to assail before the competent court of law, the disaffirmative order recorded by the learned trial Court upon his application, for extension of time for begetting compliance with the condition precedent, occurring, in the affirmative conditional decree pronounced upon his apposite civil suit. All pending applications also stand disposed. No costs. Records be sent back forthwith.

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

Shri Tek Singh and others .....Appellants/Plaintiffs.

Versus

Smt. Ganga Devi .....Respondent/Defendant.

RSA No. 168 of 2006.
Reserved on : 23.11.2017.
Decided on: 5th December, 2017.

Specific Relief Act, 1963- Section 5- Plaintiff has filed a civil suit for possession of the suit land pleading that defendant and her predecessor-in-interest through Mangat Ram, was tenant and the house in question- tenancy has been terminated through notice under Section 106 of

Transfer of Property Act- defendant denied she being tenant over the suit land- she raised plea of adverse possession- suit was dismissed by the Trial Court as well as 1st Appellate Court – **Held-** that plaintiff has himself admitted that the possession of the defendant through her predecessor-in-interest started 1947- hence, omission in the pleading for the commencement of possession is not material- other requirements of establishing adverse possession i.e. being open, continuous and exclusive to the knowledge of everyone – hostile to the true owner have been proved – the devolution of the property Mangat Ram over all the present defendant had also stand established from the Will executed by Mangat Ram in favour of defendant- both courts below had rightly appreciated the evidence- no merit in the appeal. (Para-9 to 11)

For the Appellants: Mr. Bhupender Gupta, Senior Advocate with Mr. Ajit Jaswal, Advocate.

For the Respondent : Mr. K.S. Kanwar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiffs' suit for rendition of a decree in respect of theirs being entitled for vacant possession of the suit land being rendered qua thereto, was, under concurrent pronouncements recorded thereon by both the learned Courts below, hence, dismissed.

2. Briefly stated the facts of the case are that the plaintiffs claimed themselves to be owner of a house situated over the land measuring 308 square meters situate in mauja Sirinagar, Tehsil Kandaghat, District Solan, H.P, which their predecessor Ram Rattan had let out to one Mangat Ram on a monthly rent of Rs.10/- per month about 55 years back and in the year 1970, the rent was increase to Rs.20/ per month. Mangat Ram said to have died on 10.02.1989 and after his demise the tenancy was alleged to have been paid regularly upto June, 1995, but from July, 1995 onwards the respondent/defendant refused to pay the rent. Accordingly, her tenancy was terminated by issuing a notice under Section 106 of the Transfer of Property Act, of 30.1.1997 and she was asked to handover the vacant possession and to pay the rent upto date. On failure of the defendant to handover the vacant possession a suit was filed for possession and recovery before the learned Sub Judge 1st Class, Kandaghat in the year 1997. In the said suit the respondent/defendant is said to have taken the plea of she being the owner of the property by denying the title of the plaintiffs. Therefore, the present suit was filed by the plaintiffs in the trial Court for possession on the basis of title.

3. The defendant contested the suit and filed written statement, wherein, she denied the state of the plaintiffs that the Mangat Ram was tenant in the demised premises on payment of rent. It is averred that Mangat Ram built up the house in question more than 40 years back on the land in question which was possessed by Mangat Ram openly continuously exclusively to the knowledge of every one as owner. Mangat Ram had already became owner of the property including the property in question and has bequeathed his entire property including the property in question in favour of the defendant by a registered Will of 5.6.1985. It was denied that on the demise of Mangat Ram, the tenancy was transferred in her name at the monthly rent of Rs.100/- per month. The defendant also denied the factum of hers being in arrears of rent and also liable to pay mesne profit.

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 possession of the suit premises, as alleged? OPP

2. Whether the suit is not maintainable in the present form? OPD.

3. Whether the plaintiff is estopped to file the present suit? OPD.

4. Whether the suit is liable to be dismissed under Order 7, Rule 11, C.P.C.? OPD.

5. Whether the Court has no jurisdiction to entertain and try the suit?

6. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiffs/appellants herein. In an appeal, preferred therefrom by the plaintiffs/appellants before the learned First Appellate Court, the latter Court dismissed the appeal and affirmed the findings recorded by the learned trial Court.

6. Now the plaintiffs/appellants herein, have instituted the instant Regular Second Appeal before this Court wherein they assail the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission on 01.12.2006, this Court, admitted the appeal instituted by the plaintiffs/appellants against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial question of law:-

a) Whether in the absence of the specific pleadings the two Courts below were justified in assuming that plea of adverse possession had been taken by the respondent-defendant?

Substantial questions of Law No.1 to 4.

7. The defendant, is the successor-in-interest of one Mangat Ram. She resisted the suit of the plaintiffs, for possession of the suit khasra number(s), (i) on anvil of her predecessor-in-interest, one Mangat Ram, raising about 40 years back, a house on suit khasra number(s), thereafter with an *animus possidendi*, his unbrokenly to the knowledge, of the true owners, holding possession thereof, for the statutorily enjoined period of time, for his hence being construable, to perfect his title thereon, by prescription. She has propounded, Will borne in Ex.DA, executed in her favour by her predecessor-in-interest one Mangat Ram, to, espouse that (a) with her predecessor-in-interest, perfecting, his title by prescription upon the suit land, his also holding the befitting legal capacity, to execute a testamentary disposition, in respect thereto; (b) thereupon hers, on his demise acquiring title vis-a-vis the suit land.

8. The learned counsel appearing, for the plaintiffs/appellants herein, has contended that the pleadings reared by the defendant in her written statement, wherein, she has echoed of her predecessor-in-interest, with an *animus possidendi,* during, his life time holding settled possession vis-a-vis the suit khasra number(s), especially for the statutorily mandated period of time, for his hence perfecting title thereon, by adverse possession (a) is nebulously reared nor any recital with specificity in timing vis-a-vis commencement(s), with an *animus possidendi,* of possession of suit khasra number(s), by one Mangat Ram, occurrs therein, *(b)* the execution, of testamentary disposition, by Mangat Ram vis-a-vis the contesting defendant being not proven in accordance with law, given the marginal witnesses thereto, not stepping into the witness box; (c) thereupon, even if assumingly, the contesting defendant, holds a bequest vis-a-vis the suit khasra number(s), thereupon, lack of proof of its valid and due execution, within the domain of mandatory statutory provisions borne in Section 63 of the Indian Succession Act; (d) render the apposite rights conferred thereunder upon the contesting defendant being not bestowable vis-a-vis her.

9. A careful reading of the contentions reared, by the contesting defendant, in her written statement, do add succor, to the contention addressed before this Court, by the learned counsel appearing, for the appellants/plaintiffs, (i) of, theirs being nebulously averred nor theirs with exactitude, delineating the commencement of period of holding of possession, with an *animus possidendi,* by one Mangat Ram upon suit khasra number(s). Even though, the aforesaid infirmity exists in the aforesaid pleadings, cast in the written statement reared by the defendant, yet when the plaintiff Tek Singh, stepped into the witness box, he has scored off all effects thereof, (i) especially when in his cross-examination, he has admitted suggestions, put to him by

the counsel, for the defendant, inasmuch as (a) of Mangat Ram in the year 1947-48 raising construction beyond and in addition, vis-a-vis the area, whereon, he was purportedly inducted as a tenant by the plaintiffs. (b) His also acquiescing, to a suggestion put to him, by the counsel for the defendant, of, the aforesaid Mangat Ram, during, his life time and thereafter, the contesting defendant holding possession of the suit khasra number(s). (c) The effect of the aforesaid acquiescence(s) is of hence, the plaintiffs conceding, of Mangat Ram, commencing, his adverse possession, upon suit khasra number, in the year 1947, when he (d) extended portion of the purported demised premises, by his making addition(s) and extension(s) thereto. (e) The aforesaid acts, being overt acts, of Mangat Ram, besides theirs constituting, his openly denying the title of the plaintiffs vis-a-vis the suit khasra number(s), (f), hence the plaintiffs scoring off the effect(s) of the defendant's omission(s), to with precision besides with exactitude, ascribe commencement(s), with an *animus possidendi,* of possession by one Mangat Ram upon suit khasra number.

10. Furthermore, admission(s) existing, in the cross-examination, of plaintiff Tek Singh, of the contesting defendant being the adoptive daughter, of deceased Mangat Ram, thereupon, his admitting the execution of Ex. DA, renders Ex. DA, to, not hence warrant, its proof in the manner as enjoined by Section 63 of the Indian Succession Act, the reason being (a) with the plaintiff, not, establishing that, apart from, the contesting defendant, there being other befitting legal heirs of deceased Mangat Ram, hence, when the latter alone purportedly held the befitting locus standi, to assail the testamentary disposition of deceased testator Mangat Ram, (b) thereupon, with the plaintiffs, not, holding the befitting locus standi, to impeach the validity of Ex. DA, (b) rather his faintly denying the execution Ex. DA, given its not bearing his signature, given deceased Mangat Ram scribing his signature, on, a document in Urdu, whereas his signatures in English existing upon Ex. DA, is also ridden with falsity, given Ex. DA carrying the signatures of deceased testator therein, though in English, whereas, thereafter, the plaintiffs, not, concerting to rid them, of their authenticity, by eliciting any apposite legal opinion, being rendered by the handwriting expert concerned, (c) hence, renders the Ex. DA to be a validly executed document, dehors proof hence not forthcoming in respect of its valid execution in the manner envisaged under Section 63 of the Indian Succession Act. Even otherwise, with the plaintiff in his cross-examination, acquiescing, to a suggestion, of, the plaintiff extantly holding possession of the extant suit khasra number(s) besides his voicing in his cross-examination, of, the contesting defendant being the adoptive daughter, of deceased testator Mangat Ram, (d) paramountly also his facilitating proof, of, one Mangat Ram perfecting his title by prescription upon the suit khasra number also hence, do not warrant, of, Ex. DA being enjoined, to be proven in accordance with the provisions enshrined in Section 63 of the Indian Succession Act, (e) imperatively when hers being the adoptive daughter of Mangat Ram, also hers holding possession of the suit khasra number(s), was, on demise of Mangat Ram, solitarily entitled to inherit the suit khasra numbers.

11. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as well as by the learned trial Court are based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court have not excluded germane and apposite material from consideration. Accordingly, the aforesaid substantial question of law is answered in favour of the respondent and against the plaintiff.

12. In view of the above discussion, the instant appeal is dismissed and 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.

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

Court on its own motion ...Petitioner.
Versus
State of H.P. & others ...Respondents.

CWPIL No. 23 of 2017 with
CWPIL No.73 of 2017
Date of Decision: December 12, 2017

Constitution of India, 1950- Article 226- The court took cognizance of operation of liquor vends near schools in violation of judgment of Supreme Court **State of Tamil Nadu and others vs. K. Balu and another, (2017) 2 SCC 281** and directed the State of Himachal Pradesh to ensure compliance of aforementioned decision of Hon'ble Supreme Court of India- Further directed that distance of the location of the liquor vends notified not be measured from the gate of the school, but from the farthest point of the schools- In the liquor vends, it must be conspicuously displayed that sale of liquor for children is prohibited - CCTV cameras must be installed in the liquor vends to check the violation- there must be sensitization of persons employed in the liquor shops about their duties to protect the interests of the children- petition disposed of. (Para-23)

Cases referred:
State of Tamil Nadu and others vs. K. Balu and another, (2017) 2 SCC 281
Arrive Safe Society of Chandigarh vs. The Union Territory of Chandigarh & another, Special Leave Petition (Civil) No. 10243 of 2017

For the Petitioner:	M/s Vikrant Thakur & Deven Khanna, Advocates as Amicus Curiae.
For the Respondents:	Mr. Shrawan Dogra, Advocate General, with M/s Anup Rattan, Romesh Verma, Additional Advocate Generals and J.K. Verma Deputy Advocate General, for the respondents.

The following judgment of the Court was delivered:

Sanjay Karol, Aciting Chief Justice

On the basis of letter petitions, addressed to this Court, alleging opening of illegal liquor vends, taking *suo motu* cognizance, petitions were registered, in which notices were issued.

2. M/s Vikrant Thakur and Deven Khanna, Advocates, were requested to assist the Court as Amicus Curiae.

3. In the two letter petitions, it is alleged that contrary to the directions issued by the Hon'ble Supreme Court of India, the State has allowed the liquor vends to be opened up, more so in the manner which have become a source of nuisance. Also it is adversely affecting the otherwise tender minds of students, for the liquor vends stand opened in close proximity of the schools.

4. The Deputy Commissioner(s) and Superintendent(s) of Police of all the Districts were impleaded as party respondent(s) and were asked to file their responses.

5. Having noticed the discrepancies in the affidavits, on 18.07.2017, this Court passed the following order:-

"From the response-affidavit dated 3rd July, 2017 that of Deputy Commissioner, Kangra at Dharamshala, **it is evident that at least 14 wine shops within the district were found to be operating in violation of the orders/directions passed by Hon'ble Supreme Court of India** dated 15.12.2016. We direct Deputy Commissioners as also Superintendents of Police of all 12 administrative districts within the State of Himachal Pradesh to bring it to the notice of Secretary, (Excise and Taxation) to the Government of Himachal Pradesh-respondent No.2 within 24 hours from today by way of written communication including by way of e-mail, the factum of any liquor vends/wine shops which is /are functional within their respective jurisdiction in violation of the orders /directions dated 15.12.2016 as also subsequent orders/directions passed by Hon'ble Supreme Court of India. Respondent No.2 shall ensure forthwith closure/shifting of such liquor vends/wine shops in accordance with law within next 24 hours. List on 25.7.2017.

Authenticated copy

(Emphasis supplied)

6. Since there was conflict in the stand taken by the Deputy Commissioners and the Superintendent(s) of Police, on 25.07.2017, this Court again passed the following order:

"Earlier during the day, we passed the following order:

"Mr.Anup Rattan, learned Additional Advocate General, to ascertain from the Superintendent of Police, Kangra the basis for making averments with regard to the distance in para-8 of his affidavit dated 15th July, 2017. Need has arisen in view of the stand which now the State is taking, stating that on actual measurement the distance is far less. Now, either the averments made by the Superintendent of Police are factually incorrect or the contentions based on instructions imparted by the Excise Department are incorrect. Let such information be ascertained during the course of the day. We also direct the Secretary, Excise and Taxation to remain present in Court today itself at 2.00 PM."

"Mr.Onkar Sharma, Principal Secretary, Excise and Taxation, Government of Himachal Pradesh, who is present in Court, states that the information furnished with respect to the actual distances is on the basis of information supplied by the officials of Public Works Department.

In this view of the matter, we are not inclined

to accept the statement of Mr.Anup Rattan, learned Additional Advocate General, that the liquor vends, so indicated in the affidavit of Superintendent of Police, Kangra, are not required to be closed.

The Apex Court vide judgment dated 15th December, 2016 passed in State of Tamil Nadu and others vs. K. Balu and another, (2017) 2 SCC 281, issued directions with regard to opening up of liquor vends along the National and State Highways. The directions contained therein stand modified vide order, dated 31st March, 2017, more so with respect to the State of Himachal Pradesh to the following effect:

"In the case of area comprised in local bodies with a population of 20,000 people or less, the distance of 500 metres shall stand reduced to 220 metres"

Faced with this situation, Mr.Onkar Sharma, states that he shall personally visit the spot for ascertaining as to how the discrepancies with regard to the distance came to fore. Also, he shall visit the area indicated by the complainant for ascertaining the factual position and ensure that any liquor is

sold, in violation of the policy framed by the Government as also the directions issued from time to time by the Hon'ble Supreme Court and also by this Court.

Affidavit of compliance be filed within a period of 10 days.

List on 8th August, 2017."

7. On 04.08.2017, on the assurance of the State, this Court passed the following order:-

"Mr.Anup Rattan, learned Additional Advocate General, states that in view of intervening developments, a fresh application bringing on record subsequent events, also explaining as to why order dated 25th July, 2017 could not be compiled with, is required to be filed.

We expect the Additional Chief Secretary, Excise and Taxation, Government of Himachal Pradesh, to have the exercise completed, so undertaken by him, with respect to all the liquor vends within the State of Himachal Pradesh.

Affidavit of compliance be positively filed within a period of three weeks.

List on 1st September, 2017."

8. The order was complied, with the filing of affidavit dated 16.09.2017 that of Additional Chief Secretary to the Government of Himachal Pradesh, whereby Court was informed that liquor vends of all the Districts of Himachal Pradesh, were inspected. Districts Solan, Hamirpur, Una, Chamba, Mandi, Bilaspur, Revenue District BBN, Baddi, District Solan, Revenue District Nurpur at Jachh, Kangra, no liquor vend was found functioning in violation of the orders passed by Hon'ble Supreme Court of India or Liquor Policy framed by the State. However, with respect to other areas of District Kangra, liquor vend of Maranda near Agro Petrol Pump of Palampur Circle; two liquor vends at Satiwala and Timbi in District Sirmour; seven vends in District Kullu, six liquor vends in District Shimla; two liquor vends in District Kinnaur & Spiti were found to be operating in violation of the Liquor Policy and the directions issued by the Apex Court and as such orders were issued for their shifting and/or closure.

9. Further, when the matter was brought to the notice of this Court that in District Shimla itself there were other liquor vends which were being operated in violation of the Liquor Policy, on 09.10.2017 this Court directed the State to file a fresh status report.

10. Since there was ambiguity in the affidavit of the Department of Excise and the Deputy Commissioner, Shimla, on 27.10.2017, this Court passed the following order:-

"Ambiguity in the affidavits, that of the Excise Department and the Deputy Commissioner, Shimla be clarified. Also, status with regard to liquor vends near St. Edward School and near the Sanitorium Hospital, Chaura Maidan, Shimla be explained by the Deputy Commissioner, Shimla."

11. Pursuant thereto, on 31.10.2017, the Deputy Commissioner, Shimla, filed his personal affidavit stating that the liquor vends at Bemloe and Chaura Maidan, were being run in accordance with the Liquor Policy. Not finding favour with the same, this Court on 03.11.2017 & 06.11.2017 passed the following orders respectively:-

"**Distance to be calculated from the school to the liquor vend is not for the purpose of mathematical calculation, but for ensuring that liquor vend is not easily accessible to the children studying in the school. This, in fact, is the intent and purpose of not having a liquor vend within close proximity of an educational institution. We find Deputy Commissioner, Shimla to have not appreciated the object and purpose in justifying opening of the liquor vend which is clearly visible from the campus of St. Edward School, Shimla, falling within the municipal limits, Shimla**. In fact, we have doubt as to whether the distance measured by the Deputy Commissioner, Shimla

is factually correct. According to him, it is more than 107.30 meters, whereas as per the Excise Department's announcement it should be more than 100 meters.

Be that as it may, we find the approach adopted **by the State and more so that of the Deputy Commissioner, Shimla to be highly insensitive and impractical.** As such, we direct the Principal Secretary (Excise and Taxation) to the Government of Himachal Pradesh to forthwith close the liquor vend opened just opposite to Hotel Himland (East), Shimla adjoining to the bus stoppage near the school from where children board the buses.

Mr. M.A. Khan, learned Additional Advocate General to assist the Court with regard to the liquor vend which stands opened near Sanitorium Hospital, Chaura Maidan. Whether it is contrary to any one of the directions issued by the Hon'ble Supreme Court of India or not, be factually ascertained. We also request Mr. Khan to personally visit the liquor vends/AAHATAS at Lakkar Bazar, Shimla for ascertaining as to whether the same are being run totally in consonance with the excise policy, as also the directions of the Hon'ble Supreme Court of India or not.

Affidavit of compliance be positively filed within two days. List on 6.11.2017.

Authenticated copy"

(Emphasis supplied)

……x……x……x…

"In continuation of our order dated 03.11.2017, we are of the considered view that at least three liquor vends (retailer), need to be relocated and they being (i) at Chaura Maidan near Sanitorium Hospital, (ii) Country Liquor Vend (AAHATA) at Lakkar Bazar and (iii) IMFL at Lakkar Bazar.

We direct that needful be positively done within a period of two weeks from today.

List on 27.11.2017.

Copy dasti."

12. It appears that on 27.11.2017, State filed another application, qua liquor vend located at St. Edward School, Shimla and this Court was persuaded by the learned Advocate General to modify the aforesaid orders dated 03.11.2017 and 06.11.2017, which the Court did do so on 27.11.2017, by passing the following order:-

"From the affidavit filed by the Excise & Taxation Commissioner, it emerges that the liquor vends at Lakkar Bazaar and Chaura Maidan in Shimla are within the limits prescribed under the Excise Policy. In so far as the liquor vend near St. Edward School, Shimla is concerned, learned Advocate General states that without going into the controversy as to whether site of the liquor vend is in consonance with the Excise Policy or not, the same shall be shifted to nearby identified place, **which is definitely outside the direct approach of the students from the school premises**. In this view of the matter, we modify our orders, dated 3rd November, 2017 and 6th November, 2017.

Let a complete copy of Excise Announcements, 2018 be supplied to learned Amicus Curiae.

List on 12th December, 2017."

(Emphasis supplied)

13. Subsequently, when the matter came up for hearing, this Court invited attention of the State through the learned Additional Advocate General, who all along had been pursuing the matter, that one liquor vend at village Gumber (Jawalamukhi), Kangra, is being run, rather illegally, inasmuch as it is in close proximity of the school and located at a place, implying as

though it is meant to cater only to the children of the school. It appeared to be an extension of the school itself.

14. This Court is assured by the learned Additional Advocate General/State that regardless of the distance of the liquor vend from the school, action for shifting the same, would positively be taken with speed and dispatch.

15. Further it is argued that present proceedings be closed.

16. At the threshold, we clarify that we have not gone into the question of the State de-notifying the National Highways as State/District Highways, for the reason is simple. Excise Policy for the year 2018-19 is likely to be issued and auction of liquor vends which usually takes place in the month of March being end of the financial year, is to take place, based on such decisions and factors which the State may consider. Hence we leave this question open, to be best reconsidered by the State and to be adjudicated, if so required in an appropriate proceeding.

17. However, we must observe: (i) from the letter petitions, it is quite apparent that the averments made therein are true; and (ii) the State after physically inspecting the liquor vends took remedial measures of closing/shifting such of those vends, which *prima facie* were found to be operating in violation of the Policy and directions issued by the Courts.

18. We are of the considered view that with regard to opening up the liquor vends near the schools/religious institutions, approach adopted by the State is extremely pedantic and pedestrian. We have already clarified that distance is not for the purpose of arithmetical calculation, but to prevent easy accessibility and/or visibility thereof from such premises.

19. The Himachal Pradesh Excise Act, 2011 (Section 26), prohibits sale of liquor as also employment of minors in the liquor vends. In fact, it entails penal consequences. Section 28 empowers the State to issue licence, permit or pass on such basis and such conditions as the State may prescribe. Significantly, sub-Section (5) of the said Section mandates consideration of public opinion with respect thereto. Even the Himachal Pradesh Liquor License Rules, 1986 prohibit sale of liquor to minors.

20. We have already noticed that in *K. Balu* (supra), the Apex Court issued directions to all the Chief Secretaries and Director Generals of Police for taking steps prohibiting sale of liquor on National or State Highways. The said directions came to be modified in *Arrive Safe Society of Chandigarh vs. The Union Territory of Chandigarh & another,* Special Leave Petition (Civil) No. 10243 of 2017.

21. Article 47 of the Constitution of India mandates as under:-

> "47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health.—The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health."

22. At this point in time, we may also take note of the fact that this Court, way back in the year, 1983, itself had issued directions prohibiting sale of liquor at a distance of about 200 yards from the place of worship and places of education (*Himachal Pradesh Nashabandi Parishad and others vs. State of H.P. and others,* CWP Nos.136 and 179 of 1983). The directions vis-a-vis display of liquor bottles or containers (Para-34) of these liquor vends are applicable even today.

23. We notice that thereafter the State had modified the Policy and the distance stands reduced. Be that as it may, since the financial year is about to end, we leave the issue of distance, whether adequate or not, to be considered in an another appropriate proceeding, but however, dispose of the present petitions with the following directions.

> i. Before the next announcement of the Liquor Policy i.e. for the financial year 2018-19, the State shall consider as to whether it is advisable/prudent to

open liquor vends on erstwhile National/State Highways, which stand de-notified as such, solely to overcome the applicability of the directions issued by the Hon'ble Supreme Court of India in *K. Balu* (supra) and *Arrive Safe* (supra);

ii. Whether distance presently prescribed for opening up of the liquor vends from the schools//educational/religious institutions is adequate or not and requires modification;

iii. (a) In any case, distance so notified is not to be measured from the gate of the school, but the farthest point of the premises (building and play ground) of the schools, for as is apparent that the school at Gumber is totally open from all directions, including the play ground and the liquor vend is freely visible and accessible to children from all sides. Thus, distance is to be measured not from the class room; end of the building; or the beginning of the play ground;

(b). No ambiguity can be allowed with regard thereto. It is the radial distance from the boundary of the school and not the distance from the gate of the school(s) which would be considered;

(c). This Court cannot be oblivious of the fact that most of the schools in Himachal Pradesh, particularly in the rural areas, are unfenced and do not have any boundary walls. They are absolutely open from all sides, be it the school play ground or the building housing the school itself;

iv. In the liquor vends, it must be conspicuously displayed that sale of liquor for children is prohibited and in any case, consumption of liquor even for adults is injurious to health.

v. CCTV cameras must be installed in the liquor vends. Such cameras are to be installed by the operators of the liquor vends. This would only ensure security of the shop and take note of violation if any carried out by the employees manning the liquor vends, more specifically with regard to sale of liquor to children;

vi. The persons employed in the shops should be orientated/sensitized towards the law and should be explained in no uncertain terms their duties to protect the interest of the children; and

vii. Views of the ladies particularly that of Mahila Mandal(s) must prevail, in the event of objection being raised with regard to the situs of the liquor vends.

24. Before parting, we wish to place on record appreciation qua the efforts put in by M/s Vikrant Thakur and Deven Khanna, Amicus Curiae, who, on the instructions of this Court, contacted letter petitioners and obtained necessary feedback.

25. Learned Amicus Curiae undertake to communicate the outcome of the present petition to the letter petitioners.

With the aforesaid observations, present petition stands disposed of.

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

State of H.P. ...Petitioner

Versus

Aman Suman & another ...Respondents

Cr. Revision No. 161 of 2017
Decided on : 12.12.2017

Code of Criminal Procedure, 1973- Section 482- Criminal Revision- Section 304 (A) (aa) of I.P.C readwith Sections 180 and 196 of the M.V. Act- Section 223 Cr.P.C.- Charges have been filed against the accused under Section 304 (A)(aa) of I.P.C read with Sections 180 and 196 of the M.V. Act - ordered to be segregated by the learned Additional Sessions Judge-cum-Special Judge, CBI- Consequently, the accused relegated to the learned Trial Magistrate concerned facing trial under the provisions of Sections 180 and 196 of the M.V. Act – Revision preferred- High Court while setting aside the order of the learned Additional Sessions Judge- **Held** – that in view of the provisions of Section 223 of the Cr.P.C. – persons enumerated in the Section and being tried together for the offences committed during the course of the same transaction are to be tried jointly - Consequently, order of the learned trial Court below set aside and quashed and the Court directed to proceed against the accused jointly as per law. (Para-2 and 3)

For the petitioner : Mr. R.S. Thakur, Addl. A.G.
For the respondents : Mr. Vivek Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The State of H.P. is aggrieved by the order recorded by the learned Additional Sessions Judge-cum-Special Judge, CBI, Shimla, H.P., whereby he segregated offences borne in Section 304 (A) (aa), from, the offences borne in Sections 180 and 196 of the Motor Vehicles Act, besides thereafter he proceeded to relegate the accused concerned, to the learned trial Magistrate concerned, for, hence facing trial for commission of offences, contemplated under Sections 180 and 196, of the Motor Vehicles Act.

2. For making an apt determination vis-a-vis the legality, of the aforesaid pronouncement, an allusion of the apt provision(s), borne in Section 223 Cr.P.C. is imperative, provision whereof stands extracted hereinafter:-

> "223. **What persons may be charged jointly**. The following persons may be charged and tried together, namely:-
>
> (a) persons accused of the same offence committed in the course same transaction;
>
> (b) person accused of an offence and persons accused of abetment of, or attempt to commit, such offence;
>
> (c) person accused of more than one offence of the same kind, within the meaning of section 219 committed by them jointly within the period of twelve months;
>
> (d) persons accused of different offences committed in the course of the same transaction;
>
> (e) persons accused of an offence which includes theft, extortion, cheating, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first named persons, or of abetment of or attempting to commit any such last- named offence;
>
> (f) persons accused of offences under sections 411 and 414 of the Indian Penal Code (45 of 1860). or either of those sections in respect of stolen property the possession of which has been transferred by one offence;
>
> (g) persons accused of any offence under Chapter XII of the Indian Penal Code relating to counterfeit coin and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence; and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges: Provided that where a number of persons are charged with separate offences and such persons do not fall within any

of the categories specified in this section, the Magistrate 02 Court of Session may, if such persons by an application in writing, so desire, and if he or it is satisfied that such persons would not be prejudicially affected thereby, and it is expedient so to do, try all such persons together."

A circumspect reading of the hereinabove extracted relevant provision(s) of the Cr.P.C. make a clear (i) expostulation, of, the category of persons enumerated therein, being tried together vis-à-vis the offences, committed, during the course of the same transaction, (ii) of persons abetting, attempting or conspiring vis-à-vis the principal accused, in the latter committing offences also being amenable for theirs being jointly tried, alongwith the principal offender. (iii) Hereat, respondent No.1 Aman Suman, is the principal offender, he is alleged to commit an offence punishable under Section 304 (A) of the IPC AND respondent No.2 Sumritra Chauhan, is alleged to commit an offence punishable under Sections 180 and 196, of the Motor Vehicles Act.

3. Uncontrovertedly, ascription(s) of the aforesaid penal offences vis-à-vis Aman Suman and qua Sumritra Chauhan, arise from AND are prima facie evidently committed, during, the course of the same transaction. Consequently, both were amenable to be tried jointly, for all the offences aforestated. However, on the learned Additional Sessions Judge, segregating, the offences ascribed vis-à-vis Aman Suman, from, the ones ascribed vis-à-vis Sumritra Chauhan, has hence obviously infracted the statutory provision(s), engrafted in Section 223 Cr.P.C., (i) thereupon his verdict suffers from a gross infirmity, hence it is quashed and set aside. The Court concerned, shall proceed to charge the accused respectively, if not charged, for the incriminatory role(s) ascribed vis-à-vis them by the Investigating Officer concerned, in the latters' report furnished before the learned committal Magistrate AND shall also hold them to a joint trial. However, it is open for one Sumritra Chauhan, to, argue for discharge before the learned Additional Sessions Judge concerned.

4. In view of the above directions, the instant petition as well as all pending application(s), if any, stand disposed of.

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

Sunita Sharma .....Petitioner

Versus

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

CWP No. 1571 of 2017
Decided on: 12.12.2017

Constitution of India, 1950- Article 226- Consumer Protection Act, 1986- Sections 10 and 16- Civil Writ Petition- Appointment as a female member in H.P. State Consumer Dispute Redressal Commission- Name of the petitioner recommended at serial No.2 by the Selection Committee- The candidate reflected at serial No.1 having been appointed in H.P. University not available for appointment- The respondent instead of making offer to the petitioner opted to make an offer to the respondent who was empanelled at serial No.3 by the Selection Committee- The selection made by the State Government thereof challenged by way a writ petition- **The High Court held-** that the action of the Competent Authority to appoint any one out of the empanelled candidate(s) as member irrespective of their position in the merit list, more so, as there was no rule framed, was discriminatory and meted out an arbitrary treatment to the petitioner, which was violative of Articles 14 and 16 of the Constitution of India. (Para-8 and 9)

Constitution of India, 1950- Article 226- Consumer Protection Act, 1986- Sections 10 and 16- Civil Writ Petition- The High Court further held- that the empanelment of the candidate(s)

in the select list having been made on merit and that too on the basis of their performances in the interview, in a case of bracketed candidates, the senior in age ranks high as compared to candidate who is junior in age- Since, there were no rules holding the field the rules governing service jurisprudence were applicable and, as such, the petitioner could not have been ignored.

(Para-10 and 11)

Cases referred:

State of Kerala and another V. K. Reghu Varma and others, AIR 2010 Kerala 28
S. Chandramohan Nair V. George Joseph and others, (2010) 12 SCC 687
N. Kannadasan V. Ajoy Khose and others, (2009) 7 SCC 1

For the petitioner: Mr. K.D. Sood, Sr. Advocate with Mr. Sanjeev Sood, Advocate.
For the respondents: Mr. Virender Verma, Addl. A.G for respondent No.1.
Mr. Adarsh K. Vashisth, Advocate for respondent No.2.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

The petitioner, a law graduate and practicing lawyer, aggrieved by the appointment of respondent No.2 as Female Member in the H.P. State Consumer Disputes Redressal Commission (hereinafter referred to as the 'Commission' in short) in preference to her, has filed the present writ petition for redressal of her grievance on the grounds *inter-ali*a that she being eligible and duly qualified for appointment as Female Member in the Commission submitted her application for consideration against vacancy of Female Member advertised in the year 2016 by the 1st respondent. She was called for interview on 2nd July, 2016. Her interview along with other eligible candidates as per list, Annexure P-1 was conducted by a Selection Committee constituted under sub-Section (1A) of Section 16 & sub-Section (1A) of Section 10 of the Consumer Protection Act, 1986 (hereinafter referred to as the 'Act' in short)comprising the then President of H.P. State Consumer Disputes Redressal Commission as its Chairman, the Principal Secretary (FCS&CA) and the Principal Secretary (Law) to the Government of Himachal Pradesh, Members. The Selection Committee made its recommendations, Annexure P-1 (Colly.) for appointment as Female Member in the Commission out of panel prepared by it. The following including the petitioner were candidates empanelled by the Selection Committee, which on the face of it is purely on the basis of merit:-

Sr. No.	Name	Marks scored
1.	Dr. Karuna Machhan	14/20
2.	Ms. Sunita Sharma	11/20
3.	Smt. Meena Verma	11/20
4.	Smt. Yogita Dutta	10/20

2. The candidate Dr. Karuna Machhan at serial No.1 of the panel was not available for appointment as Female Member because by that time, she was appointed somewhere else i.e. in H.P. University against some post. Respondent No.1 instead of making offer of appointment to the petitioner, who was at Serial No.2 of the panel opted for making offer of appointment to the private respondent, who was at Serial No.3. The order in which the candidates were empanelled is pure and simple on merits as in the recommendation; Annexure P-1 (Colly.), the Selection Committee in the very opening sentence has said that the Female Member in the Commission was recommended to be appointed out of the panel so prepared on the basis of performance of candidates interviewed. Therefore, aggrieved by the appointment of private respondent as

member in the State Commission, the petitioner made the representation, Annexure P-2 to the 1st respondent and made a request that she being at Serial No.2 of the list (panel) may be given appointment as member State Commission. The 1st respondent, however, seems to have not taken any action on the representation, Annexure P-2. It is in this backdrop, the petitioner has approached this Court by filing the present writ petition for the grant of following prayers:

a. Quash the selection and appointment of respondent No.2 as Female Member of the H.P. State Consumer Disputes Redressal Commission.

b. To direct the respondent No.1 to consider the petitioner for appointment in place of respondent No.2.

c. Direct the production of all the relevant records.

3. The respondents when put to notice have contested the writ petition. The 1st respondent has not disputed the empanelment of candidates for appointment as member State Commission by the Selection Committee constituted for the purpose. It is also not disputed that the candidate at Serial No. 1 in the panel Dr. Karuna Machhan was not available for appointment as Member State Commission as she had already joined service in H.P. University by that time. As per stand of the 1st respondent, the candidates at Serial No. 2 and 3 in the panel had scored equal marks in their interview, therefore, the private respondent who was at Serial No. 3 of the panel was preferred for appointment as member in preference to the petitioner on the basis of her "public experience". Also that, the job of the Selection Committee is to empanel eligible and suitable candidates for appointment as member in the Commission. The appointing authority is free to appoint any candidate recommended for appointment by the Selection Committee named in the panel. The Selection Committee is free to device its own method at the time of making its recommendations, however, keeping in mind that the candidates appeared for interview are eligible and having prescribed qualification in terms of the provisions contained under the Act. The claim of the petitioner that she being higher in merit and also senior in age to the private respondent, should have been appointed as member, has been denied being wrong.

4. Respondent No.2 though has filed separate reply, however, on similar lines as by the 1st respondent. Her contentions are, therefore, need not to be elaborated in this judgment.

5. In rejoinder, the petitioner has denied the contentions to the contrary in reply to the writ petition being wrong and reiterated what she averred in the writ petition. It is also pointed out that for want of any material on record, it cannot be said that the Selection Committee could have devised its own method for making recommendations. The committee, according to the petitioner, was required to have acted in accordance with the well settled norms and not arbitrarily or adopted its own method. The appointment of respondent No.2 as member State Commission has been sought to be quashed being not in accordance with the Act and rules framed thereunder and rather arbitrary, discriminatory and violative of Articles 14 and 16 of the Constitution of India.

6. On the parties having exchanged affidavits, the 1st respondent through learned Additional Advocate General was directed to produce the records pertaining to selection process conducted for filling up the vacancy of female member in the Commission. On perusal of record so produced, no material except that the private respondent allegedly having public experience, was found available justifying appointment of the private respondent as Member of the Commission in preference to the petitioner. On having gone further through the record so produced, no documentary proof suggesting that the public experience of the private respondent was better as compared to the petitioner could be found available therein. It is desirable to note the reasons recorded to ignore the petitioner in the record so produced, which reads as follows:-

N/155:-

It has come to the notice that in r/o State Consumer Commission, the recommended candidate at Sr. No. 1 (Dr. Karuna Machhan) has already joined her service on 24.09.2016 in HPU on her

appointment as Assistant Professor. As such, she may now not like to accept this position if offered. ..... Submitted pl.

Sd/-
5-10-2016
Pr. Secy. ((FCS&CA)

N/156:

For the State Commission two candidates have equal marks. Based on public experience Smt. Meena Verma can be appointed.

For District Forums, N 147 to 150 be seen.

Sd/-
Principal Secretary
5/10

Hon'ble Minister F&CS

Sd/-
(Minister)
6/10

Hon'ble CM

N/157

The following may be appointed in State Consumer Commission/District Consumer Forums:-

State Consumer Commission (Female Member):

1. Smt. Meera Verma, VPO Gawas, Tehsil Chirgaon, District Shimla.
2. xxxxx
3. xxxxx
4. xxxxx
5. xxxxx
6. xxxxx

-sd-
Chief Minister
19/11/2016.

7. The Chief Minister, on going through the reasons as aforesaid, has approved the appointment of the private respondent as Member in the Commission and consequently, she has been appointed, and continuing, as such, in the Commission. We, however, were not satisfied with the reasons that the private respondent is having public experience over and above the petitioner, hence directed the Additional Chief Secretary, Food Civil Supply and Consumer Affairs to the Government of Himachal Pradesh to appear in person to assist the Court. This order reads as follows:-

> "Learned Additional Advocate General assisted by Ms. Suman, Clerk has produced the record pertaining to the selection of Member in H.P. State Consumer Redressal Commission, Shimla. Prima-facie, we are not satisfied with the appointment of the private respondent as Member for the reasons that the petitioner Sunita Sharma in the merit list was at serial No. 2 whereas the said respondent was at serial No. 3. No reasonable and plausible explanation is there on record to justify the selection of private respondent in preference to the petitioner who otherwise also not only a law graduate but senior in age also. The

only explanation that the private respondent is having public experience over and above that of the petitioner is also not prima-facie correct. In this backdrop, we direct Additional Chief Secretary, Food Civil Supply and Consumer Affairs to the Government of Himachal Pradesh to appear in person and assist the Court on the next date. List on ***27.11.2017."***

8. Consequently, the Additional Chief Secretary appeared in person in this Court and apprised that the Selection Committee only prepares a panel and submit the same to the Government. The Minister/Chief Minister may appoint anyone out of the empanelled candidate(s) as Member irrespective of their position in the merit. Also that, no rules, guidelines or instructions governing the appointment of the Member(s) in District Consumer Fora and the Commission have yet been framed and that the matter to frame such rules is under consideration of the department. We reproduce the order to this effect passed on 4.12.2017 in the writ petition, which reads as under:-

"Mr. Tarun Kapoor, Additional Chief Secretary, Food, Civil Supplies and Consumer Affairs to the Government of Himachal Pradesh is present in person.

We have been informed that as per the practice prevalent, the Selection Committee prepares the panel and submit the same to the Government for appointment of Member(s) in District Consumer Fora and H.P. State Consumer Disputes Redressal Commission, Shimla. In the past also, the Minister/Chief Minister has ordered the appointment of such Member(s) without adhering to the position of empanelled candidate in the panel so prepared. No rules, guidelines or instructions governing the appointment of such Member(s) are yet framed. According to Mr. Kapoor, the matter qua framing rules for appointment of the Member(s), District Consumer Fora and State Redressal Commission is under consideration of the department. It is in this backdrop, this petition is to be heard further and for that list on ***11.12.2017."***

9. It is in this background, we proceeded further to hear and decide the fate of this writ petition. In our considered opinion, in the matter of appointment as Member of the State Commission, the 1st respondent has discriminated the petitioner and meted out an arbitrary treatment to her. Such act on the part of the said respondent is not only illegal but also violative of Articles 14 and 16 of the Constitution of India. It is even beyond imagination that the private respondent is having public experience better than the petitioner for the reason that the latter is senior in age as compared to the former. As we feel, a person senior in age is having better experience in all spheres of life including the public experience. We record it authoritatively and with all exactness that the petitioner having enrolled as an Advocate in the year 1992 and in effective legal practice since then not only in this Court but in the State Administrative Tribunal and various quasi judicial authorities including the State Consumer Disputes Redressal Commission/District Consumer Disputes Redressal Forum, certainly is well averse with various social problems as compared to the private respondent, who as per documents she furnished alongwith her application is post graduate in commerce and also did the Master's degree in the business administration, which qualification she acquired in the year 2012. When she was studying up to 2012, whereas, the petitioner is in effective legal practice since 1992, it is not understandable as to what prompted the 1st respondent to assess her public experience better than the petitioner.

10. We are more than satisfied that the candidates in select list, Annexure P-1 (Colly.) have been empanelled on merit assessed on the basis of their performance in the interview. The petitioner and private respondent both having scored 11 marks out of 20 have, therefore, to be considered as bracketed candidates. Although, no rule governing the appointment of the Member in the State Commission/District Consumer Fora have yet been framed by the respondent-State. However, if the position of the rules governing service condition of the Government employees is seen, in a case of bracketed candidates, the senior in age ranks high as compared to bracketed candidate, who is junior in age. It is for this reason, the Selection

Committee has ranked the petitioner at higher pedestal in merit as compared to the private respondent. True it is that the respondent while making the appointment out of empanelled candidates as Member of the State Commission are not bound to adhere to their merit and may appoint anyone from them as Member, however, without there being any rules to this effect framed by the respondent-State, such pick and choose policy is without any legal sanctity behind it.

11. The respondent-State cannot make appointment against a post qua which the person appointed has to be paid from the public exchequer, in such an arbitrary and whimsical manner. We would have approved the power exercised by the competent authority in the matter of appointment of private respondent as Member of the Commission, had there been some sort of resemblance between her merit and that of the petitioner in any sphere i.e., academic, professional or social. The petitioner for the resons already recorded is more meritorious as compared to the private respondent and, as such, could have not been ignored at all.

12. The judgment of the Kerala High Court in ***State of Kerala and another*** V. ***K. Reghu Varma and others, AIR 2010 Kerala 28*** citied by learned Additional Advocate General and also relied upon by learned counsel representing the private respondent is not at all applicable in the present case for the reason that the scheme as well as the rules framed by the State of Kerala under the Consumer Protection Act empowers the Selection Committee only to finalize the panel of candidates after subjecting them to suitability test as deemed fit and proper for the purpose of assessing their merit, suitability etc., for holding the post and not to prepare a select list of the candidates in the order of merit. This being the position of the Rules in the State of Kerala the candidates finalized by the Selection Committee are being recommended for appointment and the appointing authority is free to appoint any candidate recommended by the Selection Committee. The only restriction on the appointing authority i.e., the Government of Kerala under the Rules is that it can not appoint anyone outside the list of the qualified candidates furnished by the Selection Committee. This being not the position of Rules in the State of Himachal Pradesh, neither the respondent-State nor private respondent can be heard of seeking protection of law laid down in the judgment supra, that too, when the Apex Court in ***S. Chandramohan Nair*** V. ***George Joseph and others, (2010) 12 SCC 687***, again a case from the State of Kerala has held as under:-

> "17. An analysis of these provisions shows that appointment of judicial and other members is required to be made by the State Government on the recommendation of the Selection Committee. If the Chairman and/or the members of the Selection Committee do not agree on the candidature of any particular person, then opinion of the majority would constitute recommendation of the Selection Committee. Though, the State Government is not bound to accept the recommendations made by the Selection Committee, if it does not want to accept the recommendations, then reasons for doing so have to be recorded. The State Government cannot arbitrarily ignore or reject the recommendations of the Selection Committee. If the appointment made by the State Government is subjected to judicial scrutiny, then it is duty bound to produce the relevant records including recommendation of the Selection Committee before the Court to show that there were valid reasons for not accepting the recommendation."

13. It is thus seen from the ratio of the judgment ibid that even in the State of Kerala also, though the Government is not bound to accept the recommendations made by the Selection Committee, however, in that eventuality, the reasons for doing so are required to be recorded. It has further been held in this judgment that the State Government cannot arbitrarily ignore or reject the recommendations made by the Selection Committee. The point in issue, in the present writ petition, is squarely covered in favour of the petitioner by the above cited judgment of the Apex court because while ignoring her for appointment as Member of the State Commission, virtually no reasons has been recorded and the private respondent has been preferred to be

appointed as such, on her so called "public experience", which in our considered opinion and by any stretch of imagination can be said to be better than that of the petitioner.

14. Even the Apex Court in ***N. Kannadasan*** V. ***Ajoy Khose and others***, ***(2009) 7 SCC 1***, again a case concerning with the appointment of President, State Consumer Disputes Redressal Commission has held that submitting a panel of names to the Government for appointment as President and one out of three names suggested in the panel is appointed as President, the question of meeting of mind between the Chief Justice and the executive would not arise but by reasons thereof, ultimate authority to appoint the President is not legally sustainable. The ratio of the judgment supra, therefore, lead to the only conclusion that even the executive cannot overlook the merit of qualified and selected candidates empanelled in the list except for recording reasons therefor.

15. The present, as we have already said, is a case where no legal and valid reasons has been recorded by the respondent-State qua appointment of private respondent as woman member in the State Commission in preference to the petitioner. Therefore, her appointment in all fairness as well as in the ends of justice deserves to be quashed and set aside.

16. We are also drawing support from the judgment of Madras High Court in ***T. Xavier*** V. ***State of Tamil Nadu*** dated ***7th June, 2012***. Like in the State of Himachal Pradesh, in Tamil Nadu also, no rules authorizing the State to appoint anyone out of the list of empanelled candidates and in ignorance of the merit of empanelled candidates exist. Therefore, while taking note of the entire case law including the judgment of Kerala High Court in ***K. Reghu Varma*** case supra, it has been held as under:-

> "17.....A thorough reading of Section 10 (1-A) would not specifically state as to how many persons the Selection Committee has to recommend for a single post. What it only says is that every appointment under Section 10 (1) shall be made on the recommendation of the Selection Committee. In this case, even as the Selection Committee found the petitioner alone suitable for the post of President and the other candidates who participated in the interview along with the petitioner were found unfit for recommendation, in my stand point, the said selection is final and binding on the appointing authority. Hence, the State Government's reference to the decision of the Kerala High Court has neither any bearing nor any relevance to the case on hand.
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> 18. The other provisions viz., Section 16 and Section 20 of the Act deal with the composition of State Commission and Composition of National Commission respectively and Rule 12-A of the Consumer Protection Rules,1987, deals with the procedure for selection of members of the National Commission. Therefore, the said provisions are not relevant to the present case.
>
> 19. The principle underlined by the Supreme Court in N.Kannadasan's case, cited supra, while asserting the primacy of judiciary in appointment of President of the State Commission by recommending the names of judges, who, in its opinion, are independent and fit persons to be appointed, is the matter for concern. It is true that if a panel of names is suggested and the State makes appointment of one of them, the question of meeting of mind between the Chief Justice and the executive would not arise but there cannot be any doubt whatsoever that by reason thereof the ultimate authority to appoint would be the executive. The principle of purposive interpretation may be resorted to hold that for the purpose of selecting a person to be appointed as President of a District Forum, the process of selection has to be in accordance with the provisions of the Act and the Rules. Those provisions contemplate that appointment of President is required to be made by the State Government on the recommendation of the Selection Committee. Then, that

recommendation goes to the executive under the scheme of appointment. The powers of the judicial authority and the executive are underlined therein so also the power to be exercised in selecting a person, which is after a recommendation from the judicial authority.

20. In the instant case, when the Selection Committee has recommended a single name and that committee, after analysing every factor, selected a proper person having judicial knowledge to function as President of the District Forum, it is not for the executive to call for a panel of persons to choose a name of their own choice. The scheme of the Act under Section 10 (1-A) contemplates that every appointment shall be made on the recommendation of the Selection Committee, which is headed by a retired Judge of the High Court. In the solemn functioning of the committee, if they choose a right person whether is one or more and he is found to be a fit person to be appointed, the executive has to take a decision either to act on the recommendation or otherwise, but it is not for the executive to call for a panel of names and decide the appointment.

21. Article 50 of the Constitution demarcates separation of judiciary from executive, under which the State shall take steps to separate the judiciary from the executive in the public services of the State. Such powers for the judiciary and executive are defined under the scheme of the Act and the provisions made thereunder. When a name is recommended by the Selection Committee under the chairmanship of the State Commission, it is for the State to act on that. In other words, the Selection Committee, under the Act and the Rules, adopting its own methods as it deems fit to assess whether the candidates placed before it are duly qualified to hold the post of either President or Member, recommends to the executive for appointment and, thereafter, the State shall proceed to appoint the person based on the recommendation. The power conferred on the executive is only to finalize the name (panel) sent by the Selection Committee and not to call upon the judicial authority to send a panel of names. It is also clear from the scheme of the Act that the appointing authority, namely the executive, cannot appoint the candidate outside the list of qualified candidates furnished by the Selection Committee and to that extent there is a fetter or restriction on the power and method of appointment of the President and Members of the various Forums under the Consumer Protection Act and its State Rules, on the Government. It is not otherwise to call upon the Selection Committee, which is under the control of Chairmanship of a retired Judge of the High Court, to send a panel of names. So, the underlined power as per the Constitution and the scheme of the Act has to be understood in such a manner and, accordingly, the State has to act on the recommendation of the Selection Committee."

17. Having said so, we allow the writ petition and quash the appointment of the private respondent as Member in the H.P. State Consumer Disputes Redressal Commission and direct the 1st respondent to consider the petitioner, who otherwise is meritorious and more experienced as compared to the private respondent for appointment as Member in the Commission within one month from the date of production of a copy of this judgment by her before the 1st respondent.

18. The writ petition is accordingly allowed and stands disposed of. Pending application(s), if any, shall also stand disposed of.

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

Tirath Ram ..Petitioner.
Versus
Swaran Dass and others. ..Respondents.

Cr.MMO No. 19 of 2010
Date of decision: 12.12.2017

Code of Criminal Procedure, 1973- Section 200- A complaint under Section 200 Cr.P.C filed by one Tirath Ram alleging illegal disbursement of funds under Indira Gandhi Aawas Youzna, the land where construction being done stated to be beyond the territorial domain of the Gram Panchyat concerned – the Learned Sessions Judge on revision setting aside the same- Hence, the present petition- **High Court held** – that in view of report submitted by the police nothing is borne out that the disbursement of the funds was recommended by a Panchayat other than the one in whose territorial jurisdiction the house was being constructed- Even otherwise, the scheme had been duly sanctioned by the BDO and the Deputy Commissioner and, as such, issuance of the process held to be bad in the eyes of law- The learned Sessions Judge had rightly quashed the summoning order.

For the petitioners: Mr. Rakesh Thakur, Advocate.
For the respondents: Mr. Ajay Sharma, Advocate for Respondents No. 1 to 4.
Mr. R.S.Thakur, Addl. A.G. for respondent No. 5.

The following judgment of the Court was delivered:

Sureshwar Thakur, J. (oral)

One, Tirath Ram instituted a complaint under Section 200 Cr.P.C. before the learned trial Court concerned, alleging therein, of illegal disbursement of funds being vis-à-vis the accused named therein. (a) empathetically contrary to the mandate of the apposite scheme, (b) The disbursement of funds vis-à-vis co-accused Herbansi Devi, occurred, under the Indira Gandhi Aawas Youzna AND were distributed vis-à-vis her for enabling her, to construct her house. At the time, of, the aforesaid accused hence seeking disbursement of funds under the aforesaid scheme, vis-à-vis her, she purveyed to the Panchayat concerned, all documents, wherein a clear display occurs, of hers, intending to raise construction, upon land existing within the territorial domain, of Gram Panchayat Kuriala yet the resolution recommending disbursement(s) of funds vis-à-vis her, was rendered by a Panchayat, other than the one wherewithin whose territorial domain, she intended to construct a house.

2. The learned trial Magistrate took cognizance on the complaint AND proceeded to order for issuance, of, summons upon the accused, named in the complaint concerned. The accused hence instituted a revision petition, before, the learned Sessions Judge, thereupon the latter set-aside the summoning order rendered by the learned trial Court. The complainant is aggrieved therefrom hence has preferred the instant petition, constituted under Section 482 of the Code of Criminal Procedure. It is apparent on a reading of the concluding portion, of Annexure P-1, Annexure whereof, is a report furnished, before the learned trial Magistrate, by the Additional S.P. Una, (i) of no specific inter-diction being borne in the relevant scheme, against, disbursement of funds being recommended by a Panchayat other than the one wherewithin whose territorial, domain, the aspirant intends to raise construction. The aforesaid concluding portion, of, Annexure P-1 hence does render open a conclusion, of even, if a resolution was made, by a Panchayat other than the one, within whose territorial domain the aspirant intended to raise construction, (ii) thereupon with the resolution being merely recommendatory in nature (iii) besides with sanction(s) being meted thereto by the Block Development Officer and by the Deputy

Commissioner, thereupon (iv) there was no incriminatory liability fastenable upon the accused, (v) moreso, when the aspirant had purveyed to the Panchayat concerned, all papers revealing hers intending to raise construction, upon, land situated within the territorial domain of Panchayat Takka. Even otherwise the resolution is merely a recommendery resolution. Uncontrovertedly, with the construction by Harbansi Devi, being completed, after hers using the apposite funds, thereupon it would not be appropriate to reverse the impugned order. In sequel thereof it can be concluded, that the learned Sessions Judge has aptly quashed the summoning order, rendered by the trial Magistrate vis-à-vis the accused. Accordingly, the instant petition is dismissed. No costs.

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

Anil Aggarwal .....Petitioner.

Versus

H.P. Housing and Urban Development Authority Shimla and another .....Respondents.

CWP No.10237 of 2012.
Judgment reserved on : 07.12.2017
Date of decision:14th December, 2017.

Constitution of India, 1950- Article 226- Section 4 of the H.P. Public Premises and Land (Eviction and Rent Recovery) Act- Unauthorized Construction of Building- Petitioner having encroached upon 47.49 Square meters by way of a roof projection, had been directed to remove the same- Petitioner, however, requesting that encroachments be regularized by the respondents after permitting him to purchase the said area- Respondents however proceeded under Section 4 of the H.P. Public Premises Act, which was allowed by the Collector and the appeal filed by the petitioner had also been dismissed- hence, the present writ petition- **The High Court held**- that the encroachments were not due to the constraints at the site, as alleged- The petitioner on the contrary had expanded vertically and horizontally in all possible directions and raised construction over an area, which was double the area as allotted to him- the plea of site constraints set up by the petitioner to justify his illegal construction was not justifiable and clearly an afterthought. (Para-10 and 11)

Constitution of India, 1950- Article 226- Section 4 of the H.P. Public Premises and Land (Eviction and Rent Recovery) Act- Unauthorized Construction of Building- Further held - that the matter relating to obstruction, illegal construction, unauthorized encroachment and violation of statutory plans and schemes have to be dealt firmly by the Courts and there has to be zero tolerance on the part of courts while deciding such cases- No sympathetic view can be taken in such matters- Petitioner also cannot urge negative parity , that the case of the petitioner be considered for regularization as per the other encroachers- Further held that the concept of equality is a positive concept which cannot be enforced negatively as two wrongs cannot make one right. (Para-20 to 26)

Constitution of India, 1950- Article 226- Section 4 of the H.P. Public Premises and Land (Eviction and Rent Recovery) Act- Unauthorized Construction of Building- Further held- that the encroachments of this magnitude not possible without active support and connivance of the officials of the respondents- Therefore, respondents directed to hold an inquiry within six months and fix responsibility before reporting compliance on or before 18.6.2018. (Para-31)

Cases referred:

Dipak Kumar Mukherjee versus Kolkata Municipal Corporation and others (2013) 5 SCC 336

M.I.Builders Pvt. Ltd. versus Radhey Shyam Sahu and others (1999) 6 SCC 464

Friends Colony Development Committee versus State of Orissa and others (2004) 8 SCC 733
Royal Paradise Hotel (P) Ltd. versus State of Haryana and others (2006) 7 SCC 597
Shanti Sports Club and another versus Union of India and others (2009) 15 SCC 705
Priyanka Estates International Private Limited and others versus State of Assam and others (2010) 2 SCC 27,
Sanjay Adlakha versus State of Haryana and others (2011) 15 SCC 387
Union Territory of Lakshadweep versus Seashells Beach Resort and others (2012) 6 SCC 136
Esha Ekta Apartments Cooperative Housing Society Limited and others versus Municipal Corporation of Mumbai and others (2013) 5 SCC 357
State of Haryana and others versus Ram Kumar Mann, (1997) 3 SCC 321,
National Institute of Technology versus. Chandra Shekhar (2007) 1 SCC 93,
State of Punjab & others versus. Col. Kuldeep Singh, AIR 2010 SC 1937,
Kulwinder Pal Singh and another versus State of Punjab and others (2016) 6 SCC 532
Commissioner of Municipal Corporation, Shimla versus Prem Lata Sood and others (2007) 11 SCC 40
Union of India and others versus Indian Charge Chrome and another (1999) 7 SCC 314
Kuldeep Singh versus Govt. of NCT of Delhi (2006) 5 SCC 702

For the Petitioner : Ms.Jyotsna Rewal Dua, Senior Advocate with Ms.Charu Bhatnagar, Advocate.
For the Respondents: Mr.Neeraj Gupta, Advocate, for respondent No.1.
Mr.J.S.Guleria, Assistant Advocate General, for respondent No.2.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

I would preface this judgment by referring to the observations made by the Hon'ble Supreme Court in ***Dipak Kumar Mukherjee*** *versus* ***Kolkata Municipal Corporation and others (2013) 5 SCC 336*** in connection with illegal and unauthorized construction of buildings and other structures which read thus:-

> "*8. What needs to be emphasised is that illegal and unauthorised constructions of buildings and other structure not only violate the municipal laws and the concept of planned development of the particular area but also affect various fundamental and constitutional rights of other persons. The common man feels cheated when he finds that those making illegal and unauthorised constructions are supported by the people entrusted with the duty of preparing and executing master plan/development plan/zonal plan. The reports of demolition of hutments and jhuggi jhopris belonging to poor and disadvantaged section of the society frequently appear in the print media but one seldom gets to read about demolition of illegally/unauthorisedly constructed multi-storied structure raised by economically affluent people. The failure of the State apparatus to take prompt action to demolish such illegal constructions has convinced the citizens that planning laws are enforced only against poor and all compromises are made by the State machinery when it is required to deal with those who have money power or unholy nexus with the power corridors.*
>
> *9. We have prefaced disposal of this appeal by taking cognizance of the precedents in which this Court held that there should be no judicial tolerance of illegal and unauthorized constructions by those who treat the law to be their sub-servient, but are happy to note that the functionaries and officers of Kolkata Municipal Corporation (for short, 'the Corporation') have been extremely vigilant and taken steps for enforcing the provisions of the Kolkata Municipal Corporation Act, 1980*

(for short, 'the 1980 Act') and the rules framed thereunder for demolition of illegal construction raised by respondent No.7. This has given a ray of hope to the residents of Kolkata that there will be zero tolerance against illegal and unauthorised constructions and those indulging in such activities will not be spared."

2. Similar sentiments have been expressed earlier to this decision, some of which shall be referred to during the course of this judgment.

3. Adverting to the facts, it would be noticed that the petitioner was allotted by the respondents HIG Plot No. 18, measuring 113.12 square metres in Housing Colony at Nahan under the Hire Purchase Basis vide allotment letter dated 30.03.2002 on as is where is basis. Pursuant to this, a Hire Purchase Tenancy Agreement came to be executed between the parties on 13.06.2002 and possession thereafter was delivered to the petitioner on 11.07.2002. A conveyance deed with respect to the plot was subsequently executed on 27.09.2004. On 18.10.2005, the petitioner received a communication from the Assistant Engineer of the respondent wherein it was stated that the petitioner had encroached upon 47.49 square metres by way of roof projection and was directed to remove the same. In response to the same, the petitioner vide letter dated 31.10.2005 tried to justify why he had encroached upon the land on the ground that by encroaching the land he has only protected the possession and further prayed that his case of encroachment may be considered for the same as with that of the other encroachments which had been regularized by the respondents after permitting such encroachers to purchase the said area. The respondents did not accede to such request and instead issued a notice under Section 4 of the H.P. Public Premises and Land (Eviction and Rent Recovery) Act and thereafter filed a petition for ejectment of encroached land under Sections 3, 4, 5 and 7 which was allowed by the Collector and the appeal filed against the same also came to be dismissed constraining the petitioner to file the instant petition for grant of the following substantive reliefs:-

"i) For issuing a writ of certiorari or any other appropriate writ for quashing order dated 19.8.2011 enclosed as Annexure P-1.

ii) For directing the respondents to settle the alleged encroachment case of the petitioner by permitting him to purchase the area under alleged encroachment, in case the alleged encroachment is held to be an encroachment, without discriminating the petitioner vis-à-vis other similarly situated persons named in Annexure P-11 who have been permitted to purchase the area encroached by them."

4. In reply filed by respondent No.1, preliminary objections regarding petition being not maintainable and concealment of facts have been raised. It is averred that since the petitioner is an encroacher having encroached upon land measuring 47.49 square metres, the present petition being a gross abuse of process of law is liable to be dismissed. These averments have been reiterated in the reply filed on merits.

5. The petitioner has filed rejoinder wherein he has again tried to justify the reasons for his encroachment.

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

6. At the outset, it would be noticed that on 13.06.2013 a learned Division Bench of this Court passed the following orders:-

"Heard. During the course of arguments, it has been brought to the notice of the Court that the petitioner is still ready to take/purchase the land measuring 47.49 sq meter allegedly encroached by the petitioner. Besides above, petitioner is also ready to purchase more land, if found in his possession. Petitioner has also very humbly submitted that respondents/authorities may be directed to consider his case for transferring such land on the genuine prevailing circle rate so that the

apprehension of mis-utilization of such land by the petitioner or by anyone else or the apprehension of non-utilization of such land suitably, may be mitigated.

Keeping in view the submissions advanced on behalf of the petitioner, in the facts and circumstances, liberty is given to the petitioner to approach the respondents or its authorities within two weeks from today, along with certified copy of this order, with the proposal to purchase/allotment of the land adjacent to his house and between the outer wall of his house upto the retaining wall, so that the measurement of the same may be made for transfer of such land on circle rate prescribed for the area, within permissible norms of the respondent authority, as it would be in the interest of revenue and for resolving the controversy. The outcome of the same may be brought before this Court by filing affidavit on or before the next date of hearing.

List on ***24.7.2013.***

Copy Dasti."

7. In compliance to the aforesaid orders, the Board of Directors deliberated upon the issue and took the following decision:-

"The Board after detailed deliberations desired that files of individual case-wise of encroachment and unauthorized construction be examined and dealt accordingly. Addl. Item No.29 regarding allotment of encroached land to Sh.Anil Aggarwal also came up for discussion as per the order passed by the Hon'ble High Court in CWP No.10237 of 2012 titled as Anil Aggarwal V/s HIMUDA. After detailed discussion, it was observed that since Sh.Aggarwal has made encroachment upon HIMUDA land to the large extent and done un-authorized construction thereon, his case for regularization of land cannot be considered."

8. Now adverting to the facts and documents on record, both the authorities constituted under the H.P. Public Premises and Land (Eviction and Rent Recovery) Act, have concurrently found the petitioner to be an encroacher. The encroachment further stands proved in the report submitted by the Local Commissioner appointed by this Court which reads thus:-

" Proceeding of site inspection by Naresh Vasisht, Superintending Engineer, 12th Circle HPPWD Nahan as Local Commissioner of Plot No.HIG-18 of Sh.Anil Aggarwal in H.B.Colony on 09.10.2017 at NAHAN CWP No. 10237/2012.

Consequent upon the referring back of the case to the undersigned vide Deputy Advocate General (Sh.Neeraj Sharma's) letter dated 19.09.2017 in CWP No.10237/2012. Both the parties were directed vide this office letter No.3930-31 and 3032-33 both dated 22.09.2017 to produce approved copy of the Architectural drawing duly approved by the competent authority.

Sh.Anil Aggarwal, the petitioner vide his letter dated 28-9-17 and the Executive Engineer, HP Housing Board Nahan (representative of HIMUDA) vide his letter No.752 dated 04.10.2017 provided the architectural drawing approved by the competent authority.

Further Sh.Anil Aggarwal vide his letter dated 03.10.2017 requested for early hearing and the other party the Executive Engineer H.P. Housing Board gave its consent and as such the site was inspected on 09.10.2017 and the report is as under:-

(i) The petitioner Sh.Anil Aggarwal was allotted a plot of land measuring 113.125 sqm named HIG-18 in housing board colony.

(ii) As per approved Architectural drawing duly approved by the competent authority allowed built up area on different floors is as under:-

GROUND FLOOR	=	*31.96m²*
FIRST FLOOR	=	*61.92m²*

SECOND FLOOR = 61.92m²
TOTAL 155.20m²
FAR 1:37

The facts (i) & (ii) recorded above are not disputed.

The measurement of built up area were carried out on 09.10.2017 and the following facts came to light:-

1. *Built up area on Ground Floor: 4.01x9.95= 39.89 Sqm against approval of 31.96 Sqm.*
2. *Built up Area on First Floor: 12.10x 9.95= 120.395 Sqm against approval of 61.62 m²*
3. *Built up Area on Second Floor: 12.10x 9.95=120.395m²*

The above calculations 1,2 and 3 are tabulated below for the purpose of clarity:

LEVEL	APPROVED BUILT UP AREA IN SQUARE METER	ACTUAL BUILT UP AREA IN SQUARE METER
Ground Floor	31.96 sq. mtrs	39.89
First Floor	61.92 sq. mtrs	120.395
Second Floor	61.92 sq. mtrs	120.395
Total	155.20 sq.mtrs	280.68

Both the parties present agreed to the above measurements and put their signatures in token of their complete satisfaction.

Sd/- .....Petitioner.
Sh.Anil Aggarwal
Present in person.

Sd/-
Sh.Ajay Sharma .....Respondent.
Executive Engineer,
HP Housing Board Nahan
(representative of HIMUDA)

Sd/-
Er.Naresh Vasisht
(Local Commissioner)
Superintending Engineer,
12th Circle, HPPWD, Nahan."

9. It would be noticed that when the area is specified in square metres, it apparently appears to be quite small. However, when the same is multiplied by 10.7639 to

convert it into square feet, it would be noticed that the total encroachment made by the petitioner is infact as under:-

Ground Floor	39.89 x 10.76=429 sq. ft.
First Floor	120.395x10.76=1295 sq.ft.
Second Floor	120.395x10.76=1295 sq.ft.
Total	280.68x10.76=3020 sq.ft.

10. From the above, it is evidently clear that the encroachment made by the petitioner is nearly double the actual allotment made in his favour. Even though, Ms. Jyotsna Rewal Dua, Senior Advocate, assisted by Ms.Charu Bhatnagar, Advocate, for the petitioner, with all vehemence at her command, would argue that it was due to site constraints that the petitioner had to encroach upon the area more than that of allotted to him. However, I find no merit in this submission for the simple reason that even if it is assumed that there were constraints at the site, even then these would have only been there at the level of laying down of foundation and, therefore, once the foundation had been laid, there was no reason why the petitioner should have then expanded vertically and horizontally in all possible directions and raised construction over an area which was double the area that was infact allotted to him.

11. It would be noticed that the approved built up area of the ground floor was 31.96 and even if the site constraints are taken into consideration and it is assumed that the petitioner had on account of this constructed the ground floor over an area of 39.89 square metres, then obviously in case his intention was not to encroach upon any area, the petitioner would not have constructed over an area of 120.395 square metres as against approved built up area of 61.92 on both floors which clearly proves his intention of grabbing and encroaching upon the property of the respondents. Once, the ground floor was constructed over an built up area of 39.89 square metres, obviously then the first and second floors could have conveniently been constructed within the approved built up area of 61.92 square metres. Therefore, the plea of site constraints set up by the petitioner to justify his illegal construction of constraints at site is not justifiable and is clearly an after thought.

12. In ***M.I.Builders Pvt. Ltd.*** *versus* ***Radhey Shyam Sahu and others (1999) 6 SCC 464***, the Hon'ble Supreme Court in no unequivocal terms held that no consideration should be shown to the builder or any other person where construction is unauthorized and it was further held that this dicta is now almost bordering the rule of law. It was further held that the Courts cannot exercise discretion which encourages illegality and perpetuates any illegality. Unauthorized construction, if it is illegal cannot be compounded and has to be demolished. There is no way out. Judicial discretion cannot be guided by expediency. Further, it was held that the Courts are not free from statutory fetters. Justice is to be rendered in accordance with law. Judges are not entitled to exercise discretion wearing the robes of judicial discretion and pass orders solely on their personal predilections and peculiar dispositions. Judicial discretion whenever it is required to be exercised has to be in accordance with law and set legal principles.

13. In ***Friends Colony Development Committee*** *versus* ***State of Orissa and others (2004) 8 SCC 733***, it was held by the Hon'ble Supreme Court that deliberate deviations from the sanctioned plan should not be condoned and compounded and it was observed as under:-

> "20. *The pleadings, documents and other material brought on record disclose a very sorry and sordid state of affairs prevailing in the matter of illegal and unauthorized constructions in the city of Cuttack. Builders violate with impunity the sanctioned building plans and indulge deviations much to the prejudice of the planned development of the city and at the peril of the occupants of the premises constructed or of the inhabitants of the city at large. Serious threat is posed to*

ecology and environment and, at the same time, the infrastructure consisting of water supply, sewerage and traffic movement facilities suffer unbearable burden and are often thrown out of gear. Unwary purchasers in search of roof over their heads and purchasing flats/apartments from builders, find themselves having fallen prey and become victims to the design of unscrupulous builders. The builder conveniently walks away having pocketed the money leaving behind the unfortunate occupants to face the music in the event of unauthorized constructions being detected or exposed and threatened with demolition. Though the local authorities have the staff consisting of engineers and inspectors whose duty is to keep a watch on building activities and to promptly stop the illegal constructions or deviations coming up, they often fail in discharging their duty. Either they don't act or do not act promptly or do connive at such activities apparently for illegitimate considerations. If such activities are to stop, some stringent actions are required to be taken by ruthlessly demolishing the illegal constructions and non-compoundable deviations. The unwary purchasers who shall be the sufferers must be adequately compensated by the builder. The arms of the law must stretch to catch hold of such unscrupulous builders. At the same time, in order to secure vigilant performance of duties, responsibility should be fixed on the officials whose duty it was to prevent unauthorized constructions, but who failed in doing so either by negligence or by connivance.

21.The conduct of the builder in the present case deserves to be noticed. He knew it fully well what was the permissible construction as per the sanctioned building plans and yet he not only constructed additional built up area on each floor but also added an additional fifth floor on the building, and such a floor was totally unauthorized. In spite of the disputes and litigation pending he parted with his interest in the property and inducted occupants on all the floors, including the additional one. Probably he was under the impression that he would be able to either escape the clutches of the law or twist the arm of the law by some manipulation. This impression must prove to be wrong.

22. In all developed and developing countries there is emphasis on planned development of cities which is sought to be achieved by zoning, planning and regulating building construction activity. Such planning, though highly complex, is a matter based on scientific research, study and experience leading to rationalization of laws by way of legislative enactments and rules and regulations framed thereunder. Zoning and planning do result in hardship to individual property owners as their freedom to use their property in the way they like, is subjected to regulation and control. The private owners are to some extent prevented from making the most profitable use of their property. But for this reason alone the controlling regulations cannot be termed as arbitrary or unreasonable. The private interest stands subordinated to the public good. It can be stated in a way that power to plan development of city and to regulate the building activity therein flows from the police power of the state. The exercise of such governmental power is justified on account of its being reasonably necessary for the public health, safety, morals or general welfare and ecological considerations; though an unnecessary or unreasonable inter- meddling with the private ownership of the property may not be justified.

23. The municipal laws regulating the building construction activity may provide for regulations as to floor area, the number of floors, the extent of height rise and the nature of use to which a built-up property may be subjected in any particular area. The individuals as property owners have to pay some price for securing peace, good order, dignity, protection and comfort and safety of the community. Not only filth, stench and unhealthy places have to be eliminated, but the layout helps in achieving family values, youth values, seclusion and clean air to make the locality

a better place to live. Building regulations also help in reduction or elimination of fire hazards, the avoidance of traffic dangers and the lessening of prevention of traffic congestion in the streets and roads. Zoning and building regulations are also legitimized from the point of view of the control of community development, the prevention of over-crowding of land, the furnishing of recreational facilities like parks and playgrounds and the availability of adequate water, sewerage and other governmental or utility services.

24. Structural and lot-area regulations authorize the municipal authorities to regulate and restrict the height, number of stories and other structures; the percentage of a plot that may be occupied; the size of yards, courts, and open spaces; the density of population; and the location and use of buildings and structures. All these have in view and do achieve the larger purpose of the public health, safety or general welfare. So are front setback provisions, average alignments and structural alterations. Any violation of zoning and regulation laws takes the toll in terms of public welfare and convenience being sacrificed apart from the risk, inconvenience and hardship which is posed to the occupants of the building. [For a detailed discussion reference may be had to the chapter on Zoning and Planning in American Jurisprudence, 2d, Vol.82.]

25. Though the municipal laws permit deviations from sanctioned constructions being regularized by compounding but that is by way of exception. Unfortunately, the exception, with the lapse of time and frequent exercise of the discretionary power conferred by such exception, has become the rule. Only such deviations deserve to be condoned as are bona fide or are attributable to some mis-understanding or are such deviations as where the benefit gained by demolition would be far less than the disadvantage suffered. Other than these, deliberate deviations do not deserve to be condoned and compounded. Compounding of deviations ought to be kept at a bare minimum. The cases of professional builders stand on a different footing from an individual constructing his own building. A professional builder is supposed to understand the laws better and deviations by such builders can safely be assumed to be deliberate and done with the intention of earning profits and hence deserve to be dealt with sternly so as to act as a deterrent for future. It is common knowledge that the builders enter into under hand dealings. Be that as it may, the State Governments should think of levying heavy penalties on such builders and therefrom develop a welfare fund which can be utilized for compensating and rehabilitating such innocent or unwary buyers who are displaced on account of demolition of illegal constructions."

14. In ***Royal Paradise Hotel (P) Ltd.*** *versus* ***State of Haryana and others (2006) 7 SCC 597***, the Hon'ble Supreme Court while reiterating that unauthorized construction should not be encouraged and compounding is not to be done when the violations are deliberate, designed, reckless or motivated, observed as under:-

"*7. It is clear from the statement of the synopsis and list of dates furnished by the appellant itself, that on 4.2.1998, Mr. Chawla, who put up the construction before it was sold to the appellant received a notice under Section 12 of the Act informing him of contravention of Section 3 or Section 6 and of violation of Section 7(1) and Section 10 of the Act and directing him to stop further construction. When it was found that the appellant was defying the direction to stop, an order was passed on 26.2.1998 under sub-Section (2) of Section 12 of the Act directing him to remove the unauthorized construction and to bring the site in conformity with the relevant provisions of the Act on finding that there was clear violation of Section 7 and Section 10 of the Act. On 16.3.1999, another notice was issued to Mr. Chawla mentioning therein that there is a contravention of Section 7(1) or Section 10 of the Act and directing removal of the unauthorized construction. The copies of the original notices are produced by the respondents along with the counter affidavit*

filed on behalf of the respondent Nos.1 to 3. Though the copies of such notices have been produced by the appellant also, we find that there are some omissions in the copies produced on behalf of the appellant. Whatever it be, the fact remains that the construction was made in the teeth of the notices and the directions to stop the unauthorized construction. Thus, the predecessor of the appellant put up the offending construction in a controlled area in defiance of the provisions of law preventing such a construction and in spite of notices and orders to stop the construction activity. The constructions put up are thus illegal and unauthorized and put up in defiance of law. The appellant is only an assignee from the person who put up such a construction and his present attempt is to defeat the statute and the statutory scheme of protecting the sides of highways in the interest of general public and moving traffic on such highways. Therefore, this is a fit case for refusal of interference by this Court against the decision declining the regularization sought for by the appellant. Such violations cannot be compounded and the prayer of the appellant was rightly rejected by the authorities and the High Court was correct in dismissing the Writ Petition filed by the appellant. It is time that the message goes aboard that those who defy the law would not be permitted to reap the benefit of their defiance of law and it is the duty of High Courts to ensure that such defiers of law are not rewarded. The High Court was therefore fully justified in refusing to interfere in the matter. The High Court was rightly conscious of its duty to ensure that violators of law do not get away with it.

8. We also find no merit in the argument that regularization of the acts of violation of the provisions of the Act ought to have been permitted. No authority administering municipal laws and other laws like the Act involved here, can encourage such violations. Even otherwise, compounding is not to be done when the violations are deliberate, designed, reckless or motivated. Marginal or insignificant accidental violations unconsciously made after trying to comply with all the requirements of the law can alone qualify for regularization which is not the rule, but a rare exception. The authorities and the High Court were hence right in refusing the request of the appellant."

15. In ***Shanti Sports Club and another*** *versus* ***Union of India and others (2009) 15 SCC 705***, the Hon'ble Supreme Court approved the order of the Delhi High Court which had declared the construction of sports club by the appellants on the land acquired for planned development Delhi to be illegal by observing thus:-

"73. *Before concluding, we consider it necessary to enter a caveat. In all developed countries, great emphasis has been laid on the planned development of cities and urban areas. The object of planned development has been achieved by rigorous enforcement of master plans prepared after careful study of complex issues, scientific research and rationalisation of laws. The people of those countries have greatly contributed to the concept of planned development of cities by strictly adhering to the planning laws, the master plan etc. They respect the laws enacted by the legislature for regulating planned development of the cities and seldom there is a complaint of violation of master plan etc. in the construction of buildings, residential, institutional or commercial. In contrast, scenario in the developing countries like ours is substantially different. Though, the competent legislatures have, from time to time, enacted laws for ensuring planned development of the cities and urban areas, enforcement thereof has been extremely poor and the people have violated the master plans, zoning plans and building regulations and bye-laws with impunity.*

74. In the last four decades, almost all cities, big or small, have seen unplanned growth. In the 21st century, the menace of illegal and unauthorized constructions and encroachments has acquired monstrous proportions and everyone has been paying heavy price for the same. Economically affluent people and those having

support of the political and executive apparatus of the State have constructed buildings, commercial complexes, multiplexes, malls etc. in blatant violation of the municipal and town planning laws, master plans, zonal development plans and even the sanctioned building plans. In most of the cases of illegal or unauthorized constructions, the officers of the municipal and other regulatory bodies turn blind eye either due to the influence of higher functionaries of the State or other extraneous reasons. Those who construct buildings in violation of the relevant statutory provisions, master plan etc. and those who directly or indirectly abet such violations are totally unmindful of the grave consequences of their actions and/or omissions on the present as well as future generations of the country which will be forced to live in unplanned cities and urban areas. The people belonging to this class do not realize that the constructions made in violation of the relevant laws, master plan or zonal development plan or sanctioned building plan or the building is used for a purpose other than the one specified in the relevant statute or the master plan etc., such constructions put unbearable burden on the public facilities/amenities like water, electricity, sewerage etc. apart from creating chaos on the roads. The pollution caused due to traffic congestion affects the health of the road users. The pedestrians and people belonging to weaker sections of the society, who cannot afford the luxury of air-conditioned cars, are the worst victims of pollution. They suffer from skin diseases of different types, asthma, allergies and even more dreaded diseases like cancer. It can only be a matter of imagination how much the government has to spend on the treatment of such persons and also for controlling pollution and adverse impact on the environment due to traffic congestion on the roads and chaotic conditions created due to illegal and unauthorized constructions. This Court has, from time to time, taken cognizance of buildings constructed in violation of municipal and other laws and emphasized that no compromise should be made with the town planning scheme and no relief should be given to the violator of the town planning scheme etc. on the ground that he has spent substantial amount on construction of the buildings etc. - K. Ramdas Shenoy v. Chief Officers, Town Municipal Council, Udipi 1974 (2) SCC 506, Dr. G.N. Khajuria v. Delhi Development Authority 1995 (5) SCC 762, M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu 1999 (6) SCC 464, Friends Colony Development Committee v. State of Orissa 2004 (8) SCC 733, M.C. Mehta v. Union of India 2006 (3) SCC 399 and S.N. Chandrasekhar v. State of Karnataka 2006 (3) SCC 208.

75. Unfortunately, despite repeated judgments by the this Court and High Courts, the builders and other affluent people engaged in the construction activities, who have, over the years shown scant respect for regulatory mechanism envisaged in the municipal and other similar laws, as also the master plans, zonal development plans, sanctioned plans etc., have received encouragement and support from the State apparatus. As and when the courts have passed orders or the officers of local and other bodies have taken action for ensuring rigorous compliance of laws relating to planned development of the cities and urban areas and issued directions for demolition of the illegal/unauthorized constructions, those in power have come forward to protect the wrong doers either by issuing administrative orders or enacting laws for regularization of illegal and unauthorized constructions in the name of compassion and hardship. Such actions have done irreparable harm to the concept of planned development of the cities and urban areas. It is high time that the executive and political apparatus of the State take serious view of the menace of illegal and unauthorized constructions and stop their support to the lobbies of affluent class of builders and others, else even the rural areas of the country will soon witness similar chaotic conditions.

76. In the result, the appeals are dismissed. However, by taking note of the submission made by Shri Mukul Rohtagi that some time may be given to his clients

to vacate the land, we deem it proper to grant thee months' time to the appellants to handover possession of the land to the concerned authority of DDA. This will be subject to the condition that within two weeks from today an affidavit is filed on behalf of the appellants by an authorised person that possession of the land will be handed over to DDA by 30 th November, 2009 and during this period no encumbrances whatsoever will be created by the appellants or their agents and that no compensation will be claimed for the construction already made. Needless to say that if the required undertaking is not filed, the concerned authorities of DDA shall be entitled to take possession of the land and, if necessary, take police help for that purpose."

16. Similar observations are echoed by the Hon'ble Supreme Court in ***Priyanka Estates International Private Limited and others*** *versus* ***State of Assam and others (2010) 2 SCC 27***, wherein it was observed as under:-

"55. It is a matter of common knowledge that illegal and unauthorized constructions beyond the sanctioned plans are on rise, may be due to paucity of land in big cities. Such activities are required to be dealt with by firm hands otherwise builders/colonizers would continue to build or construct beyond the sanctioned and approved plans and would still go scot-free....."

17. Similar, sentiments have been expressed by the Hon'ble Supreme Court in ***Sanjay Adlakha*** *versus* ***State of Haryana and others (2011) 15 SCC 387.***

18. In ***Union Territory of Lakshadweep*** *versus* ***Seashells Beach Resort and others (2012) 6 SCC 136***, the Hon'ble Supreme Court did not approve the grant of relief in matters of violation of CRZ notification only upon humanitarian and equitable considerations and it was observed as under:-

"30. The High Court's order proceeds entirely on humanitarian and equitable considerations, in the process neglecting equally, if not more, important questions that have an impact on the future development and management of the Lakshadweep Islands. We are not, therefore, satisfied with the manner in which the High Court has proceeded in the matter.

31. The High Court obviously failed to appreciate that equitable considerations were wholly misplaced in a situation where the very erection of the building to be used as a resort violated the CRZ requirements or the conditions of land use diversion. No one could in the teeth of those requirements claim equity or present the administration with a fait accompli. The resort could not be commissioned under a judicial order in disregard of serious objections that were raised by the Administration, which objections had to be answered before any direction could issue from a writ court."

19. The observations by the Hon'ble Supreme Court in ***Deepak Kumar Mukherjee's case*** (supra) have already been extracted above and similar ethos was reflected by the same Bench of the Hon'ble Supreme Court in ***Esha Ekta Apartments Cooperative Housing Society Limited and others*** *versus* ***Municipal Corporation of Mumbai and others (2013) 5 SCC 357,*** wherein it was observed:-

"1. In last five decades, the provisions contained in various municipal laws for planned development of the areas to which such laws are applicable have been violated with impunity in all the cities, big or small, and those entrusted with the task of ensuring implementation of the master plan, etc., have miserably failed to perform their duties. It is highly regrettable that this is so despite the fact that this Court has, keeping in view the imperatives of preserving the ecology and environment of the area and protecting the rights of the citizens, repeatedly cautioned the concerned authorities against arbitrary regularization of illegal constructions by way of compounding and otherwise."

20. In view of the law expounded in the aforesaid decisions, it can conveniently be held that even the most deterrent orders that have been passed by the Hon'ble Supreme Court in matters of obstruction, illegal construction, unauthorized encroachments, violation of statutory plans and schemes have had no effect and have not acted as a deterrent. As observed by the Hon'ble Supreme Court, there has to be zero tolerance on the part of the Court when it gets down to decide the cases of unauthorized encroachments, obstructions and illegal constructions, violation of statutory plans and schemes. Therefore, even on the ground of sympathy, the Court cannot come to the rescue of the petitioner or else such direction would be blatant violation of the orders of the Hon'ble Supreme Court and grant of any relief to the petitioner is not only impermissible, but would even amount to judicial impropriety, blatant and scant respect for the orders of the Hon'ble Supreme Court which otherwise are binding upon this Court under Article 141 of the Constitution of India.

21. It is then vehemently argued by the learned counsel for the petitioner that the case of the petitioner should be ordered to be considered for regularization as in the case of other encroachers as mentioned in Annexure P-11 of the writ petition. This plea has been vehemently opposed by the learned counsel for the respondents on the ground that the petitioner is not a similarly situated to those persons. However, without going into that question, it would be noticed that what the petitioner is urging is a plea of negative parity which cannot be claimed or enforced in a Court of law as it is only legal right that can be enforced in a Court of law.

22. In ***State of Haryana and others*** *versus* ***Ram Kumar Mann, (1997) 3 SCC 321***, it was held that a wrong order cannot be the foundation for claiming equality. It was further held that a wrong decision by the Government does not give a right to enforce the wrong order and claim parity or equality and two wrongs can never make a right. It was also held that a right agitated before the Court must be founded upon enforceable right to entitle one to the equality treatment for enforcement thereof. It is apt to reproduce para 3 of the judgment, which reads thus:-

> *"3. The question, therefore, is whether the view taken by the High Court is correct in law. It is seen that the respondent had voluntarily resigned from the service and the resignation was accepted by the Government on 18.5.1982. On and from that date, the relationship of employer and the employee between the respondent and the State ceased and thereafter he had no right, whatsoever, either to claim the post or a right to withdraw his resignation which had already become effective by acceptance on 18-5-1982. It may be that the Government for their own reasons, had given permission in similar case, to some of the employees mentioned earlier, to withdraw their resignations and had appointed them. The doctrine of discrimination is founded upon existence of an enforceable right. He was discriminated and denied equality as some similarly situated persons had been given the same relief. Article 14 would apply only when invidious discrimination is meted out to equals and similarly circumstanced without any rational basis or relationship in that behalf. The respondent has no right, whatsoever and cannot be given the relief wrongly given to them, i.e., benefit of withdrawal of resignation. The High Court was wholly wrong in reaching the conclusion that there was invidious discrimination. If we cannot allow a wrong to perpetrate, an employee, after committing misappropriation of money, is dismissed from service and subsequently that order is withdrawn and he is reinstated into the service. Can a similar circumstanced person claim equality under Section 14 for reinstatement? Answer is obviously "No". In a converse case, in the first instance, one may be wrong but the wrong order cannot be the foundation for claiming equality for enforcement of the same order. As stated earlier for enforcement of the same order. As stated earlier, his right must be founded upon enforceable right to entitle lion to the equality treatment for enforcement thereof. A wrong decision by the Government does not give a right decision by the Government does not give a right to enforce the wrong order and claim parity or equality. Two wrongs can never made a right. Under*

these circumstances, the High Court was clearly wrong in directing reinstatement of the respondent by a mandamus by a mandamus with all consequential benefits."

23. In ***National Institute of Technology*** *versus****. Chandra Shekhar (2007) 1 SCC 93***, the Hon'ble Supreme Court after placing reliance upon the judgment of State of Haryana Vs. Ram Kumar (supra) and lot of other judgments, has held that a wrong decision by the Government would not give a right to enforce a wrong order and claim parity or equality. The relevant portion of the judgment reads as under:-

"10. Merely because in some cases the norms may not have been followed that cannot be a ground to hold that departure from norms should be continued. There are serious allegations about respondent having manipulated and fabricated documents to substantiate his stand. We need not go into these allegations. But as has been fairly accepted by the learned counsel for the respondent, there is no official communication from IIT Madras to support the respondent's stand that he was asked by the authorities of the said institute not to attend the programme. There should have been some material to support the stand. Unfortunately, for the respondent there is none. On the other hand admittedly after April, 2005 the respondent had abandoned the programme. It is also on record that the appellant notwithstanding these facts had asked the respondent to report back to IIT, Madras to continue studies in terms of High Court's direction. But that does not seem to have been done by the respondent."

24. In ***State of Punjab & others*** *versus****. Col. Kuldeep Singh, AIR 2010 SC 1937***, the Hon'ble Supreme Court held that Article 14 of the Constitution of India does not envisage for negative equality and is not meant to perpetuate illegality or fraud. Article 14 of the Constitution has a positive concept. Equality cannot be claimed in illegality and therefore, cannot be enforced by a citizen or Court in a negative manner. If an illegality and irregularity has been committed in favour of an individual or a group of individuals or a wrong order has been passed by a judicial Forum, others cannot invoke the jurisdiction of higher or superior Court for repeating or multiplying the same irregularity or illegality or for passing wrong order. A wrong order/decision in favour of a particular party, does not entitled any other person to claim benefit on the basis of wrong decision. It is apt to reproduce para 14 of the judgment, which reads thus:-

"14. Thus, even if some other similarly situated persons have been granted some benefit inadvertently or by mistake, such order does not confer any legal right on the petitioner to get the same relief. (Vide Chandigarh Administration & Anr. V. Jagjit Singh & Anr., AIR 1995 SC 705 : (1995 AIR SCW 493); Smt. Sneh Prabha Vs. State of U.P. & Ors., AIR 1996 SC 540: (1995 AIR SCW 4449); Jalandhar Improvement Trust Vs. Kameshwar Prasad Singh & Anr., AIR 2000 SC 2306 : (2000 AIR SCW 2389); Union of India & Ors. Vs. Rakesh Kumar, AIR 2001 SC 1877: (2001 AIR SCW 1458); Yogesh Kumar & Ors. Vs. Government of NCT Delhi & Ors. AIR 2003 SC 1241:(2003 AIR SCW 1630); Union of India & Anr. V. International Trading Company & Anr, AIR 2003 SC 3983: (2003 AIR SCW 2828); M/s Anand Button Ltd. Vs. State of Haryana & Ors. AIR 2005 SC 565; (2005 AIR SCW 67); K.K. Bhalla Vs. State of M.P. & Ors. AIR 2006 SC 898: (2006 AIR SCW 345); and Maharaj Krishan Bhatt & Anr. Vs. State of Jammu & Kashmir & Ors. (2008) 9 SCC 24) : (AIR 2009 SC (Supp) 615 : 2008 AIR SCW 5421)."

25. Recently, the Hon'ble Supreme Court in ***Kulwinder Pal Singh and another*** *versus* ***State of Punjab and others (2016) 6 SCC 532*** after noticing the aforesaid decisions observed as under:-

"16. The learned counsel for the appellants contended that when the other candidates were appointed in the post against de-reserved category, the same benefit should also be extended to the appellants. Article 14 of the Constitution of India is not to perpetuate illegality and it does not envisage negative equalities. In

State of U.P. And Ors. v. Rajkumar Sharma and Ors. (2006) 3 SCC 330, it was held as under: (SCC p.337, para 15)

> *"15. Even if in some cases appointments have been made by mistake or wrongly that does not confer any right on another person. Article 14 of the Constitution does not envisage negative equality, and if the State committed the mistake it cannot be forced to perpetuate the same mistake. (See Sneh Prabha v. State of U.P. (1996) 7 SCC 426; Secy., Jaipur Development Authority v. Daulat Mal Jain(1997) 1 SCC 35; State of Haryana v. Ram Kumar Mann(1997) 3 SCC 321; Faridabad C.T. Scan Centre v. D.G., Health Services (1997) 7 SCC 752; Jalandhar Improvement Trust v. Sampuran Singh (1999) 3 494; State of Punjab v. Dr. Rajeev Sarwal (1999) 9 SCC 240; Yogesh Kumar v. Govt. of NCT, Delhi (2003) 3 SCC 548; Union of India v. International Trading Co. (2003) 5 SCC 437 and Kastha Niwarak Grihnirman Sahakari Sanstha Maryadit v. President, Indore Development Authority (2006) 2 SCC 604.)"*
>
> *Merely because some persons have been granted benefit illegally or by mistake, it does not confer right upon the appellants to claim equality."*

26. Two wrongs cannot make one right. Moreover, the concept of equality is a positive concept which cannot be enforced negatively. Further, even if it is assumed that some decision was taken by the respondents, even then an incorrect decision cannot be made foundation and basis for asking the Court to take similar view inasmuch as the parity is not extendable qua illegal acts.

27. As a last ditch effort, the learned counsel for the petitioner would vehemently argue that both the authorities below have failed to take into consideration that no doubt there is encroachment, but same is only in the form of roof projection and cannot, therefore, be treated as encroachment as these projections have been raised to protect the property of the petitioner on account of constraints existing on the spot.

28. Even, this plea cannot be accepted for the simple reason that the encroachment as found on the spot is not by way of projections as is alleged by the petitioner but is in the form of actual built up area, as is clearly evident from the records of the case and further corroborated by the report of the Local Commissioner (supra).

29. In addition to that, it may be observed that the petitioner himself has not seriously disputed the encroachment because in the response filed to the report of the Local Commissioner, it was only prayed that as per existing instructions, an owner can cover 80% of the total area. Even, this plea of the petitioner cannot be accepted in view of the authoritative pronouncements of the Hon'ble Supreme Court on the subject as it is settled principle of law that rules, regulations, application on the date of sanction, will apply (Refer: ***Commissioner of Municipal Corporation, Shimla*** *versus* ***Prem Lata Sood and others (2007) 11 SCC 40, Union of India and others*** *versus* ***Indian Charge Chrome and another (1999) 7 SCC 314, Kuldeep Singh*** *versus* ***Govt. of NCT of Delhi (2006) 5 SCC 702.***

30. In view of the aforesaid detailed discussion, there is no merit in this petition and the same is accordingly dismissed, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

31. However, before parting, this Court cannot ignore that the encroachment/illegal construction of this magnitude could not have been possible unless and until there was active support and/or connivance of the officials of the respondents, more particularly, those who were entrusted to oversee and ensure that no encroachment/ unauthorized construction is carried out. Therefore, the respondents are directed to hold an inquiry within six months and fix responsibility and report compliance before 18th June, 2018 and for this purpose the case be listed before the Court on **18th June, 2018.**

32. Needless to observe, the mere fact that some of the Officials/Officers have retired or are no longer in the services of the respondents, shall not come in the way of holding such inquiry against such Officials/Officers.

****

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

Shri Jeewan Kumar Khanna .....Appellant.

Vs.

The General Public and others .....Respondents.

RFA No.: 23 of 2016
Reserved on: 01.11.2017
Date of Decision: 14.12.2017

Code of Civil Procedure, 1908- Regular First Appeal- Appeal filed against the dismissal of the probate petition- The appellant/petitioner had filed a probate petition for probate of a will dated July, 1984 executed by his mother, which was duly registered - By virtue of the will his mother had bequeathed her entire movable and immovable properties along with all tangible assets left by her at the time of her death to him– While contesting the probate petition one of the sisters of the appellant/petitioner had contested the same inter alia on the ground that no Will was executed in his favour and the same was false and fictitious- Probate petition came to be dismissed, hence, the first appeal- The High Court while reversing the judgment of the Trial Court **held**- that if a Will is executed as per the provisions of the Section 63 of the Indian Succession Act- the presence of the propounder of the will at the time of execution of the Will per se does not cast a doubt on the genesis or the validity of the Will, rendering the execution of the Will suspicious- On facts held that there were no suspicious circumstances regarding the execution of the Will and the findings to this extent returned by the Learned Trial Court were thus set aside. (Para-23 to 31)

Code of Civil Procedure, 1908- Regular First Appeal- Appeal filed against the dismissal of the probate petition- Further Held- that once the initial onus of proving the will by the propounder had been discharged the onus then shift to the person assailing the Will, to prove that the Will was false or fabricated. (Para-34 to 36)

Case referred:
Mahesh Kumar Vs. Vinod Kumar and others (2012) 4 Supreme Court Cases 387

For the appellant: Mr. R.K. Bawa, Senior Advocate, with Mr. Jeevesh Sharma, Advocate.
For the respondents: Mr. Arvind Sharma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge :

By way of this appeal, the appellant has challenged the judgment, dated 01.09.2015, passed by the Court of learned Additional District Judge-II, Shimla in Probate Petition No. RBT-3-S/2 of 2014/11, vide which, learned Court below has dismissed the Probate Petition so filed by the present appellant.

2. Brief facts necessary for the adjudication of the present appeal are that the appellant/petitioner (hereinafter referred to as 'the petitioner') filed a Probate Petition for probate of Will dated July 1984 executed by his mother late Smt. Ram Chameli Khanna, widow of late Sh.

Badri Nath Khanna in favour of the petitioner. As per the petitioner, his mother late Smt. Ram Chameli Khanna died on 30.03.2011. In her lifetime, she had executed her last will in the month of July, 1984, which was duly registered by her in the office of Sub-Registrar, Shimla on 26.06.1985. By virtue of the said Will, late Smt. Ram Chameli Khanna had bequeathed her entire immovable and movable properties and other tangible assets left by her at the time of her death in favour of the petitioner, who was to hold the said property in his capacity as an absolute owner thereof. It was further mentioned in the petition that at the time of her death, Smt. Ram Chameli Khanna was residing with the petitioner at Lower Bazaar Shimla. It was further stated in the petition that the Will was executed by Smt. Ram Chameli Khanna in a sound state of mind out of her own desire and without any pressure. Present respondents, who were impleaded as respondents No. 2 and 3 in the Probate Petition and who happen to be the real sisters of the petitioner and daughters of deceased Smt. Ram Chameli Khanna, were stated in the petition not to be entitled to the immovable as well as movable properties of lat Smt. Ram Chameli Khanna.

3. As per records, respondent Smt. Anita Khanna was proceeded against *ex parte*, as she did not appear before the learned Court below, whereas probate petition was contested by respondent No. 2.

4. In her reply filed to the petition, the stand taken by respondent No. 2 *inter alia* was that Smt. Ram Chameli Khanna was not only petitioner's mother, but she was also the mother of replying respondent as well as respondent No. 3, which fact had been concealed by the petitioner. It was further mentioned in the petition that no Will was ever prepared by Smt. Ram Chameli Khanna during her life time in the month of July, 1984. As per the replying respondent, Smt. Ram Chameli Khanna during her life time used to visit the replying respondent occasionally and also used to stay with respondent No. 3 and she never disclosed about the execution of the Will in favour of the petitioner. It was specifically mentioned in the reply that no Will was ever prepared by Smt. Ram Chameli Khanna during her life time in favour of the petitioner and that the petitioner had prepared a false Will and was trying to grab the property of late Smt. Ram Chameli Khanna on the strength of the said forged and fabricated document, which was prepared by the petitioner to deprive the replying respondent and respondent No. 3 of their legitimate right.

5. On the basis of pleadings of the parties, the following issues were framed by the learned trial Court on 16.08.2012:

> *"1. Whether the applicant is entitled for probate of Will dated July 1984 executed by his mother late Smt. Ram Chameli, S/o late Sh. Badri Nath, as alleged? OPA*
>
> *2. Whether the petition is not maintainable, as alleged? OPR-2*
>
> *3. Whether the applicant has no cause of action to file the petition, as alleged? OPR-2*
>
> *4. Whether this Court has no jurisdiction to dispose of the present petition, as alleged? OPR-2.*
>
> *5. Relief.*

6. On the basis of evidence adduced by the respective parties in support of their respective claims, the following findings were returned by learned trial Court on the issues so framed:

"Issue No. 1:	*No.*
Issue No. 2:	*No.*
Issue No. 3:	*No.*
Issue No. 4:	*No.*
Issue No. 5:	*The petition is dismissed as per operative part of judgment."*

7. In order to prove his case, petitioner examined five witnesses. Respondent No. 2 did not enter the witness box, however, her son, namely, Satyam Taneja deposed in the Court as RW-1. No other witness was examined by respondent No. 2.

8. PW-1 Sh. Madan Lal Gupta deposed in the Court that he was a retired Government servant and he knew the deceased parents of the petitioner. He further stated in the Court that in July 1984, Smt. Ram Chameli Khanna had executed a Will in his presence, which was also signed by the testator in his presence. He further deposed that he had seen the Will, Ex. PW1/A, on which he had appended his signatures as a witness. This witness deposed in Court that the mother of the petitioner had appended her signatures on Will Ex. PW1/A in his presence. He also deposed that at the time of execution of the Will, Smt. Ram Chameli Khanna was in a sound state of mind. He further deposed that firstly the Will was read over and explained to Smt. Ram Chameli Khanna by Sh. Ajay Kumar, Advocate, contents of which were acknowledged to be correct by Smt. Ram Chameli Khanna in front of him. He also deposed that the Will was also signed by the other witness, namely, Sh. Mast Ram Sharma. He further stated in the Court that he knew Smt. Ram Chameli Khanna on account of his acquaintance with Shri Badri Nath Khanna, who was having a clothes shop in Lower Bazaar. He also deposed that he used to purchase clothes from the shop of Sh. Badri Nath Khanna, whereafter they had developed good relations with each other. In his cross-examination, this witness deposed that he could not state as to on which particular date the Will was prepared. He after perusing the Will stated that the same was prepared in July 1984. In his cross-examination, he stated that Smt. Ram Chameli Khanna had one son and two daughters, however, she had bequeathed her property in the name of Sh. Jeewan Lal only. He further deposed in his cross-examination that the Will was prepared in the office of the Advocate in Lower Bazaar. He also deposed that he was called for the purpose of execution of the Will by Mr. Khanna. In his cross-examination, he also stated that he was not aware as to who typed the Will and thereafter stated that it might have been typed by the Clerk. He also stated that he had read the Will, which was scribed in English. He denied that Smt. Ram Chameli Khanna was not present in the office of the lawyer. He also denied that the Will was not read over to Smt. Ram Chameli Khanna in vernacular. He also deposed that he did not knew the other witness and that he was informed that the other witness was employed in Deputy Commissioner's office. In his cross-examination, this witness also stated that when the Will was executed, Jeewan Khanna was present in the office of the lawyer. He denied the suggestion that the Will was a forged document prepared by Jeewan Khanna in connivance with the said witness.

9. PW-2 Sh. Yash Pal Sharma deposed in the Court that Mast Ram Sharma was his father, who had died on 18.11.1990. He also stated that his father was serving in Deputy Commissioner's office. He also stated that Will Ex. PW1/A contained the signatures of his father, which he identified. In his cross-examination, he stated that he did not knew Smt. Ram Chameli Khanna and Badri Nath. He also stated that he was not aware where his father has appended signatures on the Will. He also stated that he did not knew as to whether his father knew either Sh. Madan Lal Gupta or Shri Ajay Kumar, Advocate. He denied the suggestion that he was falsely deposing at the behest of petitioner.

10. PW-3 Smt. Leela Sandal deposed in the Court that she had brought the requisite record from the office of Sub Registrar (Rural), Shimla, as per which, Will Ex. PW1/A of Smt. Ram Chameli Khanna, widow of late Sh. Badri Nath Khanna, was duly registered in the office of Sub Registrar and the registration number of the same was 58. She also deposed that the Will was registered on 26.06.1985. In her cross-examination, this witness deposed that she was serving in the Department since September, 2009 and she was not aware as to who had scribed the Will Ex. PW3/A.

11. Jeewan Khanna, i.e., the petitioner entered the witness box as PW-4. He deposed in the Court that Smt. Ram Chameli Khanna was his mother, who died on 30.03.2011 in Shimla in his house. He further stated that before her death, his mother was unwell and he used to look after his mother. He also deposed that in July, 1984, his mother executed a Will, as per which, she had bequeathed her moveable as well as immoveable property in his favour. He further stated

that the Will was executed by his mother without any pressure. He also stated that at the time of execution of the Will, the age of his mother was around 55 years and she was in a sound mental state. He also deposed that thereafter, his mother had got the Will registered on 26.06.1985 in the office of Registrar. He also stated that his sisters had neither any right nor any claim on the moveable and immoveable assets of his deceased mother. In his cross-examination, this witness deposed that the Will was not prepared in his presence. He also stated that the Will was handed over to him by his mother about 15-20 years ago. He admitted the suggestion that the date of the execution of the Will was not mentioned in the same. He denied the suggestion that the Will was not executed by his mother. He admitted the suggestion that his mother was having three children and there was no reference of the other two children in the Will. He denied the suggestion that in the Probate Petition filed by him, there was no mention of the daughters of Smt. Ram Chameli Khanna. He also denied the suggestion that the signatures of Smt. Ram Chameli Khanna at circles "C, D and E" in Ex. PW1/A were not matching with each other. He further stated that his mother was matriculate. He also denied the suggestion that the Will was a forged document prepared by him.

12. Sh. Ajay Kumar, the Scribe of the Will entered into the witness box as PW-5. His deposition is being reproduced hereinbelow:

> *"Stated that late Sh. Badri Nath Khanna, S/o Sh. Bhola Nath and his wife Smt. Ram Chameli were my clients. Sh. Badri Nath Khanna got his own will drafted from me on 5th June, 1984, copy of which is Ex. PW5/A (Original seen and returned). The will the original of which has been brought by the petitioner today and copy of which is Exhibit PW5/A*
>
> *was executed in my office. My signatures are in Mark A. The note in Mark-A on Ex. PW5/A is also in my hand.*
>
> *Smt. Ram Chameli W/o Sh. Badri Nath also got her will drafted fro me. Copy of which is Ex. PW1/A. I have today seen the original will and identify my signature on Ex. PW1/A in evidence. The will was drafted as per instruction of Smt. Ram Chameli and was signed by the witness in my office in Lower Bazaar Shimla. Ram Chameli and witness signed the original will, copy of which is Ex. PW1/A in my presence. The executant Smt. Ram Chameli was in sound disposing mind when she executed the original of Ex. PW1/A*
>
> *XXXX XXX XXX*
>
> *Sh. Badri Nath was my client since 1976. It is correct that date of drafting the will is not mentioned Ex. PW1/A. Self stated that the will was typed in the month of July, 1984. The witnesses were not there and I told them to come alongnwith witnesses and I appended the note thereon, as far I am remembering the facts, the date was not mentioned inadvertently. It is incorrect that Ram Chameli never visited my office for will Ex. PW1/A. It is incorrect that Ex. PW1/A prepared by me at instance of Badri Nath Khanna. I do not keep the record of documents drafted by me in my office. It is correct that will Ex. PW1/A typed on typewriter. It is correct that endorsement 'C' Ex. PW1/A of endorsement 'A' in Ex. PW5/A are in my own handwriting. It is incorrect that I am deposing falsely."*

13. As I have already mentioned above, respondent No. 2 did not enter the witness box. On behalf of the said respondent, her son, namely, Sh. Satyam Taneja entered the witness box as RW-1. In his affidavit so filed by way of evidence, he stated to be the attorney of his mother Smt. Asha Taneja, who on account of her ill health, was not able to travel Shimla. This witness further mentioned in the affidavit that late Smt. Ram Chameli Khanna and late Sh. Badri Nath Khanna were his maternal grand parents and Smt. Ram Chameli Khanna died on 30.03.2011. He further mentioned in the affidavit that Sh. Jeewan Khanna and Smt. Anita Khanna were his maternal uncle and maternal aunt, respectively. As per the said witness, his maternal grand mother, during her lifetime used to visit them and they also used to visit her at Shimla. It is

further mentioned in his affidavit that Smt. Ram Chameli Khanna never informed PW-2 or PW-3 that she had executed Will Ex. PW1/A. As per this witness, Smt. Ram Chameli Khanna had not prepared any Will and Ex. PW1/A produced by Jeewan Khanna was nothing but a forged Will so as to deprive the legal heirs of late Smt. Ram Chameli Khanna of their right in property. It further stood mentioned in the affidavit that Smt. Ram Chameli Khanna was not conversant with English and she only used to sign in Hindi. Will Ex. PW1/A did not bear the signatures of Smt. Ram Chameli Khanna. It was also mentioned in his affidavit that he had seen Smt. Ram Chameli Khanna writing and signatures on the Will were not that of Smt. Ram Chameli Khanna. He also stated that a Civil Suit qua the property owned and possessed by Smt. Ram Chameli Khanna was pending in the High Court of Delhi. In his cross-examination, he deposed that his mother had retired from BHEL as a Chief Medical Officer. He also stated that the doctor, who had issued the certificate in favour of his mother that she could not travel to Shimla was not cited as a witness. He admitted the suggestion that he had not brought any medical record of his mother. He also stated in his cross-examination that Dr. A.K. Singh, who had issued medical certificate Ex. RW1/C had remained senior of his mother. He also admitted in his cross-examination that the reply filed on behalf of respondent No. 2 to the Probate Petition was not under his signatures. He also stated in his cross-examination that his maternal grand mother had died at Shimla. He further stated that his maternal grand father had a clothes shop at Shimla, which was thereafter being looked after by his maternal uncle, i.e., the petitioner. He stated that he was not aware that in the eviction proceedings, which stood initiated against his maternal grand father by the landlord, Sh. Ajay Kumar Sood was the lawyer of his maternal grand father. He also stated that his maternal grand parents used to reside in Lower Bazaar, but he could not tell the address, though he did remember the location. He admitted the suggestion that his maternal grand mother had not informed him that she had executed a Will in favour of the petitioner. He also admitted it to be correct that they had in fact never asked Smt. Ram Chameli Khanna in this regard. In his cross-examination, he stated that he was not aware that the Ration Card of Smt. Ram Chameli Khanna was of Shimla. He admitted the suggestion that the name of Smt. Ram Chameli Khanna was not entered either in Ration Card or Voter list at Haridwar, whereas as per the said witness, Smt. Ram Chameli Khanna used to live with them occasionally. He admitted the suggestion that he met his maternal grand mother for the last time in the year 2009, when she was in a sound state of mind. He further stated that he was not aware whether the death of his maternal grand mother took place at her residence in Lower Bazaar, where she used to reside with the deponent. He also stated that after the death of his maternal grand mother, his mother and younger brother used to come to Shimla. He admitted it to be correct that he had nothing to prove that during the illness of his maternal grand mother, his mother and his maternal aunt used to look after her. He stated in his cross-examination that letters used to be exchanged between him and his maternal grand mother. He stated that he could not produce in Court any document written by Smt. Ram Chameli Khanna. He further stated that when Smt. Ram Chameli Khanna used to visit them at Haridwar, she had not appended her signatures on any document. He also stated that he had never seen his maternal grand mother appending any signatures. He stated that he had seen the signatures of his maternal grand mother on the letters, which were at his house, but he had not brought any such letter. He further stated in his cross-examination that in the year 1984, he was seven years old and was a student of second class. He stated that he was not aware that in July 1984, his maternal grand mother had executed Will Ex. PW1/A. He admitted the suggestion that Smt. Ram Chameli Khanna had not executed any Will in favour of her daughters, though he denied the execution of Ex. PW1/A by Smt. Ram Chameli Khanna in favour of the petitioner.

14. Above is the respective ocular evidence led by both the parties in support of their contentions.

15. Learned Court below vide judgment under challenge, dismissed the Probate Petition by *inter alia* holding that the Will was shrouded with suspicious circumstances and the petitioner had not been able to dispel the said suspicious circumstances.

16. A perusal of the judgment under challenge demonstrates that learned Court below while dismissing the appeal inter alia held that the Will in issue was clouded with suspicions, which created doubts over the genuineness and authenticity of the Will. Learned trial Court held that there were two Wills appearing on record. First Will was executed by Sh. Badri in favour of petitioner dated 05.06.1984 and second Will, which stood executed without mention of any date was executed in the month of July 1984. It further held that both Wills, i.e., Will dated 05.06.1984 and the impugned Will were identical and there were overwritings in the impugned Will. Learned trial Court also held that there was no clear cut date regarding the execution of the Will. It further held that scribe of the Will (PW-5) deposed that the Will was scribed in the months of July 1984 and the witnesses were present. PW-5 further stated that he asked the propounder to come alongwith witnesses, meaning thereby, the Will was merely drafted by the Scribe, but it was not executed before him. Learned trial Court also held that as per attesting witness (PW-1), the Will was executed in the office of Scribe and he had also stated that the propounder was present in his office. Learned trial Court also held that propounder of the Will, on the other hand, had stated that he was not present at the time when the Will was executed. Learned trial Court further held that attesting witness (PW-1) had stated that the Will was read over and explained by Scribe to the testator, whereas as per the Scribe, witness were not present at the time of drafting of the Will and he had also denied that testator was present in his office. Learned trial Court also held that there was overwriting at 3-4 places and there were no signatures of the testator to the verification. It further held that no date appeared in the Will and neither PW-1 nor PW-5 had revealed about the date, though PW-5 had mentioned that the date was not mentioned inadvertently. On these basis, it was held by the learned trial Court that though the Will was a registered document, yet the propounder had miserably failed to prove that the Will was surrounded by any suspicious circumstances and, therefore, the Will could not be said to be a fair document, as there were suspicions raised over its execution. Learned trial Court also held that one more suspicious circumstance was that both respondents No. 2 and 3 being real sisters of the propounder were pleaded in the petition as in near relation of the deceased in para 4 of the petition and on these basis, learned trial Court went on to dismiss the petition.

17. I have heard the learned counsel for the parties and have also gone through the impugned judgments as well as the records of the case.

18. In my considered view, the findings so recorded by the learned Court below are perverse and not sustainable in the eyes of law. Learned Court below in fact has completely misread the statement of Scribe (PW-5) and it has also not read the statement of attesting witness (PW-1) in its correct perspective. Learned trial Court in fact had culled out suspicious circumstances where none existed. Learned trial Court has also not appreciated as to what was the defence taken by the respondents in the reply which was filed by them to the petition, which was so filed by the present appellant before the learned Court below.

19. I will dwell on all these aspects of the matter independently.

20. A perusal of the judgment passed by the learned Court below demonstrates that what primarily weighed with it while dismissing the petition was that; (a) there was no date on the Will; (b) there were overwritings upon the Will; (c) there were inconsistencies in the statements of petitioner's witnesses; and (d) respondents, who were sisters of the petitioner, were referred to as "relatives" in the probate petition.

21. Will in issue is Ex. PW1/A. The factum of the same being duly registered in the office of Sub-Registrar, Shimla on 26.06.1985 is not in dispute. A will which was executed by the father of the appellant, i.e., the husband of testator Ram Chameli Khanna, is on record as Ex. PW5/A. As per the learned trial Court, there were overwritings in Ex. PW1/A, which render the same suspicious. A perusal of Ex. PW1/A demonstrates that words "New Delhi" which were prefixed after the words "Greater Kailash" were struck off and the words "New Delhi" thereafter find mention after the words "No. 1". Second overwriting is in the word "Executor", wherein it

appears that capital "E" was later on typed. Similarly, two more overwritings are there in the said Will, wherein the word "his" has been corrected as "her". Besides this, there is no other overwriting in Ex. PW1/A. Though learned trial Court refers in its judgment that there were other overwritings upon the same, but it has not elaborated as to what were those overwritings and how the same rendered the execution of the Will to be suspicious. Striking off of the words "New Delhi" apparently was because these words were to come after the complete address. Similarly, overwriting in the word "Executor" is only of one particular alphabet, which does not in any way affect the contents of nature of the Will. Further two overwritings which had been made to word "his" into "her" were done probably because of typographical error and as testator was female, word "his" was corrected as "her". There is no overwriting either in the name of the testator or with the main contents of the Will, which mentioned as to what the testator intended to do by way of execution of the said Will. These very important aspects of the matter had been completely ignored by the learned trial Court while holding that overwritings in the Will rendered the execution of the same suspicious. In my considered view, learned trial Court hastened to come to the conclusion that the overwritings in the Will rendered the same suspicious without dwelling upon as to what were those overwritings and what was their effect upon the Will so executed by the testator. Therefore, the findings returned by the learned trial Court to the effect that there were overwritings over the Will, which rendered the same suspicious, are perverse and not sustainable.

22. Learned trial Court has also held that because there was no date mentioned in the Will, therefore also, the same was a suspicious document. A perusal of Ex. PW1/A demonstrates that though no date is mentioned on the Will, but the month and year of the execution is there. Similarly, it is a matter of record that the Will was registered on 26.06.1985, whereas its testator died on 30.03.2011. In order to prove the execution of the Will, petitioner examined the Scribe as well as one attesting witness and son of the other attesting witness, who had since died.

23. Section 63 of the Indian Succession Act, 1925 prescribes the mode of execution of unprivileged Wills and the same provides that the testator shall sign or affix his mark to the Will or it shall be signed by some other person in his presence by his direction and signature or mark of testator, or signature of person signing for him shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will and the Will shall be attested by two or more witnesses, each of whom has seen the testator signing or affixing his mark to the Will or has seen some other person signing the Will in the presence and by the direction of the testator.

24. Though it is a matter of record that the Will was not containing any date, however, it stands explained by the Scribe of the Will that mentioning of the date upon the same was inadvertently left out. In these circumstances, when the Scribe of the Will as well as one marginal witness of the same has proved the Will in the Court of law, demonstrating therein that the Will was executed as per the provisions of Section 63 of the Indian Succession Act, the finding returned by the learned trial Court that the Will was shrouded with suspicious circumstances, because it did not contain any date is not sustainable. Learned Court below erred in not appreciating that not only the month and year of the execution of the Will was duly mentioned upon the same, the Will in issue was later on duly registered by its testator, which fact stands proved on record by the statement of PW-3 and further, the testator had died almost 15 years after the execution and registration of the Will.

25. Now, I will refer to the findings returned by the learned Court below with regard to the discrepancies in the statements of the witnesses of the petitioner. I have referred in detail in the above paras of the judgment the findings, which were so returned by the Court below. For the sake of paucity, the same are not being repeated. Suffice it to say that the conclusion which had been drawn by the learned Court below about the statements of the witnesses of the petitioner are totally perverse and a result of mis-reading and mis-construing the testimonies of the said witnesses.

26. A perusal of the statement of Sh. Madan Lal (PW-1) , one of the marginal witnesses to the Will, demonstrates that he has categorically deposed in the Court that in July 1984, Smt. Ram Chameli Khanna had executed a Will in his presence, which was signed by the testator in his presence as well as the other witnesses. This witness has clearly deposed in the Court that the testator had affixed her signatures upon the Will in his presence and at the relevant time, not only the testator was in sound mind, but before she affixed her signatures upon the Will, the same was read over and explained to her by the Scribe. This witness further stated that the testator had acknowledged the contents of the Will to be correct in front of him.

27. PW-2 Sh. Yashpal Sharma had also categorically deposed in the Court that Mast Ram Sharma, the other attesting witness, was his father, who had died on 18.11.1990. He also stated that Will Ex. PW1/A contained the signatures of his father, which he duly identified.

28. PW-5, the Scribe of the Will, Sh. Ajay Kumar deposed in the Court that testator Ram Chameli had got her Will drafted from him, copy of which was Ex. PW1/A. This witness also deposed that the Will was drafted as per the instructions of testator and was signed by the witnesses in his office and that the Will was signed by both the testator as well as the witnesses in his presence. In his cross-examination, this witness stated that the Will was typed in the month of July 1984 and witnesses were not there and he had told Badri Nath to come alongwith witnesses. He further deposed in his cross-examination that the date was not mentioned upon the Will inadvertently.

29. Propounder of the Will entered the witness box as PW-4 and deposition which he had made in the Court, has been dealt with by me in above para of the judgment.

30. It is pertinent to refer to a judgment of the Hon'ble Supreme Court in ***Mahesh Kumar*** Vs. ***Vinod Kumar and others*** (2012) 4 Supreme Court Cases 387, in which the Hon'ble Supreme Court has held in the facts of that case that presence of appellant "propounder" at the time of execution of Will and the factum of testator not giving anything to other parties from his share in joint property was not decisive of the issue relating to genuineness or validity of the Will in issue.

31. Now, when one reads the statements of PW-1 and PW-5, one finds that there is no discrepancy in their statements with regard to the mode and manner in which the Will was executed. Only thing is whereas PW-1 deposed that the propounder of the Will was present when the Will was executed, PW-5 has deposed to the contrary. Now, the moot issue is as to whether will this solitary reference in the statement of PW-1 render the execution of the Will to be suspicious? In my considered view, the answer is in negative. I have minutely gone through the records of the case and there is not even an iota of evidence produced on record by the respondent from which it can be inferred that the propounder had played some role, leave aside some significant role in the execution of the Will. Even, the suggestion which was given by the respondent to the Scribe was not that the Will was scribed by him at the behest of propounder. The suggestion was that the Will was scribed at the behest of husband of the propounder. Be that as it may, one can also not lose sight of the fact that whereas the Will was executed in the year 1984, the statement of PW-1 was recorded in the month of November, 2012, when the said witness was 81 years old. Even the statement of PW-5 had been totally mis-read and mis-construed by the learned trial Court. Learned trial Court has assumed that PW-5 was deposing falsely by on one hand, stating that no witnesses were present and on the other hand, stating that the Will was signed by the witnesses in his presence. Inference to this effect drawn by the learned trial Court is completely perverse. A perusal of the cross-examination of PW-5 demonstrates that he has not said what the learned trial Court has in fact concluded. All that this witness deposed was that when Badri Nath had come for the purpose of execution of the Will, witnesses were not there and he had asked him to bring the witnesses. One does not understand as to from where from the said evidence it could be concluded that neither the Will was signed by the testator in front of the Scribe nor other witnesses had appended their signatures in front of

the Scribe. Accordingly, I hold that the findings returned to this effect by the learned trial Court are perverse and are not borne out from the records of the case.

32. It is also pertinent to mention that the adverse inference which had been drawn by the learned trial Court from the fact that the petitioner had mentioned his sisters in the probate petition to be relatives is also completely perverse, because undoubtedly, respondents being sisters of the petitioner were his relatives. It is not understood as to how the mentioning of sisters in the probate petition as relatives shrouded the Will with suspicion.

33. There is another important aspect of the matter, which also has not been taken into consideration by the learned trial Court while deciding the case. Records demonstrate that respondent Smt. Anita Khanna did not contest the probate petition. Similarly, Smt. Asha Taneja, who contested the petition, took a specific stand in her reply that deceased Ram Chameli Khanna had not executed any Will in favour of the petitioner and the Will in issue was a forged and fabricated document. It is also a matter of record that said Asha Taneja did not enter the witness box on the pretext of ill health, which was sought to be proved on the basis of a medical certificate issued by a colleague of her's. It is also as matter of record that it was her son who deposed on her behalf in the Court that said son was aged only 7 years in the year 1984, when the Will in issue was executed.

34. Be that as it may, principle of law is that the initial onus to prove the Will is upon its propounder and once the propounder discharged that onus, then it is for the person assailing the Will to prove that the Will was not a genuine document.

35. In my considered view, the propounder in the present case had successfully discharged the initial onus of proving that the Will was not shrouded with suspicious circumstances. This he did on the basis of testimony of one marginal witness, Scribe of the Will and son of other marginal witness, who was since dead as well as from the statement of official, who proved the factum of the Will being registered in the office of Sub-Registrar, Shimla.

36. I have already held above that the findings which were returned by the learned trial Court to the effect that the petitioner was not able to dispel the factum of the Will being shrouded with suspicious circumstances are perverse findings. Once the specific stand taken in the reply by the respondent was that the Will was a forged and fabricated document, then onus was upon her to prove that it was a forged and fabricated document. A forged and fabricated document means that the document was not executed by the person who as per the propounder executed the same. While deciding the petition, learned trial Court erred in not appreciating that the grounds on which respondent had disputed the Will were obviously to be proved by her. It further erred in not appreciating that onus was upon the respondents to have proved that the Will was a false and fabricated document. It is a matter of record that no evidence was led by the contesting respondent to prove that the Will was a forged and fabricated document. In the absence of the respondent having produced evidence to the effect that the Will was a forged and fabricated document and keeping in view the fact that the petitioner had discharged the initial onus of proving that the Will was not shrouded with suspicious circumstances, learned Court below gravely erred in dismissing the petition by returning findings without correctly appreciating either the pleadings of the parties or the evidence on record, both ocular as well as documentary.

37. In view of above discussion, this appeal is allowed. Judgment, dated 01.09.2015, passed by the Court of learned Additional District Judge-II, Shimla in Petition No. RBT-3-S/2 of 2014/11 is set aside and the petition filed by the appellant for grant of probate is allowed, as prayed for. Miscellaneous application(s), if any, also stand disposed of. No order as to costs.

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

Lekh Ram .....Petitioner.

Vs.

State of Himachal Pradesh .....Respondent.

Cr. MP(M) No.: 1462 of 2017
Date of Decision: 14.12.2017

Code of Criminal Procedure, 1973- Section 438- Bail Application- Petitioner apprehending arrest in an FIR filed by him approached the Court under Section 438 of the Cr.P.C. – **Held**- provisions of Section 438 of Cr.P.C. cannot be invoked by the complainant in an FIR, which has been lodged at his behest. (Para-5)

Cases referred:

Balchand Jain Vs. State of Madhya Pradesh, AIR 1977 Supreme Court 366
Gurbaksh Singh Sibbia etc. Vs. The State of Punjab, AIR 1980 Supreme Court 1632

For the petitioner: M/s. Ashok K. Sharma and Y. Paul, Advocates.
For the respondent: Mr. Vikram Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

By way of this petition filed under Section 438 of the Code of Criminal Procedure, the petitioner has prayed for grant of bail in FIR No. 67/2016, dated 22.10.2016, registered at Police Station Darlaghat under Section 379 of the Indian Penal Code.

2. Incidentally, the FIR in which the petitioner has moved the present application for grant of bail has not been filed against the petitioner. It is an FIR in which petitioner is the complainant. On 08.12.2017, this Court had ordered the matter to be listed for today, to enable the learned counsel for the petitioner to satisfy this Court as to how a bail application under Section 438 of the Code of Criminal Procedure is maintainable at the behest of complainant himself, who has lodged the concerned FIR. Learned counsel for the petitioner has placed reliance upon the judgments of the Hon'ble Supreme Court in ***Balchand Jain*** Vs. ***State of Madhya Pradesh***, AIR 1977 Supreme Court 366 and ***Gurbaksh Singh Sibbia etc.*** Vs. ***The State of Punjab,*** AIR 1980 Supreme Court 1632.

3. I have heard the learned counsel for the parties and have also gone through the judgments so relied upon by the learned counsel for the petitioner.

4. In my considered view, the judgments which are relied upon by the learned counsel for the petitioner do not answer the query which was raised by this Court on 08.12.2017. Undoubtedly, under the provisions of Section 438 of the Code of Criminal Procedure, any person who has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, may apply to the High Court or the Court of Session for a direction under the said Section that in the event of such arrest, he be released on bail, however, as is apparent from the language of the statutory provisions itself, invocation of the said provisions at the behest of said person can be only where such person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence. This Court has repeatedly asked the learned counsel for the petitioner to state as to which is that FIR in which he has apprehension of being arrested for allegedly having committed a non-bailable offence. Learned counsel for the petitioner could not point out any FIR. His contention is that he has apprehension that he may be arrested in an FIR which has been lodged by him.

5. In my considered view, this application is completely misconceived. Provisions of Section 438 of the Code of Criminal Procedure cannot be invoked by a complainant in an FIR which has been lodged at his behest. Of course, if the contents of the FIR are found to be incorrect by the Investigating Agency, then the Investigating Agency is not barred from initiating appropriate action against the said complainant, but then obviously process has to be set into motion and once that process has been set into motion, whatever rights are available to the complainant therein, can be availed of by him. That stage admittedly has not come as yet, as was intimated by the learned Deputy Advocate General.

6. Therefore, in view of above, as this Court is of the considered view that application under Section 438 of the Criminal Procedure Code is not maintainable at the behest of the complainant, who has lodged the FIR himself, the present petition is dismissed, as mis-conceived.

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

Oriental Insurance Company Ltd. .....Appellant.

Versus

Krishna Wati Devi and others. ...Respondents.

FAO No.: 195 of 2017
Date of Decision : 14/12/2017

Workman Compensation Act, 1923- Section 4- First Appeal- The Commissioner, Employees Workman Compensation calculated the amount of compensation by taking the income of the deceased at Rs.8,000/- per month, which had come to be increased by way of an amendment w.e.f. 31.3.2010, whereas, the accident had occurred on 25.2.2009- **The High Court Held-** that the income of the deceased could have been taken as Rs.4,000/- per month only as the amendment made in the statute w.e.f. 31.3.2010 could not have been employed retrospectively- Appeal allowed- Claimant held entitled to compensation of Rs.4,19,840/- assessing the income of the deceased as Rs.4,000/- per month- 12% interest per annum allowed since the lapsing of one month from the accident. (Para-3 to 5)

For the Appellant: Dr. Lalit Kumar Sharma, Advocate.
For the respondents 1 to 5: Mr. Jiya Lal Bhardwaj, Advocate.
For the respondent No. 6: Mr. Nipun Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal is directed against the judgement recorded by the learned Commissioner, Employees Workmen Compensation, Kasauli, District Solan, H.P., while his exercising, powers, under the Employee's Compensation Act.

2. In the impugned pronouncement, the learned Commissioner, had assessed compensation upon the claimants, who are evidently the successors-in-interest of deceased Ramesh Baitha, compensation whereof is comprised in a sum of Rs.16,50,175/- AND carries interest thereon with effect from 26.02.2009 i.e. the date of the accident involving the ill-fated accident, till its realization. The apposite liability with respect to its defrayment vis-à-vis the claimants, stood fastened upon the insurer/respondent No.2. This Court admits the appeal, on, the hereinafter extracted substantial questions of law:-

1. Whether in the facts and circumstances of the case the Commissioner under Employee Compensation Act is justify to calculate the amount of compensation for Rs.8,47,160/- by taking the income of deceased for Rs.8000/- per month especially when at the time of the accident occurred on 25.02.2009 the maximum wage of the workmen under Section 4 of the Workmen Compensation Act was Rs.4000/- and the substitution of such income from Rs.4000/- to Rs.8000/- per month was brought on statute w.e.f. 31.03.2010 and the Ld. Commissioner is not competent to invoke the amended provision retrospectively.

2. Whether the impugned order is liable to be set-aside/reduced as the same is in violation of the provisions of Section 4(1)(a), 4(4) of Employees Compensation Act/Workmen Compensation Act and the amount of compensation is required to be determined as under

50% of Rs.4000/-= 2000 x 211.79 =4,23,580? 3. Whether the learned Commissioner under the Employees Compensation Act is competent of award the rate of interest on the amount of compensation from the date of the accident instead of 30 days after the accident when the amount has fallen due.?

Substantial question No. 1, 2 and 3.

3. The solitary submission made by the counsel for the insurer, for, his concerting to beget reversal of the impugned pronouncement, is, with respect to the learned Commissioner, in stark discordance, with, the mandate of the relevant statutory principles, hence mis-assessing compensation amount upon the claimants, infractions whereof stand espoused, to be comprised, in (a) the learned Commissioner, though, not falling in error while taking Rs.4000/- per mensem as wages/salary drawn by the deceased, from, his employment under respondent No.2, (b) yet his falling into error, in applying upon the aforesaid figure of salary/wages per mensem, the relevant statutory principles, 'whereas' in face of prevalence, at the relevant time of occurrence of the ill-fated mishap, 'of' the mandate of explanation II to Section 4 of the Workmen's Compensation Act, 1923, (hereinafter referred to as the Act), explanation wmhereof stood subsequent thereto deleted, from the statute book,(c) rather hence enjoining the Commissioner, to mete reverence to the mandate occurring in explanation II to Section 4 of the Act, contents whereof stand extracted hereinafter, contrarily irreverence whereof by him, hence staining the impugned pronouncement.

> "Where the monthly wages of a workman exceed (four thousand rupees) his monthly wages for the purposes of clause (a) and clause (b) shall be deemed to be (four thousand rupees) only"

4. The counsel for the appellant/insurer submits, that the deceased workman, was, drawing wages/salary comprised in a sum of Rs.8000/- per mensem, to figure whereof, another sum, of Rs.300/- per day, is to be added, its comprising the daily allowance received by the deceased workman from his relevant employment, (i) hence the total sum of wages per mensem received by the deceased workan from his employer, while hence being comprised in a sum of Rs.8,000/-, in sequel thereof (ii) with the apposite explanation, holding force, at the relevant time of occurrence, of, the ill-fated mishap thereupon enjoined the commissioner to mete reverence thereto (iii) significantly with a statutory contemplation occurring therein, qua upon, per mensem wages of a deceased workman, evidently HENCE exceeding Rs.4000/-,(iv) as wages whereof, of the deceased in the instant case exceed Rs.4000/-, (v) thereupon, his monthly wages, for, the purposes of application thereon, of the relevant statutory principles, hence also attracting the mandate of clause (a) of sub section (1) of Section 4 of the Act, wherein, his wages were enjoined to be restricted in a sum of Rs.4000/- per mensem only. He submits that the aforesaid mandate of explanation II of the Act, has been irrevered by the learned commissioner. The aforesaid submission addressed before this Court, garners, immense strength, from, the evident fact, of applicability at the relevant time, of the mandate of the aforesaid explanation II of the Act, besides also obviously with the explanation aforesaid holding prevalence also clout at the time, when, the ill-fated mishap, hence occurred. In aftermath, the learned Commissioner, 'was', given the

existence of formidable evidence, qua the deceased workman, drawing, from his relevant employment per mensem salary/wages, constituted, in a sum of Rs.8,000/- hence 'enjoined' by the mandate, of explanation II of the Act, to restrict the monthly wages of the deceased workman, in a sum of Rs.4000/- besides was enjoined to apply thereon, the mandate of clause (a) of sub section (1) of Section 4 of the Act However, he has omitted to do so. Consequently, the award of the learned Commissioner warrants interference. In aftermath while applying the principle(s) embedded in clause (a) of sub section (1), of Section 4 of the Act, provisions whereof stood extracted hereinafter:-

> 4. Amount of compensation.-(1) Subject to the provisions of this Act, the amount of compensation shall be as follows, namely:-
>
> | | |
> |---|---|
> | (a) where death results from the injury | An amount equal to fifty per cent of the monthly wages of the deceased workman multiplied by the relevant factor;
Or
An amount of eighty thousand rupees whichever is more: |

whereby only with respect to 50% of, the statutory wage(s) of the deceased employee, the enjoined statutory principle(s) hence warrant their application thereon,(i) consequently this Court concludes, that (i) the wages per mensem of the deceased workman by applying the relevant statutory principle(s), hence, being comprised in a sum of Rs.2000/- (ii) hence by applying the relevant statutory factor thereon i.e. 209.92, the compensation amount defrayable to the claimants is quantified in a sum of Rs.4,19,840/-.

5. The substantial questions of law are answered accordingly. Appeal modified to the extent aforesaid. The claimants are held entitled to compensation of Rs.4,19,840/-, from, the insurance company concerned, compensation amount whereof, shall carry thereon interest @ 12% per annum, since, the elapsing of one month from the accident, till its realization/deposit and also to funeral charges comprised in a sum of Rs.2000/-, from, the insurance company. No costs.

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

Shri Puran Chauhan alias Puran Chand,
son of late Shri Mangal Chand (since
deceased) through his legal heirs Shri Mahesh Kumar
and others .....Complainants-appellants.

Vs.

Shri Tara Chand .....Accused-respondent.

Cr. Appeal No.: 468 of 2017
Reserved on: 23.11.2017
Date of Decision: 14.12.2017

Code of Criminal Procedure, 1973- Section 256(1)- Criminal Appeal- Criminal appeal filed against the orders passed by the learned JMIC disposing of an application filed under Section 256(1) of the Cr.P.C., proceeded to dismiss the complaint by holding that no competent person entitled to continue the lis was before the Court- Hence the present appeal - **The High Court held**- that it was not a case where after the death of the complainant none was before the Court

to pursue the matter- Even if a person having no locus standi had approached the Court by way of an application filed under Section 256(1) of the Code of Criminal Procedure, then the least which was expected from the learned Trial Court was to have had afforded at least one opportunity to the legal heirs/legal representatives of the deceased/complainant to pursue the matter by moving an appropriate application- Consequently, matter remanded back to the learned Trial Court with the direction to afford an opportunity to the legal representatives of the deceased/complainant to move an appropriate application to be impleaded as complainants in the case - The same directed to be decided by the learned Trial Court on its own merits.

(Para-13 to 17)

Cases referred:

S. Rama Krishna Vs. S. Rami Reddy (Dead) by his LRs. and others, (2008) 5 Supreme Court Cases 535

Ghurey Lal Vs. State of Uttar Pradesh, (2008) 10 Supreme Court Cases 450

For the appellants: Mr. Bhupender Gupta, Senior Advocate, with Mr. Neeraj Gupta, Advocate.
For the respondent: Mr. Sanjay Jaswal, Advocate.

The following judgment of the Court was delivered:

***Ajay Mohan Goel, Judge**:*

By way of this appeal, the appellants have challenged order, dated 16.01.2017, passed by the Court of learned Judicial Magistrate, 1st Class, Anni, District Kullu, H.P. in Case No. 61-3 of 2013, whereby learned Court below while disposing of an application so filed before it under Section 256(1) of the Code of Criminal Procedure, proceeded to dismiss the complaint by holding that as no application by a competent person entitled to continue the *lis* after the death of original complainant was before the Court, therefore, the Court had to proceed with the assumption that the complainant was absent.

2. Brief facts necessary for the adjudication of the present appeal are that a complaint was filed under Section 138 (1) read with Section 142 of the Negotiable Instruments Act, 1981 by Shri Puran Chauhan, son of late Sh. Mangal Chand against the present respondent, alleging therein that the complainant was an authorized agent of M/s Harkrishan Lal Baldev Rai Fruit Commission Agents, B-214, New Subzi Mandi Azaadpur, Delhi-33 and under the authority as an authorized agent of the said firm, he had supplied materials like Empty Cartons, Trays, Strapping Machines and Strapping Rolls etc. to the apple growers, including the respondent/accused, who in lieu of the same, had issued a Cheque bearing No. 486588 amounting to Rs.4,77,229/-, dated 08.12.2012, payable at State Bank of India, Branch Office Kungash, Tehsil Anni, District Kullu, H.P. It was further the case of the complainant that the Cheque was duly presented by him in the bank concerned for encashment, but the same was returned back to the complainant on 28.12.2012 with the remarks *"Insufficient Funds*". Thereafter, he issued a statutory legal notice, as required and when even then the accused did not make good the payment, he had no option but to file the complaint under Section 138(1) read with Section 142 of the Negotiable Instruments Act.

3. During the pendency of the complaint, original complainant died. After his death, an application was filed before the learned Court below under Section 256(1) of the Code of Criminal Procedure for substitution of deceased complainant with Sh. Lok Raj Sharma, son of Sh. Tara Chand Sharma, resident of Village Rrewari, P.O. Dalash, Tehsil Anni, District Kullu. It was averred in the said application that the original applicant was pursuing the complaint on behalf of original complainant, i.e., M/s. H.B. Delhi New Sabzi Mandi Azaadpur Delhi, as authorized attorney/representative of the same. It was further mentioned in the application that as authorized representative had expired and the original complainant being based in Delhi and was not personally in a position to proceed with the proceedings, it had authorized and appointed Sh. Lok Raj Sharma (supra) as its duly authorized agent/representative to pursue the matter on its

behalf before the Court. Accordingly, a prayer was made to allow Sh. Lok Raj Sharma, son of Sh. Tara Chand Sharma to further pursue the case on behalf of the original complainant or in the alternative to allow the original complainant to pursue the case itself.

4. The application so filed was opposed by the respondent *inter alia* on the ground that the application was not maintainable, as the complaint stood instituted by late Shri Puran Chauhan not in his capacity as authorized representative of firm called M/s. H.B. Delhi, but in his own capacity and further, no document was produced on record to demonstrate that deceased complainant had any legal capacity to sue on behalf of the firm in issue.

5. Learned Court below vide impugned order, dated 16.01.2017, dismissed the application so filed under Section 256(1) of the Code of Criminal Procedure and thereafter went on to hold that as there was no application before the Court filed by a competent person entitled to continue the complaint, therefore, the Court had to proceed on the assumption that the complainant was absent and on these basis, the accused was ordered to be acquitted.

6. Feeling aggrieved, this appeal stands filed by the legal heirs of deceased Puran Chauhan.

7. Impugned order, dated 16.01.2017, stands assailed *inter alia* on the ground that while a hypertechnical approach was adopted by the learned trial Court in dismissing the application filed before it under Section 256(1) of the Code of Criminal Procedure and even if the learned Court below had come to the conclusion that the application so preferred before it under Section 256(1) was not by persons who could have pursued the cause on behalf of the deceased complainant, then also, rather than dismissing the case on the assumption that the complainant was not present, at least one opportunity should have been given to the present appellants, i.e., the legal heirs as well as legal representatives of deceased Puran Chauhan to pursue the cause on behalf of deceased Puran Chauhan and had they failed to do so, then the learned trial Court could have had proceeded in accordance with law. Accordingly, it has been prayed by Mr. Neeraj Gupta, learned counsel appearing for the appellants that the impugned order, dated 16.01.2017, be set aside and the appellants be granted an opportunity to file appropriate application to bring them on record as legal representatives of deceased Puran Chauhan before the learned Court below and thereafter, pursue the case in said capacity.

8. On the other hand, Mr. Sanjay Jaswal, learned counsel appearing for the respondent while supporting the impugned order, has argued that there was no infirmity with the order so passed by the learned trial Court and even otherwise, as the respondent stands acquitted by the learned Court below, therefore, no interference in the order so passed, is called for in view of the law laid down by the Hon'ble Supreme Court in ***S. Rama Krishna*** Vs. ***S. Rami Reddy (Dead) by his LRs. and others***, (2008) 5 Supreme Court Cases 535 and ***Ghurey Lal*** Vs. ***State of Uttar Pradesh***, (2008) 10 Supreme Court Cases 450.

9. I have heard the learned counsel for the parties and have also gone through the order dated 16.01.2017, passed by the learned Court below as well as the records of the case.

10. It is not in dispute that the original complaint was filed by Shri Puran Chauhan. It is also not in dispute that in the complaint, it was so stated by the complainant that he was an authorized agent of M/s. Harkrishan Lal Baldev Rai Fruit Commission Agents, B-214, New Subzi Mandi Azadpur, Delhi-33. It is also not in dispute that it was not mentioned in the said complaint that the same was being filed on behalf of M/s. Harkrishan Lal Baldev Rai Fruit Commission Agents. It is also a matter of record that the disputed Cheque stood issued by the accused in favour of Sh. Puran Chauhan, the deceased complainant. Appellants before this Court are the widow, sons and daughters of late Shri Puran Chauhan. After the death of Shri Puran Chauhan, an application was filed before the learned trial Court under Section 256(1) of the Code of Criminal Procedure, 1973 to bring on record Sh. Lok Raj Sharma, son of Sh. Tara Chand Sharma, duly constituted General Power of Attorney of M/s. H.B. Delhi, New Sabzi Mandi Azaadpur Delhi on the averments that the complaint was being pursued by Shri Puran Chauhan as the authorized agent of M/s. H.B. Delhi, New Sabzi Mandi Azaadpur Delhi and after his

death, the same may be permitted to be pursued by its General Power of Attorney Shri Lok Raj Sharma. This application so filed before the learned trial Court was rejected by the learned trial Court by *inter alia* holding that the complaint was filed by Shri Puran Chauhan in his sole name and in his individual capacity and not on behalf of H.B. Delhi as its authorized agent and further that the cheque in question was also issued in the name of Shri Puran Chauhan and, therefore, liability of the accused, if any, was towards Shri Puran Chauhan and not towards M/s. H.B. Delhi. Learned trial Court further went on to hold that the original complaint had been filed by late Shri Puran Chauhan in his individual capacity and cheque amount was stated to be owed to him and therefore, firm M/s. H.B. Delhi does not come into picture and Shri Chander Prakesh Narula, alleged partner of the same, had no *locus standi* to continue the same either personally or through its authorized agent. Incidentally, Sh. Chander Prakash Narula, who had filed such an application before the learned trial Court has not assailed this order. Therefore, findings returned by the learned trial Court to the effect that Chander Prakash Narula had no *locus standi* to file and maintain the said application, are not subject matter of the present appeal. What is the subject matter of the present appeal is the subsequent order of the learned trial Court, whereby the said Court after dismissing the application so filed by Shri Chander Prakesh Narula, went on to proceed with the matter as if the complainant was not present before the Court, by drawing an assumption in this regard under the provisions of Section 256 of the Code of Criminal Procedure, whereafter it acquitted the accused and thus dismissed the complaint.

11. In my considered view, findings returned by the learned trial Court to the effect that because there was no application by a competent person entitled to continue the present complaint filed before the Court, therefore, it was a case where the Court would have to proceed under Section 256(1) of the Code of Criminal Procedure on the assumption that the complainant is absent, are perverse findings. This is for the reason that learned trial Court has construed the provisions of Section 256(1) of the Code of Criminal Procedure in a hypertechnical manner.

12. Admittedly, here it was not a case where after the death of the complainant, none was before the Court to pursue the matter. An application was filed under Section 256(1) of the Code of Criminal Procedure, bonafidely, by one Shri Chander Prakash Narula, who had made a prayer that he may be permitted to continue the complaint either on behalf of M/s. H.B. Delhi or through its General Power of Attorney.

13. In my considered view, because when there was someone representing the cause, whom the learned Court below found to be having no *locus* to continue the cause, then the least which was expected from the learned Trial Court was to have had afforded al least one opportunity to legal heirs/regal representatives of deceased Puran Chauhan to pursue the matter by moving an appropriate application and had they not done so even after grant of opportunity, then the Court could have had passed appropriate orders. I say this for the reason that it is apparent from the impugned order itself that the learned trial Court had returned a definite finding that the complaint stood filed by Shri Puran Chauhan in his individual capacity and further because the checque was drawn in his name, therefore, liability of the accused, if any, was towards late Shri Puran Chand. Having recognized this fact, learned trial Court erred in not correctly appreciating the mandate and scope of the provisions of Section 256 of the Code of Criminal Procedure. A perusal of the said Section demonstrates that the same contemplates that if summon has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day. Proviso to the said sub-section contemplates that where complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case. Sub-section (2) of the said Section provides that the provisions of sub-section (1) shall also apply where "*the non-appearance of the complainant is due to his death".*

14. Admittedly, here is a case where even as on the date when the application so filed under Section 256(1) of the Code of Criminal Procedure was dismissed by the learned trial Court, learned counsel, who earlier was also appearing for the complainant was before the Court. *Zimini* orders of the learned trial Court demonstrate that deceased Sh. Puran Chauhan was being represented by Sh. S. Kumar, Advocate, who later on filed an application under Section 256(1) of the Code of Criminal Procedure. Besides this, sub-section (1) of Section 256 even otherwise confers discretion upon the Magistrate that if the complainant was not present before it, then besides acquitting the accused, it has power to adjourn the hearing of the case to some other day, but for reasons which are to be assigned.

15. In my considered view, in the peculiar facts and circumstances of the case, learned trial Court, in the interest of justice should have had adjourned the hearing of the case to some other day and should have called upon the learned counsel, who had filed the application under Section 256(1) of the Code of Criminal Procedure, to file an appropriate application and if even thereafter no steps in this regard would have been taken by the present appellants, then obviously, learned trial Court could have had went ahead and acquitted the accused. Failure on the part of the learned Court below in exercising the discretion so vested in it, in the peculiar facts of the case, has resulted in travesty of justice. The hypertechnical approach which has been adopted by the learned trial Court is not appreciated by this Court. It has to be understood by the Courts that the aim of the Court is advancement of justice and not scuttling the rights of parties by adopting a hypertechnical view.

16. While respectfully agreeing with the preposition laid down by the Hon'ble Supreme Court in the judgments, which have been so relied upon by the learned counsel for the respondent, I hold that the said judgments have no applicability in the facts of the present case. The Hon'ble Supreme Court in judgments referred above has laid down the principle as to what parameters have to be adopted by the appellate Court while interfering in the judgments of acquittal passed in favour of accused. This is not a case where the learned trial Court has passed a judgment of acquittal in favour of the respondent on merit. As already held above, the complaint was dismissed/accused was acquitted by the learned trial Court by totally misreading and mis-appreciating the scope of the provisions of Section 256(1) of the Code of Criminal Procedure by adopting a hypertechnical view and, therefore, the judgments so cited by the learned counsel for the respondent are of no assistance as far as facts of the present case are concerned.

17. In view of above discussion, this petition is allowed. Impugned order, dated 16.01.2017, is set aside and the case is remanded back to the learned Trial Court with the direction that it shall afford an opportunity to the present appellants to move an appropriate application to implead them as complainants in the case, in place of deceased Puran Chauhan, in their capacity as his legal representatives. It is clarified that the application which shall be so filed by the appellants, shall be decided by the learned trial Court on its own merit, in accordance with law, without being influenced in any manner by any observation which has been made by this Court. Parties through their counsel are directed to appear before the learned Trial Court on ***15th January, 2018***, on which date, appellants shall file appropriate application before the learned trial Court. It is clarified that in case the appellants are not able to move such application on the date so fixed by this Court, then only one more opportunity in this regard shall be granted by the learned trial Court and if even after grant of one further opportunity, no such application is filed, then the learned trial Court shall pass appropriate orders in the case.

Appeal stands disposed of in above terms, so also miscellaneous application(s), if any.

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

Rattan Manjari Negi ... Petitioner
Versus
State of Himachal Pradesh ... Respondent

Cr. Revision No. 232 of 2017
Reserved on: 24.11.2017
Date of decision: 14.12.2017

Code of Criminal Procedure, 1973- Section 319- Criminal Revision- Petitioner impleaded as an accused under Section 319 Cr.P.C. for having allegedly committed offences under Sections 120-B, 420, 467, 468, 471 of Indian Penal Code and Section 13(2) of Prevention of Corruption Act, 1988- Order of the Learned Special Judge challenged- **The High Court held** – that power to proceed against other persons appearing to be guilty of an offence, as per Section 319 of the Code of Criminal Procedure, that too at the stage of inquiry envisages that the material available after taking cognizance by a Court and which has come in "evidence" during the course of the inquiry can only be used against the accomplice whose complicity in the offence may have either been suppressed or escaped the notice of the court – A person cannot be impleaded as an accused, merely on the basis of the material gathered by the prosecution during the investigation of the case. (Para-11 to 16)

Case referred:
Hardeep Singh Vs. State of Punjab and Others, (2014) 3 Supreme Court Cases 92

For the petitioner: Mr. Satyen Vaidya, Sr. Advocate with
Mr. Vivek Sharma, Advocate.
For the respondent: Mr. Vikram Thakur Deputy Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

By way of this revision petition, petitioner Rattan Manjari Negi has assailed order dated 14.06.2017 passed by learned Special Judge, Rampur in case No. 5K/7 of 2013, in a case registered under Sections 420, 467, 468, 471, 120-B of Indian Penal Code and Section 13(2) of Prevention of Corruption Act at Police Station, State Vigilance and Anti Corruption Bureau Reckong Peo dated 16.10.2017 vide FIR No. 1/2007 against Rajeev Sood (BDO Pooh), Kashmir Singh Rawat (Junior Engineer O/O BDO, Pooh), Nokhu Ram, Raj Chander Negi (Contractors), Ashwani Kumar (Assistant Engineer I & PH), Vijay Kumar (Secretary Gram Panchayat Murang) and Gian Singh (Technical Assistant O/O BDO Pooh), vide which, learned Court below has arrayed the petitioner also as a co-accused and a formal charge has been put to the petitioner alongwith other co-accused under Sections 120-B, 420, 467, 468, 471 of Indian Penal Code and Section 13(2) of Prevention of Corruption Act, 1988.

2. The case of the petitioner is that the order so passed by learned Court below is perverse and not sustainable in law as learned Special Judge has erred in not appreciating that in exercise of its jurisdiction so conferred upon it under Section 319 Cr.P.C., learned Court below could not have arrayed the petitioner as co-accused at the stage of passing the impugned order, especially when he was not named as co-accused in the course of investigation nor at the time when the challan was filed in the Court and thus, as no further material was with the Court as on 14.06.2017, learned Court below has erred in impleading the petitioner as co-accused.

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

4. Before proceeding further, it is relevant to take note of Section 319 Cr.P.C. This provision confers upon the Court power to proceed against other persons appearing to be guilty of offence where, in the course of any inquiry into, or trial of, an offence, appears to have been committed by a person not being the accused. For ready reference, Section 319 Cr.P.C. is being reproduced herein below:-

> "**319. Power to proceed against other persons appearing to be guilty of offence**. - (1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.
>
> (2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.
>
> (3) Any person attending the Court although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.
>
> (4) Where the Court proceeds against any person under sub-section (1), then-
>
> (a) the proceedings in respect of such person shall be commenced afresh, and witnesses re-heard;
>
> (b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

5. A 5 Judge Bench of the Hon'ble Supreme Court in ***Hardeep Singh Vs. State of Punjab and Others***, ***(2014) 3 Supreme Court Cases 92***, while discussing the scope of said Section, formulated the following questions:-

"6. On the consideration of the submissions raised and in view of what has been noted above, the following questions are to be answered by this Bench:

> **6.1.** (i) What is the stage at which power under Section 319 CrPC can be exercised?
>
> **6.2.** (ii) Whether the word "evidence" used in Section 319(1) CrPC could only mean evidence tested by cross-examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?
>
> **6.3.** (iii) Whether the word "evidence" used in Section 319(1) CrPC has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?
>
> **6.4.** (iv) What is the nature of the satisfaction required to invoke the power under Section 319 CrPC to arraign an accused? Whether the power under Section 319(1) CrPC can be exercised only if the court is satisfied that the accused summoned will in all likelihood convicted?
>
> **6.5.** (v) Does the power under Section 319 CrPC extend to persons not named in the FIR or named in the FIR but not charged or who have been discharged?"

6. While answering question No. (iii), which is relevant for the purpose of adjudication of the present case, after referring to the earlier judgments of Hon'ble Supreme Court it held as under:-

> "76. Ordinarily, it is only after the charges are framed that the stage of recording of evidence is reached. A bare perusal of Section 227 CrPC would show that the legislature has used the terms "record of the case" and the "documents submitted therewith". It is in this context that the word "evidence" as appearing in Section 319 CrPC has to be read and understood. The material collected at the stage of investigation can at best be used for a limited purpose as provided under Section 157 of the Evidence Act i.e. to corroborate or contradict the statements of the witnesses recorded before the court. Therefore, for the exercise of power under Section 319 CrPC, the use of word "evidence" means material that has come before the court during an inquiry or trial by it and not otherwise. If from the evidence led in the trial the court is of the opinion that a person not accused before it has also committed the offence, it may summon such person under Section 319 CrPC.
>
> 77. With respect to documentary evidence, it is sufficient, as can be seen from a bare perusal of Section 3 of the Evidence Act as well as the decision of the Constitution Bench, that a document is required to be produced and proved according to law to be called evidence. Whether such evidence is relevant, irrelevant, admissible or inadmissible, is a matter of trial.
>
> 78. It is, therefore, clear that the word "evidence" in Section 319 CrPC means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents. It is only such evidence that can be taken into account by the Magistrate or the court to decide whether power under Section 319 CrPC is to be exercised and not on the basis of material collected during investigation.
>
> 79. The inquiry by the court is neither attributable to the investigation nor the prosecution, but by the court itself for collecting information to draw back a curtain that hides something material. It is the duty of the court to do so and therefore the power to perform this duty is provided under the CrPC.
>
> 80. The unveiling of facts other than the material collected during investigation before the magistrate or court before trial actually commences is part of the process of inquiry. Such facts when recorded during trial are evidence. It is evidence only on the basis whereof trial can be held, but can the same definition be extended for any other material collected during inquiry by the Magistrate or court for the purpose of Section 319 CrPC?
>
> 81. An inquiry can be conducted by the Magistrate or court at any stage during the proceedings before the court. This power is preserved with the court and has to be read and understood accordingly. The outcome of any such exercise should not be an impediment in the speedy trial of the case. Though the facts so received by the Magistrate or the court may not be evidence, yet it is some material that makes things clear and unfolds concealed or deliberately suppressed material that may facilitate the trial. In the context of Section 319 CrPC it is an information of complicity. Such material therefore, can be used even though not an evidence in stricto sensu, but an information on record collected by the court during inquiry itself, as a prima facie satisfaction for exercising the powers as presently involved.
>
> 82. This pre-trial stage is a stage where no adjudication on the evidence of the offences involved takes place and therefore, after the material along with the charge-sheet has been brought before the court, the same can be inquired into in order to effectively proceed with framing of charges. After the charges are

framed, the prosecution is asked to lead evidence and till that is done, there is no evidence available in the strict legal sense of Section 3 of the Evidence Act. The actual trial of the offence by bringing the accused before the court has still not begun. What is available is the material that has been submitted before the court along with the charge-sheet. In such situation, the court only has the preparatory material that has been placed before the court for its consideration in order to proceed with the trial by framing of charges.

83. It is, therefore, not any material that can be utilised, rather it is that material after cognizance is taken by a court, that is available to it while making an inquiry into or trying an offence, that the court can utilise or take into consideration for supporting reasons to summon any person on the basis of evidence adduced before the court, who may be on the basis of such material, treated to be an accomplice in the commission of the offence. The inference that can be drawn is that material which is not exactly evidence recorded before the court, but is a material collected by the court, can be utilised to corroborate evidence already recorded for the purpose of summoning any other person, other than the accused. This would harmonise such material with the word "evidence" as material that would be supportive in nature to facilitate the exposition of any other accomplice whose complicity in the offence may have either been suppressed or escaped the notice of the court.

84. The word "evidence" therefore has to be understood in its wider sense both at the stage of trial and, as discussed earlier, even at the stage of inquiry, as used under Section 319 CrPC. The court, therefore, should be understood to have the power to proceed against any person after summoning him on the basis of any such material as brought forth before it. The duty and obligation of the court becomes more onerous to invoke such powers cautiously on such material after evidence has been led during trial.

85. In view of the discussion made and the conclusion drawn hereinabove, the answer to the aforesaid question posed is that apart from evidence recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilised only for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 CrPC. The "evidence" is thus, limited to the evidence recorded during trial."

7. In the background of the law discussed above, now this Court will go into the legality of the order under challenge.

8. A perusal of the impugned order demonstrates that in Para-13 thereof, learned Special Judge has assigned reasons as to why the petitioner was ordered to be impleaded as an accused. It stands mentioned in the said para that the process of installation of the spans/rope way right from its inception till its completion and commissioning was done under the supervision of a committee constituting of members of the concerned Panchayat and B.D.O. Pooh, and its officials and after completion of the same, they were handed over to the concerned Panchayat. It further stands mentioned in the said para that the completion and operationalising/commissioning condition of Mongshong-Kharo span was certified by Pradhan Shiv Chand of Gram Panchayat, Rarang and Jagat Kirti, the then Technical Assistant and thereafter possession thereof was taken by the persons concerned under a certificate duly signed by them. It further stands mentioned in the said para that completion and commissioning condition certificate with respect to motor span from Ribba to Kharo was certified by Rattan Manjari, the then Pradhan of Gram Panchayat, Ribba but the said persons had not been chargesheeted on the ground that they were not found party to criminal conspiracy. Thereafter, it has been observed by learned trial Court that the reasons cited for not arraying the above named persons as co-accused were beyond comprehension and prosecution

could not be allowed to adopt different yardsticks while assessing the involvement of the accused and the persons who have not been arrayed as accused especially when the facts relied upon against the present accused as well as the person not chargesheeted were quite identical. Learned trial Court further held that it was the case of the prosecution that entire process of installation of the spans rights from its inception to its commissioning and transfer thereof to the concerned Panchayat was done in active corroboration with the President of the Panchayat. Learned trial Court also held that they being the local persons could be held to be well aware with the sites which had been selected by the committee for installation of the spans and, therefore, how could it be believed that Pradhan of Gram Panchayat, Ribba, could not distinguish between a gravity span and a span run by a motor. It also held that there was no technicality involved in knowing the sites of the installation of the spans and the operation thereof by gravitation or by a mechanized system. Learned trial Court further held that it was constrained to observe that the reasons for not arraying the above named persons as accused were actuated with consideration other than the object to bring the actual culprits to book. It was on these basis that learned trial Court arrayed petitioner as co-accused.

9. Learned trial Court thus has spelt out reasons as to why it has impleaded the present petitioner as an accused in the trial.

10. Now, the stage at which the impugned order has been passed by the Court is the stage post taking cognizance and before framing of the charge. It is but obvious that because at the time when the impugned order was passed as no charges had been framed there was no evidence before the Court which stood recorded by it after framing of charge. The decision which was taken by learned trial Court to implead the present petitioner as an accused in the trial was obviously on the basis of the material which had been placed before it by the prosecution. Therefore, the moot issue is as to whether on the basis of the material which had been placed before learned trial Court by the prosecution on the basis of which cognizance was taken of the matter by learned trial Court, could learned trial Court have had arrayed the petitioner as an accused at the time of framing of charges or not.

11. In my considered view, the answer is in the negative. I say so for the reason that 5 Judge judgment of the Hon'ble Supreme court i.e. *Hardeep Singh Vs. State of Punjab and Others* (supra) spells out very clearly and very categorically that on the basis of what material, learned trial Court can implead a person as an accused in exercise of powers conferred upon it under Section 319 Cr.P.C. Material so envisaged in the said judgment of the Hon'ble Supreme Court is (a) material gathered by way of "evidence" and (b) material gathered by way of inquiry by the Court.

12. The word "evidence" as has been clarified by Hon'ble Supreme Court as mentioned in Section 319 Cr.P.C. means only such evidence as is made before the Court, in relation to statements, and as produced before the Court, in relation documents. Hon'ble Supreme Court has categorically said that it is only such evidence that can be taken into account by the Magistrate or the Court to decide whether the power under Section 319 Cr.P.C. is to be exercised and not on the basis of material collected during the investigation.

13. Hon'ble Supreme Court has further held that the inquiry by the Court is, "neither attributable to investigation nor the prosecution but by the Court itself for collecting information to draw back a curtain that hides something material". Hon'ble Supreme Court has further held that unveiling of facts other than the material collected during investigation before the Magistrate or Court before trial actually commences is part of the process of inquiry. It has further been held that such facts when recorded during trial are evidence. Hon'ble Supreme Court has further held that it is, therefore, not any material that can be utilized, rather it is that material after cognizance is taken by a Court which is available to it while making an inquiry into or trying an offence, that the Court can utilize or take into consideration for supporting reasons to summon any person on the basis of evidence adduced before the Court, who may be on the basis of such material, treated to be an accomplice in the commission of the offence.

14. Thereafter, it stands concluded by Hon'ble Supreme Court that apart from evidence recorded during trial, any material that has been received by the Court after cognizance is taken and before the trial commences, can be utilized only for corroboration and to support the evidence recorded by the Court to invoke the power under Section 319 Cr.P.C.

15. Coming to the facts of the present case, herein Court did not exercise its power under Section 319 of Cr.P.C. on the basis of material which was placed before it by way of evidence, as it is understood under Section 319 of Cr.P.C. Neither there is anything on record from which it can be inferred that after taking cognizance and before the stage of trial in the course of inquiry into trying the offence, material came before the Court which led to the Court passing the order of impleading the petitioner as an accused. In other words, there was no unveiling of facts other than material collected during investigation after the Court had taken cognizance and before the stage of trial. This demonstrates that the decision of learned trial court of impleading the petitioner as an accused in the trial, was entirely based on the material which was collected during the course of investigation before the Court had taken cognizance of the offence. I am afraid on the basis of appreciation of such material which the prosecution had collected during the course of investigation, learned trial Court could not have had exercised its power under Section 319 of Cr.P.C. and ordered the impleadment of the petitioner as a party respondent. In my considered view, the order so passed to this effect by learned trial Court does violence to the law as has been laid down by the Constitution Bench of Hon'ble Supreme Court in ***Hardeep Singh Vs. State of Punjab and Others*** (supra).

16. In view of above discussion, this petition is allowed. Impugned order dated 14.06.2017 passed by learned Special Judge, Rampur, in case No. 5K/7 of 2013, vide which present petitioner was ordered to be impleaded as an accused in the trial, is accordingly quashed and set aside. It is clarified that the order of impleadment of the present petitioner as an accused by learned trial Court has been set aside on technical grounds and this order shall not come in the way of learned trial Court to pass an appropriate order in this regard on a subsequent stage in accordance with law.

17. Petition stands disposed of in above terms. Miscellaneous applications pending, if any, stand disposed of.

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

State of H.P. .....Appellant.

Versus

Ajeet Singh and others .....Respondents.

Cr. Appeal No. 711 of 2008
Decided on : 14.12.2017

Code of Criminal Procedure, 1973- Section 378- Appeal against Acquittal- Sections 147, 148, 149, 341, 325 and 506 of the Indian Penal Code, 1860- Accused came to be acquitted for the aforesaid offences by the learned Trial Court- State assailing the acquittal- **The High Court Held-** that the deposition of the complainant was not as per the narration in the FIR Ex.PW-5/A, the presence of one of the witness Kalo Devi, who was stated to have witness the occurrence, doubtful at the time of occurrence- The version of the said witnessed was also doubtful- The disclosure by PW-1 that the assault was perpetrated by three persons as per Ex.PW-5/A i.e. FIR, not testified by PW-1 in examination-in-chief- The same held to be an improvement besides a stark contradiction vis-à-vis his previously recorded statement – Benefit of doubt rightly extended- Acquittal upheld. (Para-9 and 10)

For the appellant: Mr. R.S.Thakur, Addl. A.G.
For the respondent: Mr. Dheeraj Vashist vice Mr. Ajay Kumar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed against the impugned judgement of acquittal recorded by the learned Chief Judicial Magistrate, Kinnaur District, Camp at Rampur Bushahar, upon, Police Challan No. 4-2 of 2005, whereby he pronounced an order of acquittal, upon, the accused qua the offences in respect whereof, they stood charged.

2. The brief facts of the case are that on 14.10.2004 at about 7 a.m, while Ganga Ram, complainant was going to board a bus, the accused after forming an unlawful assembly, were present on the road and they wrongfully restrained the complainant Ganga Ram and gave beatings to him. Accused Ajeet Singh inflicted a blow with Khukhari upon the complainant, whereas the other accused gave beatings to him causing grievous injuries to complainant Ganga Ram. Ganga Ram raised an alarm and on hearing his cries Kala Devi reached on the spot and saved the complainant from the clutches of the accused. The matter was reported to the police. The police referred the injured for medical treatment and taken into possession the nail cutter type knife and dandas, blood stained clothes of the complainant and after procuring the MLC of the injured and on completion of the investigation, into the offences, allegedly committed by the accused, the Investigating Officer concerned filed a report under Section 173 Cr. P.C. before the Court concerned.

3. Thereupon, the accused stood charged by the learned trial Court for theirs allegedly committing offences punishable under Sections under Sections 147, 148, 149, 341, 325 and 506 of the Indian Penal Code, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 10 witnesses. On closure of prosecution evidence, the statements of the accused, under, Section 313 of the Code of Criminal Procedure were recorded wherein they pleaded innocence and claimed false implication. They chose to lead defence evidence.

5. The State of H.P. is aggrieved by the judgment of acquittal recorded, upon, the accused/respondents, by the learned Court below. The learned Additional Advocate General, has concertedly and vigorously contended that the findings of acquittal recorded by the learned Court below being not harbored upon a proper appreciation “by it” of the evidence on record rather theirs standing sequelled by gross mis-appreciation “by it" of the material evidence on record. Hence, he, contends that the findings of acquittal warranting reversal by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction besides concomitantly, appropriate sentence(s) being imposed upon the accused/respondent.

6. On the other hand, the learned defence counsel has with considerable force and vigour, contended that the findings of acquittal recorded by the learned Court below being based on a mature and balanced appreciation “by it” of the evidence on record, hence theirs not warranting any interference, rather theirs meriting vindication.

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

8. The learned Additional Advocate General has contended that the affording, by the learned trial Court vis-à-vis the accused, the benefit of doubt being hinged, upon untenable grounds besides is engendered from its irreverence to the gravity of evidence of probative vigour hence necessitates interference by this Court. He has further argued that the findings of acquittal recorded upon the accused, for theirs allegedly committing offence(s) punishable under Sections 147, 148, 149, 341, 325 and 506 of the Indian Penal Code, being not anvilled, upon proper appreciation of evidence, as such, necessitate interference by this Court.

9. The instant case is hinged, upon, vivid and graphic narration qua the incident being rendered by the eye witnesses vis-à-vis the occurrence AND by the victim. The initial version qua the occurrence, is, embodied in F.I.R borne in Ext.PW-5/A. In the aforesaid exhibit, the accused are disclosed, to, by fist and leg blows hence assault the complainant. During the course of assault, the complainant testifies of his raising shrieks, shrieks whereof begot the arrival, of, Kala Devi at the site of occurrence. (i) Whereas in the FIR, the complainant, has specifically alleged that, upon, over hearing his shouts, one Kala Devi inquiring from, the accused the reason, for his perpetrating an assault, wherefrom it is apt to conclude of hers hence not eye witnessing the occurrence. It is also alleged in the F.I.R, that, upon Kala Devi arriving at the spot, thereupon, all the accused fleeing from the spot, factum whereof also amplifyingly echoes of, though, upon hearing his cries, hers, arriving at the spot, yet, the fact of hers eye witnessing the occurrence is rather dispelled. (b) also the factum of hers making inquiries from the accused qua the reason of theirs assaulting the complainant, is also rendered incredible. The solitary testification of PW-1 with respect to the version, held in Ext.PW-5/A though would alone be sufficient, to, constrain this Court, to pronounce an order of conviction, upon, the accused, unless, on an incisive perusal thereof, echoings occur, therein, in display of his improving besides embellishing, upon, his version borne in Ext.PW-5/A or unless his testimony is contradictory vis-à-vis the testification(s), of, the eye witnesses, who, respectively deposed as PW-8 and PW-9.

10. In discerning, whether, the solitary testification of PW-1 is increditworthy, it is imperative to allude, to, the factum, that, in, Ext.PW-5/A (i) he had made a disclosure qua his being assaulted by three person(s), (ii) whereas in contradiction thereof, he, in his testification, borne in his examination in chief, ascribes, the relevant incriminatory role only vis-à-vis the relevant accused. In sequel the aforesaid fact, per se, comprises a blatant improvement besides a stark contradiction vis-à-vis his previously recorded statement in writing, (iii) corollary whereof, is qua his version qua the occurrence is rendered incredible. Furthermore, his rendered testimony before the Court, makes echoings, of the police taking into possession, a Khukri, (iv) whereas upon opening, of the apposite parcel, in Court, a nail cutter was recovered therefrom, whereas, he testified of his being not assaulted with user of nail kutter, yet nail kutter whereof stood produced in Court. (v) Thereupon an aspersion is cast qua the truthfulness of the prosecution case. Similarly PW-8 and PW-9, rendered statements, qua, theirs purportedly eye witnessing the occurrence, whereas PW-1 contradicts the factum of, availability of PW-8 and PW-9 at the site of occurrence, in contemporenity, to, his being assaulted by the accused (vi) whereupon an inference is erected of PW-8 and PW-9, hence recording their presence, subsequent, to the relevant assault, taking place, (vii) thereupon their testifications, displaying of theirs, eye witnessing, the accused assaulting the victim, hence, do not acquire any virtue of credibility. Sequel of the aforesaid incisive perusal of the testifications, of, PW-1, PW-8 and of PW-9, is, of the victim rearing a false case against the accused. The reason for the victim rearing a false case against the accused, stems, from the accused, proving, the factum of the victim rearing animosity against him, with, respect to the relevant path.

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

12. In view of the above, I find no merit in this appeal which is accordingly dismissed. In sequel, the impugned judgement of the learned trial Court, is, affirmed and maintained. Record of the learned trial Court be sent back forthwith. Personal and surety bonds, if any, stand cancelled and discharged.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Jawala Prasad ...Petitioner.

Versus

State of Himachal Pradesh and others ...Respondents.

CWP No. 2092 of 2017
Decided on: December 15, 2017

Constitution of India, 1950- Article 226- Civil Writ Petition- Grant of Nautor Land- Petitioner was employed as a Sepoy in Dogra Scouts applied for nautor land- The application was duly recommended by all concerned, however, the Sub Divisional Officer rejected the application on the ground that the area was situated at a minimum distance of one kilometer (ground distance) from perennial/natural water source- The petitioner had assailed the same by way of an appeal before the Deputy Commissioner – The same was rejected on the basis of instructions issued by the Government vide letter dated 20.4.2017, that no nautor case is to be considered for issuing pattas in favour of Government employees as SLP (C)CC No. 2044/2016 title State of H.P. vs. Narender Lal Negi was pending before the Supreme Court and as per the report of the Revenue Field Agency, the grantee is a Government employee- Hence, the present petition – While filing reply the State, inter alia, also raised objections that the land applied for was not a part of the allotable pool- **The High Court held**- The petitioner being a Sepoy in Dogra Scouts formed a special category as per Rule 7 of the Himachal Pradesh Nautor Land Rules, 1968, which itself provided for a special preference for serving armed forces personnel and in view of Rule 7, instructions issued by the Government would not have applied to the case of the petitioner - Further held- The land being a part of the allotable pool was clearly an afterthought which was raised after filing of the petition and hence not sustainable. (Para-5 to 11)

Constitution of India, 1950- Article 226- Civil Writ Petition- Grant of Nautor Land- Further held- The Appellate Authority could have adjourned the appeal sine die till the time the Hon'ble Supreme Court did not decide the SLP, but in no event the appeal could have been dismissed- Consequently, writ petition allowed and the matter remanded back to the Deputy Commissioner for a decision afresh. (Para-12)

Cases referred:

Mohinder Singh Gill Vs. The Chief Election Commissioner, New Delhi (1978) 1 SCC 405

Union of India and another vs. C.S. Sidhu (2010) 4 SCC 563

For the Petitioner: Mr. K.D. Sood, Senior Advocate, with Mr. Sanjeev Sood and Mr. Dhananjay Sharma, Advocates.

For the Respondents: Mr. J. S. Guleria, Assistant Advocate General.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, J. (oral)

The petitioner is a permanent resident of Village and Post Office, Kamru, Tehsil Sangla, District Kinnaur, H.P. and currently employed as Sepoy in Dogra Scouts in the high altitude area. He applied for grant of nautor land comprised in Khasra Nos. 361/346/319 and 336/120/1, Kite 2, measuring 00-92-24 hectares in Mohal Regsantang, Tehsil Sangla, District Kinnaur, H.P. The application was duly recommended by all the concerned. However, the Sub Divisional Officer (Civil), Kalpa vide his order dated 16.7.2016 rejected the application on the ground that the applicant did not satisfy condition No.4 which reads thus:

"4. The area is situated at a minimum distance of one kilometer (ground distance) from Perennial/ Natural Water Source."

2. The petitioner assailed the aforesaid order by filing an appeal before the Deputy Commissioner, Kinnaur, however, the same has been rejected only on the basis of the instructions issued by the Government vide letter No.Rev.B.F(12)1/2008-Vol-II dated 20.4.2017 wherein it has been mentioned that no nautor case is to be considered for issuing pattas in favour of Government employees as SLP (C)CC No. 2044/2016 in case titled State of H.P. vs. Narender Lal Negi is lying pending for decision before the Hon'ble Supreme Court of India and as per the report of the Revenue Field Agency received from the Tehsildar, Sangla vide letter dated 5.7.2016, the grantee is a Government employee.

3. Being aggrieved by the orders passed by the Sub Divisional Officer (C), Kalpa dated 16.7.2016 (Annexure P-2) and the order dated 20.4.2017 (Annexure P-4) passed by the Deputy Commissioner, Kinnaur , the petitioner has filed the instant petition on the ground that the authorities below have ignored the fact that being a serving member of armed force the petitioner was entitled for the grant of nautor as a matter of right under a special category and mere fact that he happens to be a government employee would not come in the way of such grant, more particularly, when the same has been duly considered and recommended by all concerned including Panchayat, Forest Department, Co-villagers etc.

4. The respondents opposed the petition by filing reply wherein it is averred that the petitioner being a Government employee and having income more than what is prescribed in the Nautor Rules, is not eligible for grant of nautor and further that the land applied for does not fall within the category of allotable pool and, therefore, the same cannot otherwise be allotted to the petitioner. Lastly, it is claimed that the petitioner has failed to specify his special category and, therefore, also he is not entitled to grant of Nautor.

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

5. At the outset, we may notice that indubitably the case of the petitioner has been rejected by the Deputy Commissioner only on the basis of the instructions issued by the Government on 20.4.2017 (supra) and the justification as has now been put-forth by the respondents with regard to land applied for not forming a part of the allotable pool, is clearly an after thought.

6. There is no gainsaying that every decision of an administrative or executive nature must be a composite and self-sustaining one, in that it should contain all the reasons which prevailed on the official taking the decision to arrive at his conclusion. It is beyond cavil that an Authority cannot be permitted to travel beyond the stand adopted and expressed by it in the impugned action.

7. If precedent is required for this proposition it can be found in the celebrated decision of the Hon'ble Supreme Court in case titled ***Mohinder Singh Gill Vs. The Chief Election Commissioner, New Delhi (1978) 1 SCC 405***, of which the following paragraph deserves extraction:-

"8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in Gordhandas Bhanji (1952) 1 SCR 135: Public orders publicly made, in exercise of statutory authority cannot be construed in the light of Explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public

authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

8. Apart from the above, we really wonder how the respondents could have feigned ignorance regarding the special category to which the petitioner belongs, particularly when they have not disputed that he is serving as Sepoy in Dogra Scouts which is an armed force. If only the respondents had cared to read the Nautor Rules, then such defence probably would not have been raised by them because Rule 7 of the Himachal Pradesh Nautor Land Rules, 1968 clearly provides for preference of various categories which include service personnel in the armed forces and Ex-Servicemen as would be evident from a bare perusal of Rule 7 itself, which is extracted below:

*"**7.Eligibility for nautor land**. – Save for the widow and the children of a member of an armed force or semi armed force, who has laid down his life for the country (whose widow and children were eligible for grant anywhere within the Tehsil subject to the conditions mentioned in the wajib-ul-Arj in respect of the areas where the land applied for is situated) no one who is not the resident in the estate in which the land applied for is situated, shall be eligible for the grant. Every resident of the estate in which the land applied for lies will be eligible in the following orders of preference:-*

(a) Such persons who have less than ten bighas of land under self cultivation on 1.1.1974, whether as owners, or as tenants, or as lessees, either individually or collectively, or have an income of less than Rs. 2.000 per annum from all sources including lands. Provided that in this category a dependent of one who has laid down his life for the defence of the country will get preference over his counterparts.

(b) Scheduled Castes and Scheduled Tribes applicants; and

(c) The deponents of those who have laid down their lives for the defence of the country service, for the defence of the country will mean service in a uniformed force as well as in the capacity of civilian, so long as the death occurs on a front be it military or civil.

(d) Services personnel in the armed forces and Ex-Servicemen.

(e) Panchayats.

(f) Others.

Provided that a bonafide landless resident of Spiti shall be eligible for the grant of land in Nautor within the Spiti Sub-Division."

9. It does not require solomon's wisdom to visualize why such special categories have been carved out in the Rule. Joining the defence service is not only for personal gain but the person would also strive hard and risk his life to secure the borders of the country and therefore provision of such incentives like the above is necessary at the same time it is also in the public interest. Even during the so-called "peace time", armed forces are faced with war like situations. They have faced with difficult situations of proxy war and have also to deal with problems of insurgency and terrorism. These armed personnel are risking their lives while dealing with the aforesaid difficult situations and, in fact, the casualties and fatalities of the soldiers are on the rise.

10. Here it shall be apposite to refer to the observations of the Hon'ble Supreme Court in case titled ***Union of India and another vs. C.S. Sidhu (2010) 4 SCC 563,*** wherein dealing with a armed personnel, who had been treated shabbily by the Government, it was observed as under:

"9.....The Army Personnel are bravely defending the country even at the cost of their lives and we feel that they should be treated in a better and more humane

manner by the governmental authorities, particularly, in respect of their emoluments, pension and other benefits."

11. Now, as far as the applicability of the instructions issued by the Government on 20.4.2017, we are clearly of the view that the same would not apply to the case of the petitioner because admittedly he is serving as armed personnel and even though he is a Government employee, but nonetheless he belongs to a preferential category and has therefore a preferential right of allotment. The instructions would not apply to his case as he enjoys a special status and has a preference in eligibility as per Rule 7 framed by the Government itself. His case cannot be clubbed with other Government employees, who are not serving Army personnels so as to deny him the benefit of Nautor, if otherwise found eligible. On the same analogy, even the criteria of income would not apply to the case of the petitioner since he is serving as armed personnel and obviously the rule making authority was aware that such persons would be drawing salary.

12. That apart, even if it is assumed though not conceded that the notification of the Government dated 20.4.2017 was applicable to the case of the petitioner, even then, his claim for grant of Nautor could not have been rejected by dismissing the appeal. The only course open to the Deputy Commissioner was to adjourn the appeal sine die till the time the Hon'ble Supreme Court did not ultimately decide the SLP pending before it, but in no event could the appeal be dismissed.

13. For all the reasons stated above, we find merit in this petition and the same is allowed and accordingly the matter is remitted back to the Deputy Commissioner, Kinnaur for a decision afresh. Both the parties or their duly authorized representative, shall appear before him on **08.01.2018.**

14. The petition is disposed of in the aforesaid terms, so also the pending application(s), if any, leaving the parties to bear their own costs.

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

Kawaljit Kaur ....Petitioner

Versus

State of H.P. & others ....Respondents

Cr.MMO No. 282 of 2017

Date of Decision 15th December, 2017

Code of Criminal Procedure, 1973- Section 156(3) and 202- The petitioner filed a revision calling for the records from the Court of learned JMIC, Sirmour as well as office of the S.P., Nahan also inter alia seeking directions to respondents No.3 to 5 to file charge sheet under Section 173 Cr.P.C. against respondents No. 7 and 8 and their unidentified accomplices, apart from seeking protection to her life and liberty at the hands of the respondents- As per the petitioner on 7.9.2016 respondents No.7 and 8 had ravished her in Ratri Vishramghar at Yashwant Chowk, Nahan whereupon she had approached the Police Post Gunnughat - After waiting for sometime, she had gone back to Ludhiana and on the next day approached the Superintendent of Police, Nahan by filing a written complaint, narrating the entire incidents- Since, no action was taken by the police, she filed a private complaint before the learned JMIC, Nahan on 24.9.2016 – During the pendency of the private complaint a communication dated 18.4.2017, referring the private complaint as an application under Section 156(3) Cr.P.C., was received by SHO, P.S. Nahan to register a case and who thereupon registered an FIR No. 53 of 2017 dated 21.4.2017 under Sections 366, 376D, 354, 506 IPC read with Sections 25/54/59 of the Arms Act and Sections 5, 5A, 5B of the Immoral Traffic (Prevention) Act, 1956- While contesting the revision all allegations made by the petitioner were refuted- The alleged complaint

dated 8.9.2016 to the S.P. Nahan, was also denied to have been made- The communication sent by the learned JMIC was also stated to be contrary to the procedure prescribed under the Code of Criminal Procedure- On production of record, it was found that no order was passed by the learned JMIC to register the FIR on the basis of such a complaint, rather, the ministerial staff had sent a communication in routine- In fact, a status report had been sought from the SHO concerned- **The High Court thus held** - that the registration of the FIR under Section 156(3) Cr.P.C. was undoubtedly contrary to the provision of Section 202 Cr.P.C. and as a sequel FIR was ordered to be quashed- Further, the learned JMIC was directed to proceed in the matter as a complaint case. (Para-10 to 18)

For the Petitioner:	Ms. Veena Sharma, Advocate with Mr.Abhishek Sharma, Advocate along with petitioner Kawaljit Kaur in person.
For the Respondents:	Mr. Shwaran Dogra, Advocate General with Mr. Rupinder Thakur, Addl. Advocate General and Mr.Pankaj Negi, Deputy Advocate General, for respondents No. 1 to 5 and Mr.Neeraj Gupta, Advocate for respondents No. 7 and 8 along with Ms.Soumya Sambasivan respondent No. 3 in person. ASI Padam Dev, I/C P.P. Gunnughat Nahan, District Sirmaur H.P. present in person.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.(Oral)

Petitioner, who is duly identified by her counsel, present in Court, in sequal to orders passed yesterday.

2. Present petition has been filed by seeking following relief(s):-

"(a) Call for the records from the Court of learned JMIC Sirmaur at Nahan as well as from the office of SP Nahan, SHO P.S. Nahan and the Incharge Police Post Gunughat Nahan.

(b) Please to issue directions to respondents No. 1 and 2 to protect the life and liberty of the petitioner at the hands of respondents No. 7 and 8 by providing protection to the petitioner.

(c) Direct respondents No. 3 to 5 to file the charge sheet under Section 173 Cr.P.C. against respondents No. 7 and 8 and their unidentified accomplice; also to direct respondents No. 1 and 2 to take strict legal action against respondents No. 3 to 8, as the petitioner is not only a victim at the hands of private respondents and their accomplice but also at the hands of respondents No. 3 to 5 who are police officers and are harassing the innocent petitioner in the garb of investigation in collusion with respondents No. 7 and 8 and their accomplice and are pressuring and threatening the petitioner to compromise the matter with the culprits.

(d) To pass direction to respondent to expedite the proceedings in the matter.

(e) Pass such other further order(s), as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case and in the interest of justice.

(f) Any other appropriate order or direction to which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case as made out hereunder."

3. Controversy in present petition, in brief, is that on 7.9.2016 respondents No. 7 and 8 had ravished her in Ratri Vishramghar at Yashwant Chowk, Nahan whereupon she had approached the Police Post Gunnughat along with one Sahil, who met her in front of a shop opposite to Ratri Vishram Ghar and came forward to help her to approach the police. According to petitioner, her complaint was not lodged for two hours on the pretext that it would be lodged after arrival of senior police officer. After waiting for two hours, she went back to Ludhiana via Chandigarh in buses and came on the next day along with her uncle and met Superintendent of Police at Nahan and filed a written complaint and as directed by Superintendent of Police, narrating entire incident. Thereafter, for taking no action by police against respondents No. 7 and 8, she filed a private complaint in the Court of learned Judicial Magistrate 1st Class, Sirmaur at Nahan on 24.9.2016. During the pendency of private complaint, a communication dated 18.04.2015, referring private complaint as an application under Section 156(3) Cr.P.C., was received by SHO, P.S. Nahan on 19.4.2015 from office of learned JMIC, Nahan to register FIR and investigate matter on the basis of complaint and documents sent with the said communication. Thereupon, FIR No. 53 of 2017 dated 21.4.2017 was registered under Sections 366, 376D, 354, 506 IPC read with Sections 25/54/59 of the Arms Act and Sections 5, 5A, 5B of the Immoral Traffic (Prevention) Act, 1956 at P.S. Nahan. Alleging harassment by the police officials and officers under the garb of investigation, petitioner approached this Court by filing petition.

4. In reply, all allegations have been refuted by the respondents and receipt of complaint dated 8.9.2016 in the office of Superintendent of Police and presence of Superintendent of Police at Nahan on that day has also been specifically denied as respondent No. 3 the then Superintendent of Police was at her native place in Kerala during her earned leave w.e.f.1.9.2016 to 10.9.2016. However, it is also contended by learned Advocate General on behalf of respondents No. 1 to 5 that communication sent from the JMIC Court to SHO was contrary not only to the procedure prescribed in the Code of Criminal Procedure particularly in Section 202 Cr.P.C. and also the Court record as no such order was ever passed by learned JMIC.

5. Perusal of Court record, requisitioned from the Court of learned JMIC, indicates that neither there was any application under Section 156 (3) Cr.P.C. nor any order was ever passed by learned Judicial Magistrate 1st Class to register FIR on the basis of such complaint. It also transpires from the record that learned Judicial Magistrate had also noticed the said mistake of her ministerial staff and reprimanded the concerned Criminal Ahalmd, who had sent the communication in routine on behalf of learned Juidicial Magistrate 1st Class without application of mind as learned Judicial Magistrate vide order dated 10.3.2017, had only directed to send the complaint to SHO, Nahan for status report which was a part of inquiry being undertaken by JMIC keeping in view the allegations that earlier a written complaint was filed in the office of Superintendent of Police on 8.9.2016.

6 Be that as it may, during pendency of petition, petitioner has filed an application Cr.MP No. 1397 of 2017 seeking additional relief to be added as under:-

> ***"..... that the FIR registered against respondents No. 7 and 8 may be quashed and learned JMIC may be directed to proceed with the complaint in accordance with the provision under Section 202 Cr.P.C."***

7. Learned counsel for the respondents have neither opted to file reply despite granting opportunity nor opposed this application, rather it is convassed on behalf of the respondents that in view of provisions of Section 202 Cr.P.C., this prayer not only be permitted to be added as additional relief in petition, but petition be disposed of granting the same.

8. On 14.12.2017, learned Advocate General had reiterated that in view of additional relief for quashing of FIR, as proposed to be added in relief clause, petition could be allowed by passing appropriate direction, as prayed for. Learned counsel for respondents No. 7 and 8 had also conveyed agreement with submissions of learned Advocate General.

9. In response, learned counsel appearing for petitioner, after having telephonic instructions as recorded in order dated 14.12.2017 in detail, had conveyed that petitioner shall

be satisfied on allowing the petition by granting the additional relief, as prayed in Cr.MP No. 1397 of 2017, and by directing respondents No. 2 and 4 to provide protection to the petitioner from respondents No. 7 and 8 in the State of Himachal Pradesh and also directing learned Judicial Magistrate, Nahan for speedy proceeding in complaint filed by the petitioner, for which learned counsel for the respondents had agreed. Thereafter, the case was kept for passing an order in post lunch session at 2 PM.

10. When the case was called for dictating order, learned counsel Mr. Kamal Grover, came from Chandigarh, representing petitioner in morning session did not appear and remained outside the Court. He was called inside and on inquiry he expressed that as he was not well aware about contents of the petition, therefore, he had chosen to abstain from appearing and had directed the local counsel Ms. Veena Sharma, to appear on behalf of the petitioner. In these circumstances, the case was adjourned for today and it was observed that in view of such developments, it would be appropriate for the counsel of the petitioner to ensure personal appearance of the petitioner in Court.

11. In pursuance to aforesaid observation, petitioner is present in person in Court. Respondent No. 3 Ms. Soumya Sambasivan IPS, the then Superintendent of Police Sirmaur at Nahan now S.P. Shimla is also present in person. Petitioner answered in negative when she was asked as to whether she had met the police officer present in Court.

12. Today petitioner as well as learned counsel appearing on her behalf have reiterated the prayer, as made yesterday that petition may be allowed by quashing FIR No. 53 of 2017 registered in P.S. Nahan under Sections 366, 376D, 354, 506 IPC read with Section 25/54/59 of the Arms Act and Sections 5, 5A, 5B of the Immoral Traffic (Prevention) Act, 1956 with direction to learned JMIC to proceed further in accordance with provisions of Section 202 Cr.P.C. and direction to police to provide protection to the petitioner during her visits in Himachal Pradesh for pursuing the complaint filed by her and also directing learned Judicial Magistrate 1st Class for speedy proceedings in the complaint.

13. Learned counsel for the respondents have also reiterated their stand as conveyed yesterday that petition may be allowed as prayed for by the petitioner without going into the merits of allegations levelled in petition, which may be adjudicated if need in appropriate proceedings in appropriate Forum.

14. It is undisputed that on receiving a complaint, wherein offence complained of is triable exclusively by the Court of Sessions, procedure provided under Section 202 Cr.P.C. is to be followed, which reads as under:-

> ***"202. Postponement of issue of process-(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under Section 192, may, if he thinks fit, (and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction) postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:***
>
> ***(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions; or***
>
> ***(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under Section 200.***
>
> ***(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witness on oath:***

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant."

15. Section 202 Cr.P.C. provides that any Magistrate, on receipt of a complaint can postpone the issue of process against the accused and either inquire into into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit for the purpose of deciding as to whether there is sufficient ground for proceeding. However, proviso (a) to its sub-section (1) provides that no such direction for investigation shall be made where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions. So far as recording of evidence of witness during inquiry is concerned, sub-section (2) of Section 202 Cr.P.C, empowers the Magistrate to call upon the witnesses and examine them on oath.

16. It is evident from the bare perusal of this Section and also as noticed by the learned Judicial Magistrate herself and as admitted by learned counsel of parties, the registration of FIR under Section 156(3) Cr.P.C. was neither warranted nor permissible under law and its registration under Section 156(3) Cr.P.C. is contrary to the provisions of Cr.P.C.

17. In view of aforesaid facts and circumstances and undisputed exposition of law, FIR No. 53 of 2017 registered in P.S. Nahan, District Sirmaur under Sections 366, 376D, 354, 506 IPC read with Section 25/54/59 of the Arms Act and Sections 5, 5A, 5B of the Immoral Traffic (Prevention) Act, 1956 along with consequential proceeding, taken in pursuance thereto by the concerned authorities, is quashed.

18. Complaint filed by the petitioner pending in the Court of learned JMIC, which is directed to proceed in accordance with the provisions of Cr.P.C. with further direction to adjudicate the same as expeditiously as possible avoiding unnecessary adjournments.

19. So far as providing protection to the petitioner during her visits in Himachal Pradesh in pursuance to her complaint pending before learned JMIC or any consequential proceeding in pursuance thereto is concerned, the State is always duty bound to provide protection to every person. However, keeping in view the peculiar facts and gravity of offence alleged in complaint, the Director General of Police, Superintendent of Police Sirmour at Nahan and SHO P.S. Nahan are directed to provide protection to the petitioner, as prayed for, as and when requested, by the petitioner or on her behalf, to either of them in advance in writing. However, it is made clear that in case of any emergent situation, as these officers are duty bound to provide police help to any person in need for difficulty or crime being committed against him, the police help shall be provided to the petitioner immediately on receiving information in any manner though any means, without waiting any written request at that time. Petition is disposed of with aforesaid observations without adjudicating the allegations and counter allegations levelled against each other and without giving findings on merit by leaving it open to be adjudicated and decided, if required, by the appropriate Forum at appropriate stage in accordance with law, without being influenced by any observation made by this Court hereinabove.

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

Manoj Kumar & Ors. ... Petitioners

Versus

State of H.P. & Ors. ... Respondents

CWP No. 6860 of 2011
Reserved on: 04.10.2017
Date of decision: 15.12.2017

Constitution of India, 1950- Article 226- Service Matter- Petitioners seeking placement from the post of Clerk to Junior Assistant on completion of five years of service in the cadre w.e.f. 1.1.1998 along with all consequential benefits- Respondents while contesting the case averred that the Trust had its own service Rules, which were adopted in the year 1991 - As per the service Rules, the petitioners have been regularized in the year 1998 after completion of five years of regular service- The Government had indeed issued a notification on 1.9.1998 that the clerks who have completed five years were to be posted as Junior Assistant but the said notification was not adopted by the Temple Trust- **The High Court held** - that since the notification in question dated 1.9.1998 had not been adopted by the Baba Balak Nath Temple Trust- No legal rights of the petitioners have been breached by the respondents and as such, the Court cannot issue a writ of mandamus calling upon the respondents to confer a particular status or benefit upon the petitioners from a particular date. (Para-5 and 6)

For the petitioners: Mr. Ajay Sharma, Advocate.

For the respondents: Mr. Vikram Thakur, Deputy Advocate General, for respondent-State.
Mr. K.D. Sood, Sr. Advocate with Mrs. Mukul Sood, Advocate, for remaining respondents.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. :

This petition was filed by the petitioners praying for the following reliefs:-

(i) That the impugned annexure P-3 dated 24.3.2011 issued by respondents with respect to ordering recoveries of Rs.1000 per month from the pay package of petitioners may very kindly be quashed and set aside.

(ii) That recoveries as made till date by respondent in view of annexure P-3, may very kindly be ordered to be refunded to the petitioners.

(iii) That respondents may very kindly be directed to give placement to the petitioners as Junior Assistant i.e. 50% of cadre of clerks of respondent who have completed 5 years of service in the cadre w.e.f. due date i.e. 1.1.1998 with all consequential benefits of arrears of pay etc. etc.

(iv) That superfluous wording as is given in rules of the year 2001 in as much as that 'Junior Assistant will be promoted from clerks' may very kindly be ordered to be deleted from the statute book.

(v) That directions may be given to the respondents to correct orders annexure P-2 thereby ordering placement of petitioners and not promotion and accordingly only respondents may very kindly be directed to meet audit para as per office procedure forthwith without any further delay.

(vi) Directions may be given to respondents to act in accordance with annexure P-1 and order placement of petitioners to the post of Junior Assistants w.e.f. 1.1.1998 in the interest of law and justice with consequential benefits.

(vii) That the records pertaining to the case may also kindly be directed to be summoned for the kind perusal of this Hon'ble Court.

Any other or further relief as this Hon'ble Court may deem just and proper keeping in view the facts and circumstances of the case may also be passed in favour of the Petitioners and against the respondents."

2. On 04.10.2017, when the matter was heard by the Court, the following order was passed:-

"It has been jointly stated at the bar that with the afflux of time and on account of subsequent developments prayer No. (i) and (ii) have been rendered infructuous. Mr. Ajay Sharma learned counsel for the petitioners submits that now the surviving grievance of the petitioners are qua prayer No. (iii)."

3. In view of above, now this Court will only be adverting to the issue germane to adjudicating the surviving cause of petitioners i.e. relief (iii) claimed by the petitioners. Petitioners pray that the respondents be directed to place the petitioners as Junior Assistants with effect from the due date i.e. 01.01.1998 with all consequential benefits of arrears of pay etc. to the extent of 50% of the cadre of Clerks who had completed 5 years of service as on 01.01.1998. The genesis of the said relief as can be culled out from the averments made in the petition is that as per petitioners when benefit of ACP stands given to the employees of the Trust at par with the Government employees then the same also has to be given from the date the same was given to government employees. For this reliance is paled upon notification Annexure P-1.

4. On the other hand, the contention of the respondents is that Baba Balak Nath Temple Trust had made Service Rules for its employees at its own level in the year 1991 and services of the employees were regularized in the year 1996 w.e.f. 01.01.1993. As per the said Rules, petitioners completed 5 years of regular service in the year 1998 and as per Government notification, the Clerks who have completed 5 years of service had to be placed on the post of Junior Assistants. It is further the stand of the respondents that as notification dated 01.09.1998 was not adopted by the Temple Trust, hence such like benefits were not conferred upon the petitioners immediately. It is further the stand of the respondents that Service Rules framed in the year 1991 were repealed in the year 2001 and thereafter, the employees were governed by the said Rules. As per these Rules, petitioners were placed as Junior Assistants vide order dated 23.08.2003 w.e.f. 03.09.2001 on the recommendations of the Departmental Promotion committee. This is also clear from the supplementary affidavit so filed by respondents No. 2 and 3 dated 21.03.2017.

5. Be that as it may, fact of the matter remains that notification dated 01.09.1998 was not adopted by Baba Balak Nath Temple Trust. It is also not in dispute that the employees of the trust are governed by the service rules which have been so framed by the Trust. Whereas, the basis of the petitioners' contention that they are entitled for benefits as conferred upon them vide Annexure P-2 w.e.f. 01.01.1998 is notification dated 01.09.1998 issued by the Government of Himachal Pradesh, Finance Department, the justification of the respondents of conferring the said benefits upon the petitioners from the dates as they find mention in Annexure P-2 is that the benefits have been conferred on the basis of service rules which govern the services of the petitioners.

6. In this background, in my considered view, when no legal right of the petitioners has been proved to have been breached by the respondents, this Court cannot issue a writ of mandamus calling upon the respondents to confer a particular status or benefit upon the petitioners from a particular date. That being the prerogative of the respondent-trust cannot be pre-empted by the Court. Of course, this Court has got ample powers to intervene in case the employer acts in an arbitrary manner but for that the employee has to establish on record that he had an existing right and the said right stands breached by the employer. In the present case, the petitioners have not been able to establish that they had any existing legal right for being

conferred benefit which stands bestowed upon them by Annexure P-2 w.e.f. 01.09.1998. Simply because the State Government had done for its own employees, the same does not cast any duty in law upon the respondent-Trust to follow the suit.

7. In view of above discussion, in my considered view, as the petitioners are not entitled to relief (iii) as has been claimed in the relief clause of the petition, the petition is accordingly dismissed. No order as to costs. Miscellaneous Applications pending, if any, stand disposed of. Interim order, if any, also stands vacated.

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

Amit Mithrani and others .....Petitioners.
Versus
Smt. Shobhna Mithrani .....Respondent.

Criminal Revision No. 145 of 2016 along with
Cr. Revision No. 398 of 2016.
Reserved on: 07.12.2017.
Date of Decision: 16th December, 2017.

Code of Criminal Procedure, 1973- Section 23, of, the of Protection of Women from Domestic Violence Act, 2005- Criminal Revision filed against the order granting ad interim maintenance, passed under the Protection of Women from Domestic Violence Act, 2005- Both the sides challenging the grant of interim maintenance, under Section 23 of the aforesaid Act **the High Court held**- that the ad interim ex-parte order squarely falls within the ambit of Section 23 of the Act- The Magistrate concerned has sufficient powers to pass interim orders, as he deems fit and proper in the facts and circumstances of the case keeping in view the provisions borne in Sections 18, 19, 20, 21 and 22 of the Act and more specifically sub Section (2) of Section 23 of the Act- Consequently, the quantum of interim maintenance awarded also upheld- revision decided accordingly. (Para-5 and 6)

For the Petitioner(s): Ms. Anu Tuli Azta, Advocate in Cr. R. No. 145 of 2016.
Mr. Naresh Sharma, Advocate in Cr. R. No. 398 of 2016.
For the Respondent(s): Mr. Naresh Sharma, Advocate in Cr. R. No. 145 of 2016.
Ms. Anu Tuli Azta, Advocate in Cr. R. No. 398 of 2016.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Both the aforementioned petitions are being disposed of by an common order, given, common question of fact and law being involved in both petitions.

2. Both Criminal Revision Petition No.145 of 2016 and Criminal Revision Petition No. 398 of 2016, stand respectively directed by Amit Thrani and others and by Shobhana Mithrani, against the common verdict recorded by the learned Additional Sessions Judge (2),Shimla in Cr. Appeal No. 55-S/10 of 2015 and Cr. Appeal No. 57-S/10 of 2015, whereby, he modified the quantification, of, interim per mensem maintenance amount adjudicated, by the learned trial Court, from, Rs.16,000/- per mensem to Rs.15,000/- per mensem. The aforesaid quantum of ad interim per mensem maintenance, was, respectively apportioned in a sum of Rs. 9,000/- per mensem vis-a-vis the wife, of, one Amit Mithrani and in a sum of Rs.6000/- per

mensem vis-a- vis the child, of, one Amit Mithrani. The visitorial rights of one Amit Mitharni vis-a-vis his child, born out of his wedlock with one Shobhna Mithrani were, however, preserved.

3. Apparently, the aforesaid apposite order was pronounced by both the learned Courts below, upon, theirs exercising jurisdiction vested in them under Section 23, of, the of Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as the Act), provisions whereof stand extracted hereinafter:

> **"23. Power to grant interim and *ex parte* orders**.—
>
> (1) In any proceeding before him under this Act, the Magistrate may pass such interim order as he deems just and proper.
>
> (2) If the Magistrate is satisfied that an application prima facie discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence, he may grant an ex parte order on the basis of the affidavit in such form, as may be prescribed, of the aggrieved person under section 18, section 19, section 20, section 21 or, as the case may be, section 22 against the respondent."

Apparently also the orders recorded by both the learned Courts below, adjudging ad interim per mensem maintenance vis the aggrieved, were pronounced, during the pendency of a complaint, before the learned trial Magistrate, complaint whereof is constituted under Section 12 of the Act. A perusal of the relevant records, indicates that the afore referred complaint, is, awaiting adduction of evidence, upon, the apposite issue(s), by the litigants concerned. Reiteratedly, the order assailed before this Court, is, an ad interim order, whereby, per mensem interim maintenance, in the sum(s) aforesaid, was, assessed by the learned Appellate Court vis-a-vis the aggrieved.

4. The learned counsel appearing for the petitioner Amit Mithani, contends, (i) that the anvil of the learned trial Court, making, orders qua ad interim per mensem maintenance allowance vis-a-vis the aggrieved, being rested, upon, statutory powers conferred, upon him, under Section 23 of the Act, provisions whereof stand extracted hereinabove. She further contends (ii) that a reading of the aforesaid provisions borne in Section 23 of the Act, make, a visible display, of, the Magistrate concerned, holding statutory jurisdiction, to, make an ex-parte interim order in respect, of, statutorily contemplated reliefs borne in Sections 18, 19, 20, 21 and 22 of the Act. She contends, (iii)of, the scope and the amplitude, of, the jurisdiction vested in the trial Magistrate, under, Section 23 of the Act being plenary, imperatively given it fastening, jurisdiction in him, to, without awaiting for service being effected upon the apposite party or even without his awaiting for any response, thereto, (iv) his being foisted with leverage, to, on the basis of affidavits tendered by the aggrieved, hence draw, satisfaction qua the necessity, of, his making an ex-parte order, (i) even with respect to the assessment of ad interim per mensem maintenance vis-a-vis the aggrieved or with respect to order(s) vis-a-vis rights of residence or rendition(s) vis-a-vis protection orders, besides renditions vis-a-vis compensation orders, (ii) hence, she contends that necessarily, the jurisdictional fulcrum, for validating, any interim orders vis-a-vis all the reliefs contemplated in Sections 18, 19, 20, 21 and 22 of the Act, is, of (a) theirs being recorded ex-parte AND(b) satisfaction being drawn by the Magistrate concerned, upon affidavits or tangible best material, making, displays, of, the opposite party, committing, or having committed any act of domestic violene or (c) their being a likelihood of the opposite party committing an act of domestic violence. Contrarily, in case the opposite party is served or has submitted his response to the application(s), seeking pronouncement(s), of, interim ex-parte orders, within, the ambit of Section 23 of the Act, the Magistrate concerned has, no, jurisdiction to make any ex-parte order vis-a-vis any interim relief qua any of the statutory reliefs contemplated, in Sections 18, 19, 20, 21 and 22 of the Act. She contends that with the evident participation, of, the opposite party in the lis, renders the aforesaid statutory ingredients, to, beget infraction, hence, seeks quashing, of the, impugned order.

5. However, the aforesaid submission addressed by the learned counsel appearing for Amit Mithrani and others, is, frail, given (a) a close and circumspect reading of Section 23 of the Act, making, a visibly clear display, of the Magistrate concerned, being empowered, to grant interim relief(s) AND to render ex-parte orders qua reliefs, contemplated, in Sections 18, 19, 20, 21 and 22, of, the Act. Tritely, the import besides the innate nuance, carried by the title, of, Section 23 of the Act, title whereof, is, nomenclatured "Power to grant interim and ex-parte orders", is, of utmost significance for validating or invalidating, the submission of the learned counsel appearing for the petitioner Amit Mithrani. The disjunctive AND separating Power to grant interim order, from, exparte order, garners an inference, of, two distinct genre, of, orders being statutorily contemplated therein, (i) interim orders AND; (ii) ex-parte orders. Furthermore, sub-section (1), empowers, (a) the Magistrate concerned, to pass interim orders, as he, deems fit and proper. Apparently the scope and amplitude thereof, is plenary AND foists leverage in the Magistrate concerned, to, vis-a-vis the provisions borne in Sections 18, 19,20, 21 and 22, of, the Act, hence render interim relief(s). (b) Moreover, the statutory power, vested in him, for rendition of ex-parte orders, occur in sub-section (2) of Section 23 of the Act. (c) Specific egraftment therein, for, rendition of ex-parte orders, does not, hence restrict the play, of, the preceding therewith sub-section (1) of Section 23 of the Act, within domain whereof, the Magistrate concerned, may even, with evident participation before him of all the contestants concerned, is yet empowered, to render interim order(s), of any, genre. (d) With both sub-section (1) and sub section (2) of Section 23 of the Act, holding clout and command, independent of each other, (e) thereupon, the renditions, of, interim orders, impugned hereat, even if, are not, appertaining vis-a-vis the genre, of, ex-parte orders, they are yet construable, to fall, within the domain, of sub-section (1) of Section 23 of the Act, thereupon, even , if they are rendered, not, ex-parte, they are not denuded of their legal vigour.

6. Now coming to the facet of validity, of, quantum of ad interim per mensem maintenance allowance, adjudged, by the learned Additional Sessions Judge concerned, vis-a-vis Smt. Shobhna Mithrani AND vis-a-vis the child born out of her wedlock with Mr. Amit Mithrani, (I) this Court does not deem it fit and proper to interfere with the order impugned hereat, significantly when it is based, upon, evidence germane therewith. Smt. Shobhana prays, that, Mr. Amit Mithrani be directed to defray her ad interim per mensem maintenance, comprised, in a sum of Rs.80,000/-, given, her husband Amit Mitharni, earning more than a crore of rupees. On the other hand, the respondent denies the factum, of, his owning any property, vehicle and other assets. He submits, of, his having taken a loan from Easy Mobile. It is apt to mention here, that, earlier Mr. Amit Mithrani in his reply furnished, before the learned trial Court, to the apposite complaint, he had, pleaded of his working with Easy Mobile company, in company whereof, as depicted by the memorandum of association and articles of association, of, Easy Mobile India Pvt. Ltd. Company, his brother Rakesh Mithrani, holds, 5000 equity shares thereof. However, before the learned Additional Sessions Judge(s), Shimla, he has placed on record a communication, wherein, an articulation occurs, qua, his being posted as Marketing Manager in Prakriti Clonal Agrotech. The aforesaid fact which was brought on record before the learned Additional Sessions Judge concerned, is contradictory vis-a-vis the fact earlier pleaded by him in his reply furnished before the learned trial Court, to the apposite complaint, therefrom it appears, of, Mr. Amit Mitharni is concerting to beguile this Court qua his real income, for precluding, it from making an apt adjudication upon the relevant fact. In aftermath, reiteratedly the adjudication made by the learned Appellate Court qua the quantum of interim per mensem maintenance, appears to be both just and reasonable. Moreover, there is no document placed on record, by the opposite party in display of Ms. Shobhna being gainfully employed. Consequently, reiteratedly bearing in mind that Ms. Shobhna holding no independent income sufficient to support herself as also her child, besides for enabling her to bear her personal expenditure(s) as also of her child, also given her status, the ad interim per mensem maintenance, as awarded, by the learned Sessions Judge for her and for her child, is deemed just, fit and appropriate at this stage.

7. For the foregoing reasons, both the petitions are dismissed and the order impugned hereat is affirmed and maintained. The parties are directed to appear before the learned trial Court on 12.01.2018. No costs. All pending applications also stand disposed of. Records be sent back forthwith.

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

Sh. Fauj Dar Chauhan (since deceased) through his LR's

.....Appellants/Plaintiff.

Versus

Secretary (Agriculture), Govt. of H.P. Secretariat, Shimla-2 and another

.....Respondents/Defendants.

RSA No. 5 of 20007.
Reserved on :05.12.2017.
Decided on:16th December, 2017.

Code of Civil Procedure, 1908- Section 100- Regular Second Appeal- Suit for recovery- Plaintiffs filed a suit for recovery of Rs. Rs.1,53,817/- for having done some welding work for the defendants- suit dismissed by the learned Trial Court- The learned First Appellate Court partly allowed the suit and the decreed it for an amount of Rs.46,556/- only- Hence the Regular Second Appeal- **The High Court held-** that since, the relevant works are existing at the site and the defendants have failed to show that said work was executed by some other person, dehors all the necessary approvals and sanctions, the plaintiff can seek reimbursement of the expenditure incurred by him for executing the wielding work- Consequently, defendants directed to hold measurements of all executed work reproduced in Ex. PW-1/O and calculate the expenditure incurred thereupon by the plaintiff, as per the rates prevalent at that time and pay the same to the plaintiff. (Para-8 and 9)

For the Appellant: Mr. Loveneesh Kanwar, Advocate.
For the Respondents: Mr. R.S. Thakur, Addl. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The deceased plaintiff instituted, a suit against the defendants, for recovery of Rs.1,53,817/- along with interest @ 24% per annum. The suit of the plaintiff stood dismissed by the learned trial Court. In an appeal carried therefrom, by the aggrieved plaintiff, before the learned First Appellate Court, the latter Court partly allowed the plaintiff's appeal, whereby, the suit of the plaintiff was decreed, for a sum of Rs.46,556/- with proportionate costs and interest at the rate of 6% per annum from the date of institution of the suit till the realization of the decretal amount. The plaintiff standing aggrieved by the impugned verdict, hence, concerts to assail it, by preferring an appeal therefrom, before this Court.

2. Briefly stated the facts of the case are that the deceased plaintiff was a welding contractor. He has done various works of welding for the defendants when he was so asked by defendant No.2. These welding works were done under the supervision of Sh. Prakash Chand, Asstt. Engineer of defendant No.2, the bills of which amounting to Rs.80,780/- and Rs.46,556/-, were verified and passed by the concerned official of the defendants but the amount of the bills has not been released. It is further alleged that for execution of these works, the plaintiff obtained temporary connection of electricity for which he paid a sum of Rs.1548/- as electricity charges and now he is entitled to recover the entire suit amount from the defendants.

3. The defendants contested the suit and filed written statement, wherein, they have taken preliminary objections qua maintainability, non joinder of necessary parties, want of cause of action and limitation. It is pleaded that there was no legal contract inter se the parties as per the provisions of article 299 of the constitution of India for execution of any work and as such the plaintiff is not entitled to recover any amount from the defendants. According to the defendants, defendant No.2 had never asked the plaintiff to do any building work under the supervision Sh. Parakash Chand Extra, Asstt. Engineer and the bills in question are the wrong bills. It is denied that the plaintiff submitted any bills amounting to Rs. 80780/-. With respect to the bills amounting to Rs.46,556/-, it has been pleaded that while doing some work plaintiff had submitted a bill of Rs.46,556/- only for the year 1999 to Sh. Prakash Chand but neither this bill was handed over to any authority of the Govt., nor those were given to his successor by Sh. Prakash Chand after his retirement. It is pleaded that if any work has been done by the plaintiff, it has been done without fulfilling any codel requirements and therefore, the submission of any bill by the plaintiff does not arise.

4. The plaintiff filed replication to the written statement of the defendants, wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the plaintiff is entitled to recover sum of Rs.1,53,817/- with interest at the rate of 24% from the defendants, as alleged?OPP.

2. Whether the suit in the present form is not legally maintainable? OPD.

3. Whether the suit is bad for non joinder of necessary parties? OPD

4. Whether the plaintiff has no cause of action? OPD.

5. Whether the suit is barred by limitation? OPD.

6. Whether there is no legal contract as per Article 299 of Constitution of Indian between the parties? OPD

7.Whether plaintiff has no locus standi to file the present suit?OPD.

8.Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the plaintiff's suit. In an appeal, preferred therefrom by the plaintiff, before the learned First Appellate Court, the latter Court partly allowed the appeal AND reversed the findings recorded by the learned trial Court.

7. Now the plaintiff, has instituted the instant Regular Second Appeal before this Court, wherein, he assails the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission on 13.06.2007, this Court, admitted the appeal instituted by the plaintiff against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

1. Whether the appellant/plaintiff could have been denied the relief of payment of remaining amount of Rs.80780/- in view of the admission of th witnesses that the work has been completed in Type-IV quarters by the appellant/plaintiff?

2. Whether the learned appellate Court below has misread, misinterpreted and misconstrued the oral as well as documentary evidence of the parties, especially documents placed on record while passing the impugned judgment and decree?

Substantial questions of Law No.1 and 2.

8. PW-3 Prakash Chand, in his testimony existing in his cross-examination, acquiesced to the suggestion put to him by the learned counsel, appearing, for the defendant, of,

his transmitting to the DDO concerned, bills respectively borne in Ex.PW1/j, Ex.PW1/L, Ex.P1/H, Ex.PW1/E, Ex.PW1/K. However, the learned Appellate Court imputed sanctity vis-a-vis the bills borne in Ex.PW1/E to Ex.PW1/M. The learned Appellate Court had relied upon the testification rendered, by, DW-1 in his cross-examination, of, the plaintiff executing works, of installing water tank(s) above the quarters, wherein, the employees, of the respondents concerned hence reside, AND his enclosing them with steel guages. Furthermore, he acquiesced to the suggestion, put to him, by the counsel for the plaintiff, of the plaintiff also erecting an iron stair case, for accesses vis-a-vis the water tank, besides he continued to testify, in his testification, borne in his cross-examination, of, the plaintiff, erecting railings along path leading upto type-IV quarters, housing the employees of the respondent concerned, yet the aforesaid testification remained irrevered by the learned First Appellate Court, (i) merely, on the ground, of, DW-1, feigning ignorance vis-a-vis the trite factum, of, the execution of the aforesaid works, occurring or not at the behest or by the plaintiff. The aforesaid irreverance meted by the learned Appellate Court, to, the aforesaid testification, occurring in the cross-examination of DW-1, is mis-placed, for the reasons (a) of the aforesaid acquiescence(s) emanating from him, upon affirmative suggestion(s) purveyed, to DW-1, during the course, of, the counsel for the plaintiff holding him to cross-examination; (b) thereupon, the simplicitor factum of theirs being purveyed vis-a-vis him, by the counsel for the plaintiff, warranted, an inference of the defendants conceding, to, the existence of the aforesaid works at the relevant site; (c) dehors DW-1 not making any communication therein, of, their execution occurring at the behest of the plaintiff, did not deleverage, the plaintiff, from, claiming the expenses, of, his executing them, (d) especially, when no evidence has been adduced by the defendants, personificatory, of the person other than the plaintiff, executing the aforesaid work(s). Apart therefrom, the learned Appellate Court, discounted the vigour of the aforesaid testification, occurring in the cross-examination of DW-1, on the trite ground, of, prior to the execution of the aforesaid work(s), no apposite formalities, comprised in prior thereto approval(s) and sanctions being accorded by the authority concerned or by the official concerned, who meted oral directions to the plaintiff to carry out the aforesaid works, especially despite, theirs existing at the site besides when benefits thereof stand derived, by the employees of the defendants. Since, the relevant works are existing at the site, besides when no person other than the plaintiff, has been shown, by the defendants to execute them, therefore, even if no approvals and sanctions qua the execution of the aforesaid works, stand purveyed, by the authority concerned, yet it would not bar, the plaintiff to seek reimbursement, of, the expenditure incurred by him for executing the aforesaid work(s). Consequently, in the learned first Appellate Court, not imputing sanctity, to notice Ex.PW1/O, notice whereof stood issued by the plaintiff, to, the defendants qua defrayment of bills amounting to Rs.80,780/-, especially when, the defendants failed to prove, of, the plaintiff in executing them, hence, charging rates in excess, of, the prescribed rates prevalent in contemporaneity, to the execution of the relevant works, hence has committed a gross irregularity. The defendants, are directed to hold measurement(s), of, all executed works reproduced in Ex.PW1/O AND thereafter calculate the expenditure incurred thereon by the plaintiff, as per the rates prevalent at that time, and liquidate the same to the plaintiffs.

9. The above discussion unfolds the fact 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. All the substantial questions of law are answered in favour of the appellant and against the respondents.

10. In view of the above discussion, the instant appeal is allowed and the impugned judgments and decrees rendered by both the learned Courts below are modified. Consequently, the suit of the plaintiff is decreed with proportionate costs, deretal sums whereof be arrived at in the aforestated manner, along with interest @ 6% per annum from the date of filing of the suit till its realization. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back.

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

Harveer Singh Malik .....Petitioner.
Versus
State of H.P. .....Respondent.

Criminal Revision No. 199 of 2017 along with
Cr. Revision Nos. 200, 201 and 202 of 2017.
Reserved on: 12.12.2017.
Date of Decision: 16th December, 2017.

Code of Criminal Procedure, 1973- Section 227- Criminal Revision- Petitioners challenged the dismissal of an application preferred by them under Section 227 of the Code of Criminal Procedure for their discharge, in respect of offences relating to Sections 302, 148 and 149 of the I.P.C. readwith Section 25 of the Arms Act- Petitioners challenging the framing of charge under the aforesaid sections- **The High Court Held**- it is not open for the Revisional Court to make deep delvings into the record, for forming an opinion vis-a-vis the admissibility and reliability of the documents existing on record. (Para-5)

Code of Criminal Procedure, 1973- Section 227- Criminal Revision- Further held- that if incriminatory role ascribed to the accused collected during the course of the investigation show the complicity of an accused and keeping in view the heinousness of the offence committed by the accused and if their identity is cogently established and are borne from the record, the Revisional Court will validate the consequences and opinions framed by the learned Trial Court- On facts the finding returned by the Lower Court upheld- Revision dismissed. (Para-6 to 8)

Case referred:
Amit Kapoor v. Ramesh Chander (2012)9 SCC 460

For the Petitioner(s): Mr. R.K. Bawa, Senior Advocate with Mr. Jeevesh Sharma, Advocate.
For the Respondent(s): Mr. R.S. Thakur, Addl. A.G.Mr. Anand Sharma and Mr. Karan Sharma, Advocates for the complainant(s).

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

All the aforementioned petitions are being disposed of by a common order, given, common question of fact and law, being, involved in all the instant petitions.

2. All the aforementioned Criminal Revision Petitions stand respectively directed, by, the petitioners, against an order recorded by the learned Additional Sessions Judge (2), Solan, on 30.05.2017, whereby, he dismissed the application(s) instituted therebefore, under, Section 227 of the Cr.P.C., for theirs being discharged AND also proceeded to order, for framing, of, charge(s) against petitioner Harveer Singh, for, his committing offences punishable under Sections 302, 148 IPC read with Section 149 of the IPC and Section 25 of the Arms Act, whereas, he ordered for framing, of, charge(s) against petitioners Rajesh Malik, Ekta Malik and Yoginder Malik, for, theirs committing an offence punishable under Section 302, 148 IPC read with Section 149 of the IPC.

3. In pursuance, to, the Investigating Officer concerned, carrying out Investigation(s) vis-a-vis the offences embodied in FIR bearing No. 68/16, of 27.06.2016, registered at Police Station Dharampur, he filed a detailed report, under, Section 173 of the Cr.P.C., before the lerned Committal Court concerned, (I) whereupon, the latter pronounced an order, committing, the accused to face trial before the learned Sessions Judge concerned. Since, the charges framed

against the accused are respectively, under Sections 302, 307, 147, 148 of the IPC, read with Section 149 of the IPC and Section 25 of the Arms Act, (ii) thereupon, for assessing the respective inculpatory role(s) of the accused, in the offences in respect whereof charges stood framed against them, it is imperative, to reproduce the manner in which relevant occurrence, took place:-

> **"On 26.06.2016, Smt. Taranjit Kaur w/o Sh. Paramjit Singh, R/o VPO Mandvi, Police Station Khanauri, Tehsil Munak, District Sagrur, Punjab, presently residing at House No.522, Tribunal Colony, Kansal, near Sector 01, Chandigarh, aged about 28 years got her statement recorded under Section 154 Cr.P.C., with PSI Dalip Singh in PGI, Chandigarh, stating therein that her husband Paramjit Singh was running a restaurant under the name and style of Urban Dhaba, which was taken on rent and located by the side of NH-5, in Lower Sanvara, District Solan and she also used to help her husband in the above said restaurant. Hasandeep, the nephew of her husband, helps them in running the restaurant. According to the complainant, on the same day when she was sitting on the counter alongwith her husband, a group of tourists comprising 10/15 people sitting in their restaurant, who had placed orders for bread-toast, maggi and tea. Ram Singh and Naresh Kumar were attending them. When her husband had gone to the kitchen, then an elderly person, who seemed to be more than 50- years old and was wearing a white check shirt, got up and came to them at the counter and said to Hasandeep and her that the toast served by them are not good, whereupon, she reply that we buy fresh bread and butter every day and in the meanwhile a boy from the said group, who wore a blue T-shirt with round neck also came to the counter and began speaking loudly and hearing his voice, her husband came to the counter from the kitchen. He said to these people that they need not pay in case they were not happy with the bread toasts and they would not have a reason to complaint the next time. At which, the elderly person said as to who would come next time and began hurling abuses, whereupon, her husband asked them to leave the place and in no time, a lady from the ground who wore a yellow salwar and a cream shirt came to the counter and stepped on to the chair and then climbed on to the counter and entered into a scuffle with my husband. In the meanwhile, a body from the group, who wore parrot green T-shirt with another person, who wore a blue shirt and had glasses on also approached the counter and all of them began hurling abuses and scuffled with them. And the lady, who had climbed onto the counter told these people as to what they were doing and asked them to get the pistol lying in the vehicle to kill them. Upon which, the boy, who wore blue T-shirt went to the vehicle and the boy wearing parrot green T-shirt and the person wearing blue shirt and spectacles kicked the glass of the kitchen door and broke it and both of them with the lady who had climbed onto the counter and the elderly person wearing check shirt went to the kitchen and came into the counter and all four of them scuffled and began giving beatings to Hasandeep and her husband. In the intervening time, the boy wearing blue T-Shirt came there with a silver coloured pistol and began firing on Hasandeep and her husband, as soon as, he entered into the counter. She asked the boy, who wore blue T-shirt and was firing, to fire one bullet at her as well but he ran away. As soon as this boy ran away, another boy who wore parrot green colour T-shirt, came inside with pistol and lady wearing yellow Salwar asked him to run away with her but he argued that he has sustained injuries and he will definitely kill her. At that time, Ram Singh, the service boy of their restaurant dragged this boy out. All of these people along with other members of the group boarded a tempo traveler bearing the registration number of UP and fled away from the spot towards the**

downward side. She with the assistance of other employees of the restaurant, took her husband and Hasandeep, who also had sustained bullet injury in this altercation, to CHC, Dharmapur, for treatment, where the doctors declared her husband as dead and Hasandeep, who had sustained bullet injuries in his chest was referred to PGI, Chandigarh, for further treatment and she accompanied Hasandeep to PGI, Chandigarh. According to the complainant, she can identify everyone involved in the fight. All of them got together and fought with her husband and Hasandeep and have killed her husband and fired on Hasandeep and have grievously injured him. On the basis of the aforesaid statement of the complainant, FIR was registered in the police station concerned."

4. Before proceeding, to, make a pronouncement, with respect to the validity, of, the orders, pronounced by the learned Additional Sessions Judge concerned, (i) whereby, he dismissed the application(s) preferred before him, under, Section 227 of the Cr.P.C., wherein, the respective applicants, sought theirs being discharged vis-a-vis the incriminatory roles ascribed qua them, by the Investigating Officer, in the latter's report filed, under Section 173 of the Cr.P.C., (ii) also before assessing, the validity, of the pronouncement recorded by the learned Addl. Sessions Judge concerned, whereby, he ordered for framing of charge, against, petitioner Harveer Singh, for his committing offences punishable under Sections 302, 148 IPC read with Section 149 of the IPC and Section 25 of the Arms Act, (iii) besides ordered, for framing of charge against petitioners Rajesh Malik, Ekta Malik and Yoginder Malik, for, theirs committing, an offence punishable, under, Section 302, 148 IPC read with Section 149 of the IPC, (iv) it is imperative to bear in mind, the principles governing the exercise of revisional jurisdiction by this Court. The imperative principles enjoining theirs being borne in mind, by this Court, while its exercising jurisdiction, vested under Section 397 of the Cr.P.C., are, embodied in a decision, of, the Hon'ble Apex Court, reported in a case titled, as, ***Amit Kapoor v. Ramesh Chander (2012)9 SCC 460***, the relevant paragraphs No. 17, 18 and 27.1 to 27.14 are extracted hereinafter:-

"17. Framing of a charge is an exercise of jurisdiction by the trial court in terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code. Under both these provisions, the court is required to consider the 'record of the case' and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the Section exists, then the Court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction. It may even be weaker than a prima facie case. There is a fine distinction between the language of Sections 227 and 228 of the Code. Section 227 is expression of a definite opinion and judgment of the Court while Section 228 is tentative. Thus, to say that at the stage of framing of charge, the Court should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 of the Code.

18. It may also be noticed that the revisional jurisdiction exercised by the High Court is in a way final and no inter court remedy is available in such cases. Of course, it may be subject to jurisdiction of this court under Article 136 of the Constitution of India. Normally, a revisional jurisdiction should be exercised on a question of law. However, when factual appreciation is involved, then it must find place in the class of cases resulting in a perverse finding. Basically, the power is required to be exercised so that justice is done and there is no abuse of power by

the court. Merely an apprehension or suspicion of the same would not be a sufficient ground for interference in such cases.

27. Having discussed the scope of jurisdiction under these two provisions, i.e., Section 397 and Section 482 of the Code and the fine line of jurisdictional distinction, now it will be appropriate for us to enlist the principles with reference to which the courts should exercise such jurisdiction. However, it is not only difficult but is inherently impossible to state with precision such principles. At best and upon objective analysis of various judgments of this Court, we are able to cull out some of the principles to be considered for proper exercise of jurisdiction, particularly, with regard to quashing of charge either in exercise of jurisdiction under Section 397 or Section 482 of the Code or together, as the case may be :

27.1 Though there are no limits of the powers of the Court under Section 482 of the Code but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.

27.2 The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.

27.3 The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.

27.4 Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts even in such cases, the High Court should be loathe to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.

27.5 Where there is an express legal bar enacted in any of the provisions of the Code or any specific law in force to the very initiation or institution and continuance of such criminal proceedings, such a bar is intended to provide specific protection to an accused.

27.6 The Court has a duty to balance the freedom of a person and the right of the complainant or prosecution to investigate and prosecute the offender.

27.7 The process of the Court cannot be permitted to be used for an oblique or ultimate/ulterior purpose.

27.8 Where the allegations made and as they appeared from the record and documents annexed therewith to predominantly give rise and constitute a 'civil wrong' with no 'element of criminality' and does not satisfy the basic ingredients of a criminal offence, the Court may be justified in quashing the charge. Even in such cases, the Court would not embark upon the critical analysis of the evidence.

27.9 Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction, the Court is concerned primarily with the allegations taken as a whole

whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

27.10 It is neither necessary nor is the court called upon to hold a full- fledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction.

27.11 Where allegations give rise to a civil claim and also amount to an offence, merely because a civil claim is maintainable, does not mean that a criminal complaint cannot be maintained.

27.12 In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed with by the prosecution.

27.13 Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie.

27.14 Where the charge-sheet, report under Section 173(2) of the Code, suffers from fundamental legal defects, the Court may be well within its jurisdiction to frame a charge." (pp. 477 & 482, 483)

5. Reading(s), of, the hereinabove extracted relevant paragraphs, of, the verdict pronounced by the Hon'ble Apex Court, in Amit Kapoor's case (supra), make, an abundantly clear display (i) of order(s) pronounced, on, an application constituted, under, the provisions of Section 227 of the Cr.P.C., before the Court concerned, being a definite opinion formed by the Court concerned, in respect of commission(s) by the accused, of, the offences alleged against them, (ii) whereas, an order rendered, for, framing a charge being merely a tentative opinion. Furthermore, reading(s) of the relevant paragraphs, makes, a disclosure (iii) that where the order, for, framing charge is rendered by the Court concerned, upon its exercising statutory jurisdiction vested in it, under, Section 228 of the Cr.P.C., AND, (iv) the order(s) recorded, upon, an application constituted under Section 227 of the Cr.P.C., (v) ARE both well founded, upon, existence of sufficient incriminatory material also with the relevant material, making, disclosure(s), of, the inculpatory role(s) ascribed, by the Investigating Officer concerned, vis-a-vis the accused concerned, being well rested, upon, efficacious evidence collected by him, (vi) thereupon, the orders pronounced by the Court concerned, upon, its exercising jurisdiction under Section 227 of the Cr.P.C., AND upon his exercising jurisdiction under Section 228 of the Cr.P.C., hence, not, warranting any interference. Moreover, it also stands propounded therein, that, it being not open, for the revisional Court, to make deep delvings into the record, for forming an opinion vis-a-vis the admissibility and reliability of the documents existing on records, (vii) on anvil whereof, the Court concerned, records orders, while, its exercising jurisdiction under Section 227 of the Cr.P.C., and under Section 228 of the Cr.P.C.

6. Bearing in mind the aforesaid principles of law ANDalso taking into consideration, the heinousness, of the offences committed by the accused, it is deemed appropriate, to, from the hereinabove extracted relevant facts appertaining to the occurrence, make (a) discernment(s) vis-a-vis the incriminatory roles ascribed therein vis-a-vis each of the accused, (b) the sufficiency, of, evidence in respect thereto collected by the Investigating Officer, (c) the learned Addl. Sessions Judge, concerned in making the orders impugned before this Court, his taking into consideration, the evidentiary worth, of, the entire material, as stood placed before him. A perusal of the status report, discloses, of (i) accused Desh Pal instigating the commission of offences; (ii) accused Harveer Mallik instigating perpetration, of, principal offences, by principal accused one Rahul, instigations' whereof being comprised in (a) his not dissuading accused Rahul, from, collecting

fire arms, from, the vehicle, wherein it was kept; (b) his breaking open, the door of the kitchen AND proceeding thereinto, for assaulting, the victims Paramjeet Singh and Hasandeep. Apparently Accused Rahul, is, the principal offender, who fired a bullet shot, from, a licenced pistol, of, his father accused Harveer Malik. (c) Recovery of pistol, being effectuated from him AND it being opined, by the FSL concerned, of, bullet shot(s) being fired therefrom, (d) AND his snatching, the revolver of Paramjeet Singh and its recovery being effectuated from him, (e) of Harveer Malik, breaking open the door, of the kitchen and his assaulting victim(s) Paramjeet Singh and Hasandeep. Accused Nikhil alias Rohit, is, ascribed an incriminatory role, of abusing and slapping accused Paramjeet Singh, from, the other side of the counter AND his throwing a chair at Paramjeet Singh, (f) His firing a gun shot, at him AND thereafter his, at the behest of his mother Rajesh Malik, hence bringing, a, pistol from the tempo traveler. Accused Ekta is ascribed an incriminatory role, of, hers attacking with a knife, both Paramjeet and Hasandeep. Accused Rajesh Malik, is, ascribed an incriminatory role, of, his climbing onto the counter, besides assaulting victim Paramjeet Singh and Hasandeep Singh, as also, his slapping Paramjeet Singh. He is also assigned an incriminatory role, of, ordering accused Nikhil, his son to bring a pistol, from, the tempo traveler, for, with its user, his eliminating the complainant party. Accused Yoginder Singh, is assigned an incriminaltory role, of assaulting Paramjeet Singh and Hasan Deep Singh, with a sword AND his breaking open the door, of the kitchen and entering thereinto, for, assaulting both Param Jeet Singh and Hasandeep Singh. (g) The independent witnesses, to, the occurrence in their previously recorded statements in writing, make ocular disclosures in respect of the aforesaid incriminatory role(s) assigned vis-a-vis each of the accused. The FSL report, makes, a loud bespeaking, in respect of the contents, of the parcels sent to it, for analyses, on theirs being analysed, physically and chemically, (I) ethyl alcohol being detected in the contents, of parcels P/1, P/2 and P/4. (ii) The quantity of ethyl alocohal, in parcel P/4 being 70.80Mg%. (iii) Firearms Exhibits E/9A and Exhibit E/10 being in working order in their present condition. (iv) The barrels of the fire arm, bearing evidence of recent firing. (v) The cartridge cases exhibits E/9B(1), E/9B(2), E/9B(3) and exhibits E/7D(1) being fired from, firearm E/9A (0.32 revolvers).3. (vi) The cartridge cases, exhibits E/7A(1), E/7A(2) and Exhibit E/7A(3) being fired from firearm E/10(7.65MM pistol). (vii) Bullets exhibit E/2 and exhibit E/7E, being fired, from firearm exhibit E/10 (7.65mm pistol). (viii) Bullets E/7d(2), E/19, E/24 being fired from firearm exhibit E/9/A (0.32 revolver). (ix) The pieces of bangles being of same diameter and type. (x) Two live cartridges and three cartridge cases, being found, in the camber, of revolver exhibit E/9A. (xi) Traces of copper jacketed bullet, being detected, on the holes front and back side of exhibit E/20A (T-shirt) and exhibit E/20b (vest). Traces of lead bullet being detected on the back side hole of exhibit E/20a (T-shirt). Traces of lead bullet being detected on the font side of T-shirt exhibit E/23. Human blood of group “A” being detected on exhibit-1 (vest, Hasan deep), exhibit -12 (blood sample of Hasan Deep and exhibit 13-A (T-shirt of Rahul Malik), human blood being detected on Exhibit 4A (blood stained piece of card board piece), Exhibit 4-B (blood stained sugar pouches, Exhibit -6 (sword, exhibit -13b (lower/pajama, Rahul Malik), exhibit -18 (blood sample of Paramjeet Singh. (xii) The aforesaid revelations borne in the report, of, the SL concerned make loud bespeaking of the Investigating Officer concerned, hence, validly assigning inculpatory roles vis-a-vis the accused.

7. Moreover, the identity of the accused, stands cogently established, by eye witnesses, comprised, (a) in theirs validly identifying, the accused, during, the course of a valid test identification being held by the Investigating Officer, (b) predominantly also by CCTV footage, existing on record. Even though, the principal accused, stand, charged vis-a-vis offences, constituted under Sections 302, 307, 148 read with Section 149 of the IPC and Section 25 of the Arms Act, (c) whereas other co-accused stand charged with them, for theirs forming an unlawful assembly along with the principal accused, (d) thereupon, the vicarious penal liabilities, constituted under Sections 147, 148 and 149 of the IPC and Section 25 of the Arms Act, stand validly imputed vis-a-vis all the accused other than the principal accused. All the aforesaid incriminatory pieces of evidence, evidently stand borne in mind, by the learned Additional Sessions Judge concerned, in his refusing, to grant the espoused relief, to the accused AND

evidently are also borne in mind by him, for charging the accused concerned, for commission of offences as disclosed in the apposite charge sheet(s) framed vis-a-vis each of the accused.

8. Be that as it may, all the reasons and conclusions, arrived at, by the learned Additional Sessions Judge, for pronouncing orders, upon, the applications, cast under Section 227 of the Cr.P.C., besides in his ordering, for, framing charges against the accused, in his exercising powers under Section 228 of the Cr.P.C., ARE (i) squarely rested upon prima facie credible pieces, of evidence collected, by the Investigating Officer concerned, during the course, of his holding investigations. (ii) Apart from the principal accused, the roles ascribed, in the relevant occurrence vis-a-vis the other co-accused, does not disqualify them, to be amenable for theirs being charged along with the principal accused, for theirs forming an unlawful assembly along with them, (iii) thereupon, they are rendered amenable, for theirs being charged along with them, for commission of offences under Section 147, 148 and 149 of the IPC and Section 25 of the Arms Act. The gravity and severity, of, ascriptions of incriminatory roles vis-a-vis each of the accused hence being well founded, upon, prima facie credible evidentiary material existing on record, (iv) thereupon, it is unbefitting for this Court, to, delve deep into the evidence collected, for, invalidating the opinion formed by the learned Additional Sessions Judge concerned, while, his pronouncing the impugned orders, rather it is befitting for this Court to validate the conclusion(s) and opinion(s) formed by the learned Court. Significantly, when all the pieces of evidence collected against the accused do not prima facie, discloses, of imputation of incriminatory roles vis-a-vis each of the accused being not prima facie borne out therefrom.

9. For the foregoing reasons, all the petitions are dismissed and the order impugned hereat is affirmed and maintained. Any observations made hereinabove shall have no bearings upon the merits of the case. The parties are directed to appear before the learned trial Court on 12th January, 2018. All pending applications also stand dispose of. Records be sent back forthwith.

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

Amar Nath Dhiman ....Petitioner.
Versus
Punjab & Singh Bank. ....Respondent.

C.R. No. : 152 of 2017
Date of decision: 18.12. 2017

Indian Contract Act, 1872- Section 128- Civil Revision- Section 115 C.P.C.- Petitioner who was the guarantor filed objection to the execution solely on the ground that until and unless the Bank did not satisfy the decree against the principal debtor, it could not be permitted to proceed against the guarantor- Objection dismissed by the learned Trial Court- Revision petition filed- **The High Court Held**- that the liability of the surety or guarantor is co-extensive with that of the principal debtor and the surety becomes liable to pay the entire debt and further the liability of the surety or guarantor is immediate and is not deferred until the creditor exhausts his remedies against the principal debtor. (Para-6 to 11)

Cases referred:
Union Bank of India vs Manku Narayana, (1987) 2 SCC 335
State Bank of India vs M/s Indexport Registered and others, (1992) 3 SCC 159
Bank of Bihar Ltd. v. Damodar Prasad & Another, 1969 1 SCR 620
Lachhman Joharimal v. Bapu Khandu and Tukaram Khandoji, 1869 6 BomHCR 241
Industrial Investment Bank of India vs. Biswanath Jhunjhunwala, (2009) 9 SCC 478

Ram Kishun and others vs State of Uttar Pradesh and others, (2012) 11 SCC 511

For the Petitioner : Mr. Virender Rathour, Advocate.
For the respondent : Nemo

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, J (oral).

The petitioner is a guarantor, whose objections against the execution, have been ordered to be dismissed by the learned Executing Court vide its order dated 17.5.2017 and aggrieved thereby he has filed the instant revision petition.

2. It is not in dispute that the proforma respondent herein was the principal borrower of loan availed from the respondent No.1, whereas the petitioner stood guarantor of such loan. On default by the proforma respondent and the petitioner in the repayment of loan, a suit for recovery of Rs. 1,64,089/- alongwith interest came to be filed and was in fact decreed by the Civil Judge (Senior Division), Mandi by passing a joint and several decree of Rs. 1,64,089/-.

3. In order to execute the judgment and decree so passed in its favour, the respondent-bank filed an Execution Petition wherein the petitioner preferred objections solely on the ground that until and unless the bank did not satisfy the decree against principal debtor, it could not be permitted to proceed against the guarantor. As observed above, the objections came to be dismissed by the learned Executing Court constraining the petitioner to file the instant petition.

4. Even before this Court, learned counsel for the petitioner has again reiterated this stand and has placed strong reliance upon the judgment of two Hon'ble Judges of the Hon'ble Supreme Court in ***Union Bank of India*** vs ***Manku Narayana***, (1987) 2 SCC 335.

5. No doubt the Hon'ble Supreme Court in the aforesaid case has held that in case of decree covered by the mortgage, the creditor/decree holder has to initially proceed against the mortgaged property and only then could it proceed against the guarantor. However, the aforesaid view was subsequently over ruled by the three Hon'ble Judges of the Hon'ble Supreme Court in ***State Bank of India*** vs ***M/s Indexport Registered and others***, (1992) 3 SCC 159. It is apt to reproduce certain relevant observations, which read thus:

> "[12] The Court further held that such directions are neither justified under Order XX Rule 11(1) or under the inherent powers of the Court under Section 151 of the Code of Civil Procedure to direct postponement of the execution of the decree.
>
> [13] In the present case before us the decree does not postpone the execution. The decree is simultaneous and it is jointly and severally against all the defendants including the guarantors. It is the right of the decree holder to proceed with it in a way he likes. Section 128 of the Indian Contract Act itself provides that "the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.
>
> [14] In Pollock and Mulla on Indian contract and Specific Relief Act, Tenth edition, at page 728 it is observed thus:
>
> "Co-extensive.- Surety's liability is co-extensive with that of the principal debtor.
>
> A surety's liability to pay the debt is not removed by reason of the creditor's omission to sue the principal debtor. The creditor is not bound to

exhaust his remedy against the principal before suing the surety, and a suit may be maintained against the surety though the principal has not been sued."

[15] In Chitty on Contracts 24th Edition Volume 2 at page 1031 paragraph 4831 it is stated as under:-

"Prima facle the surety may be proceeded against without demand against him, and without first proceeding against the principal debtor."

[16] In Halsbury's Laws of England Fourth Edition paragraph 159 at page 87 it has been observed that "it is not necessary for the creditor, before proceeding against the surety, to request the principal debtor to pay, or to sue him, although solvent, unless this is expressly stipulated for."

[17] In Hukumchand Insurance Co. Ltd. v.Bank of Baroda, AIR 1977 Karnataka 204, a Division Bench of the High Court of Karnataka had an occasion to consider the question of liability of the surety viz-a-viz the principal debtor. Venkatchaliah, J. (as His Lordship then was) observed (Para 12):-

> "The question as to the liability of the surety, its extent and the manner of its enforcement have to be decided on first principles as to the nature and incidents of suretyship. The liability-of a principal debtor and the liability of a surety which is co-extensive with that of the former are really separate liabilities, although arising out of the same transaction. Notwithstanding the fact that they may stem from the same transaction, the two liabilities are distinct. The liability of the surety does not also, in all cases, arise simultaneously."

[18] It will be noticed that the guarantor alone could have been sued, without even suing the principal debtor, so long as the creditor satisfies the Court that the principal debtor is in default.

[19] In Jagannath Ganeshram Agarwala V. Shivnarayan Bhagirath, AIR 1940 Bom 247, a Division Bench of the Bombay High Court,(Kania and Wassoodew JJ.) held that the liability of the surety is coextensive, but is not in the alternative. Both the principal debtor and the surety are liable at the same time to the creditors."

6. Thus, what can be taken to be settled is that the liability of the surety is coextensive with that of the principal debtor, unless it is otherwise provided by the contract.

7. As early as in the year 1969, similar question came before the Hon'ble Supreme Court in ***Bank of Bihar Ltd***. v. ***Damodar Prasad & Another***, 1969 1 SCR 620, wherein their Lordships approved the judgment of the Bombay High Court in ***Lachhman Joharimal*** v. ***Bapu Khandu and Tukaram Khandoji***, 1869 6 BomHCR 241 in which the Division Bench of the Bombay High Court had held as under:

> "The court is of opinion that a creditor is not bound to exhaust his remedy against the principal debtor before suing the surety and that when a decree is obtained against a surety, it may be enforced in the same manner as a decree for any other debt."

8. It was further held:

> "The very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety. In the present case the creditor is a banking company. A guarantee is a collateral security usually taken by a banker. The security will become useless if his rights against the surety can be so easily cut down."

9. Similar reiteration of law can be found in the judgment of the Hon'ble Supreme Court in ***Industrial Investment Bank of India*** vs. ***Biswanath Jhunjhunwala***, (2009) 9 SCC 478.

10. At this stage, it would be apposite to refer to a fairly recent judgment of the Hon'ble Supreme Court in ***Ram Kishun and others*** vs ***State of Uttar Pradesh and others***, (2012) 11 SCC 511, wherein it was held as under:

> "10. There can be no dispute to the settled legal proposition of law that in view of the provisions of Section 128 of the Indian Contract Act, 1872 (hereinafter called the 'Contract Act'), the liability of the guarantor/surety is co-extensive with that of the debtor. Therefore, the creditor has a right to obtain a decree against the surety and the principal debtor. The surety has no right to restrain execution of the decree against him until the creditor has exhausted his remedy against the principal debtor for the reason that it is the business of the surety/guarantor to see whether the principal debtor has paid or not. The surety does not have a right to dictate terms to the creditor as how he should make the recovery and pursue his remedies against the principal debtor at his instance. (Vide: The Bank of Bihar Ltd. v. Dr. Damodar Prasad and Anr., 1969 AIR(SC) 297 Maharashtra State Electricity Board, Bombay v. The Official Liquidator, High Court, Ernakulam and Anr., 1982 AIR(SC) 1497 Union Bank of India v. Manku Narayana, 1987 AIR(SC) 1078 and State Bank of India v. Messrs. Indexport Registered and Ors., 1992 AIR(SC) 1740.
>
> [11] In State Bank of India v. Saksaria Sugar Mills Ltd. and Ors., 1986 AIR(SC) 868 this Court while considering the provisions of Section 128 of the Contract Act held that liability of a surety is immediate and is not deferred until the creditor exhausts his remedies against the principal debtor. (See also: Industrial Investment Bank of India Ltd. v. Biswasnath Jhunjhunwala, 2009 9 SCC 478; and United Bank of India v. Satyawati Tondon and Ors., 2010 AIR(SC) 3413.
>
> [12] Section 146 of the Contract Act provides that co-sureties are liable to contribute equally. Thus, in case there are more than one surety/guarantor, they have to share the liability equally unless the agreement of contract provides otherwise."

11. Thus, what can be taken to be settled on the basis of law expounded in the aforesaid cases is that the liability of the surety is coextensive with that of the principal debtor and the surety becomes liable to pay the entire debt and further the liability of the surety is immediate and is not deferred until the creditor exhausts his remedies against the principal debtor.

12. That apart, the surety does not have any right to dictate to the creditor his terms by asking to pursue remedy firstly against the principal debtor and to defer the proceedings against him.

13. Since the liability of the petitioner herein is coextensive with that of the principal debtor who has been arrayed as proforma respondent herein, therefore, respondent-bank is free to execute the decree against the petitioner without exhausting its remedy against the principal borrower and, therefore, no fault can be found with the order passed by the learned Executing Court whereby it dismissed the objections filed by the petitioner.

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

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

Baldev Singh ...Petitioner
Versus
Union of India & Ors. ...Respondents

CWP No. 2159 of 2008
Reserved on: 14.12.2017
Decided on: 19.12.2017

Constitution of India, 1950- Article 226- Civil Writ Petition- Code of Civil Procedure, 1908- Order 23 Rule 1 and Order 2 Rule 2- The question raised in the writ petition was whether after an unconditional withdrawal of an earlier Civil Writ Petition a successive petition was maintainable as per Order 23 Rule 1- If not, whether the petition would still be barred under the provision of Order 2 Rule 2 of the Code of Civil Procedure- **Held-** that undoubtedly the provisions of Code of Civil Procedure are not applicable in the writ jurisdiction but the principles enshrined therein are applicable- Even if, earlier petition is withdrawn unconditionally without liberty to file the same afresh, still in given circumstances of a particular case- Subsequent petition may be maintainable, but such petition would certainly be barred under the provisions of Order 2 Rule 2 of the Code of Civil Procedure. (Para-16 to 22)

Cases referred:

Gulabchand Chhotalal Parikh vs. State of Gujarat, AIR 1965 SC 1153
Babubhai Muljibhai Patel vs. Nandlal Khodidas Barot, AIR 1974 SC 2105
Sarguja Transport Service vs. STAT, AIR 1987 SC 88
Sarguja Transport Service vs. State Transport Appellate Tribunal, M.P. Gwalior & Ors. (1987) 1 SCC 5
Sarva Shramik Sanghatana (KV) vs. State of Maharashtra and others (2008) 1 SCC 494
Ramesh Chandra Sankla and others vs. Vikram Cement and others (2008) 14 SCC 58
Kundlu Devi and another vs. State of H.P. and others, Latest HLJ 2011 (HP) 579

For the petitioner: Mr. Onkar Jairath and Mr. Tenzen, Advocates, for the petitioner.
For the respondents: Mr. Desh Raj Thakur, Central Government Standing Counsel, for respondent No. 1.
Mr. N.K. Sood, Sr. Advocate, with Mr. Aman sood and Mr. Hemant Sharma, Advocates, for respondents No. 2 to 4.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge

This Court at the threshold is required to decide the following preliminary objections as raised by the respondents:-

(i) Whether after unconditional withdrawal of CWP No. 491 of 2001 on 30.04.2007, the present writ petition is not maintainable.

(ii) In case the question No. 1 is answered in negative, whether the instant petition would still be barred by the principles of Order 2 Rule 2 of the Code of Civil Procedure (for short 'Code').

However, before answering the questions as posed before this Court, certain facts need to be noticed.

2. The petitioner alongwith some other persons initially approached the Hon'ble Punjab and Haryana High Court by filing CWP No. 10808 of 1994 wherein the main relief claimed was with respect to grant of benefit of pay protection and continuity of service to the petitioner from the date they were absorbed in the Bhakra Beas Management Board (for short 'BBMB') alongwith arrears resulting from the said directions.

3. It is apt to reproduce the prayer clause which reads thus:-

(a) *A writ of mandamus or any other writ, order or direction directing the respondents to grant the benefit of pay protection and continuity of service to the petitioners from the date they were absorbed in the Bhakra Beas Management Board alongwith arrears resulting from the said directions i.e. the respondents be directed to give the same pay to the petitioners as they were drawing in the Beas Construction Board at the time of their retrenchment alongwith the arrears and also the benefit of continuity of service, be ordered to be given to them. Further decision of the Annexure P-6, be quashed.*

4. During the pendency of this writ petition, the petitioner filed CWP No. 491 of 2001 wherein one of the relief again claimed was with respect to consideration of 14 years continuous service rendered by the petitioner with the Beas Construction Board (for short 'BCB') for fixing his seniority and computation of pension w.e.f. 11.05.1966, as would be evidently clear from the prayer clause, which is reproduced in its entirety, as under:-

(b) That the respondents may be directed to consider 14 years continuous service rendered by the petitioner with Beas Construction Board for fixing his seniority and computation of pension w.e.f. 11.05.1966.

5. It is not in dispute that on 30.04.2007, the petitioner unconditionally withdrew the aforesaid writ petition and it is apt to reproduce order which reads thus:-

30.4.2007 Present: Mr. Rajiv Jiwan, counsel, for the petitioner.

Mr. N.K. Sood, Advocate, for respondents No. 1, 3 & 4.

CWP No. 491/2001

Mr. Rajiv Jiwan, learned counsel for the petitioner seeks permission to withdraw the present writ petition. Permission granted. The writ petition is dismissed as withdrawn.

Sd/-

Sanjay Karol, J.

6. Yet again, there is no dispute that after unconditional withdrawal of CWP No. 491 of 2001, the petitioner has thereafter filed the instant writ petition wherein similar relief to the one claimed in CWP No. 10808 of 1994 and CWP No. 491 of 2001 has been claimed, as would be evident from prayer clause (a), which is reproduced below:-

(a) *That the writ of mandamus be issued to the respondents directing them to count the work charge service rendered by the petitioner in BCB from 11-05-1966 to 31-01-1981 for the purpose of computation of pension as is done in the case of others employees in terms of Board's letter dated 30/11/1990 (Annexure P-1) & letter dated 04.07.1991 (Annexure P02) and on the basis of Regulations framed by BBMB for Class III & Class IV employees (Annexure P-6) & revise his pension.*

7. It is also not in dispute that before the CWP No. 10808 of 1994 could actually be taken up by that Court for final hearing, the petitioner withdrew his name from the array of the petitioners.

8. Having set out the factual background, I would now proceed to determine the questions as posed.

9. Mr. N.K. Sood, learned Senior Advocate duly assisted by Mr. Aman Sood, learned Advocate, would vehemently argue that once it is admitted that CWP No. 491 of 2001 filed by the petitioner was unconditionally withdrawn without seeking liberty to file fresh petition on the same cause of action, then by virtue of principles as envisaged and incorporated under Order 23 Rule 1 of the Code as also principles of *res judicata*, the instant petition would not be maintainable. He would further argue that even if the instant writ petition is ultimately held not to be barred on the aforesaid principles under Order 23 Rule 1 of the Code, even then the petition would be barred and not maintainable on the principles of "*might and ought*" as envisaged under Order 2 Rule 2 of the Code, as the petitioner despite the availability of grounds for relief which is now sought in this petition had not raised the same either in CWP No. 10808 of 1994 and thereafter even in CWP No. 491 of 2001 and is, therefore, precluded from raising these grounds for the first time in this writ petition.

10. On the other hand, Mr. Onkar Jairath, learned Advocate duly assisted by Mr. Tenzen, learned Advocate, would vehemently argue that the provisions of CPC are not applicable in writ jurisdiction by virtue of provisions of Section 141 of the Code and, therefore, the instant petition cannot be held to be not maintainable that too by relying upon the principles as envisaged under Order 23 of the Code (supra).

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

Question No. 1

11. Undoubtedly, the provisions of the CPC are not applicable in the writ jurisdiction by virtue of provision of Section 141 but the principles enshrined therein are applicable. (vide ***Gulabchand Chhotalal Parikh vs. State of Gujarat, AIR 1965 SC 1153, Babubhai Muljibhai Patel vs. Nandlal Khodidas Barot, AIR 1974 SC 2105 and Sarguja Transport Service vs. STAT, AIR 1987 SC 88***.)

12. Apart from above, I find that this issue is otherwise no longer *res integra* in view of the judgment of the Hon'ble Supreme Court in ***Sarguja Transport Service vs. State Transport Appellate Tribunal, M.P. Gwalior & Ors. (1987) 1 SCC 5***, wherein it was categorically held that withdrawal or abandonment of a petition under Article 226/227 without permission to file fresh petition thereunder would bar such a fresh petition in the High Court involving the same subject matter. It was further held that principle underlying Rule 1 Order 23 of the Code is one related to public policy whereby once plaintiff institutes a suit in the Court of law and thereby avails remedy given to him under law, he cannot be permitted to institute a fresh suit or by withdrawing it without the permission of the court to file fresh suit ***Invito beneficium non datur.*** The law confers upon a man no rights or benefits which he does not desire. It is apt to reproduce the relevant observations which reads thus:-

> *"8. The question for our consideration is whether it would or would not advance the cause of justice if the principle underlying R. 1 of O. XXIII of the Code is adopted in respect of writ petitions filed under Art. 226/227 of the Constitution also. It is common knowledge that very often after a writ petition is heard for some time when the petitioner or his counsel finds that the Court is not likely to pass an order admitting the petition, request is made by the petitioner or by his counsel, to permit the petitioner to withdraw from the writ petition without seeking permission to institute a fresh writ petition. A Court which is unwilling to admit the petition would not ordinarily grant liberty to file a fresh petition while it may just agree to permit the withdrawal of the petition. It is plain that when once a writ petition filed in a High Court is withdrawn by the petitioner himself he is precluded from filing an appeal against the order passed in the writ petition because he cannot be considered as a party aggrieved by the order passed by the High Court. He may as stated in Daryao v. State of U.P., (1962) SCR 574: (AIR 1961 SC 1457) in a case involving the question of enforcement of fundamental rights file a petition before the Supreme Court under Art. 32 of the Constitution because in. such a case there has*

been no decision on the merits by the High Court. The relevant observation of this Court in Daryao's case (supra) is to be found at page 593 and it is as follows :

> *"If the petition is dismissed as withdrawn it cannot be a bar to a subsequent petition under Art. 32, because in such a case there has been no decision on the merits by the Court. We wish to make it clear that the conclusions thus reached by us are confined only to the point of res judicata which has been argued as a preliminary issue in these writ petitions and no other."*

9. The point for consideration is whether a petitioner after withdrawing a writ petition filed by him in the High Court under Art. 226 of the Constitution of India without the permission to institute a fresh petition can file a fresh writ petition in the High Court under that Article. On this point the decision in Daryao's case (supra) is of no assistance. But we are of the view that the principle underlying R. 1 of O. XXIII of the Code should be extended in the interests of administration of justice to cases of withdrawal of writ petition also, not on the ground of res judicata but on the ground of public policy as explained above. It would also discourage the litigant from indulging in bench-hunting tactics. In any event there is no justifiable reason in such a case to permit a petitioner to invoke the extraordinary jurisdiction of the High Court under Art. 226 of the Constitution once again. While the withdrawal of a writ petition filed in High Court without permission to file a fresh writ petition may not bar other remedies like a suit or a petition under Art. 32 of the Constitution since such withdrawal does not amount to res judicata, the remedy under Art. 226 of the Constitution should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ petition when he withdraws it without such permission. In the instant case the High Court was right in holding that a fresh writ petition was not maintainable before it in respect of the same subject-matter since the earlier writ petition had been withdrawn without permission to file a fresh petition. We, however, make it clear that whatever we have stated in this order may not be considered as being applicable to a writ petition involving the personal liberty of an individual in which the petitioner prays for the issue of a writ in the nature of habeas corpus or seeks to enforce the fundamental right guaranteed under Art. 21 of the Constitution since such a case stands on a different footing altogether. We, however, leave this question open.

13. It would be evident from the aforesaid observations that the factors which prevailed before the Hon'ble Supreme Court for holding the second petition to be not maintainable were primarily to prevent Bench hunting and it was also observed that the writ petitions are mostly sought to be withdrawn without any liberty to file fresh at a stage when the Court is not inclined to admit the same with malafide intention by unscrupulous persons. It was in this background, the Hon'ble Supreme Court held that in cases of such nature, fresh petition could not be filed.

14. However, the said ratio was distinguished by the Hon'ble Supreme Court in **Sarva Shramik Sanghatana (KV) vs. State of Maharashtra and others (2008) 1 SCC 494** wherein it was held that the decision in ***Sarguja Transport Service*** case (supra) had to be understood in light of the observations made in paragraphs 8 and 9 as quoted above. It was further held that the decision in ***Sarguja Transport Service*** case (supra) could not be treated as a euclid formula. It is apt to reproduce the relevant observations, which reads thus:

> *"10. The appellant, which represents the workmen concerned, opposed the very entertainment of the second closure application under Section 25-O on the ground that the first application was withdrawn but without liberty from the concerned authority to file a fresh application. The appellant filed a writ petition under Article 226 of the Constitution before the Bombay High Court praying that the Deputy Commissioner of Labour should be directed not to take any further proceedings in*

relation to the closure application dated 11.5.2007 under Section 25-O. Since that writ petition was dismissed, hence this appeal by way of Special Leave Petition.

13. It often happens that during the hearing of a petition the Court makes oral observations indicating that it is inclined to dismiss the petition. At this stage the counsel may seek withdrawal of his petition without getting a verdict on the merits, with the intention of filing a fresh petition before a more convenient bench. It was this malpractice which was sought to be discouraged by the decision in Sarguja Transport case (supra).

14. On the subject of precedents Lord Halsbury, L.C., said in Quinn v. Leathem, 1901 AC 495:

> *"Now before discussing the case of Allen v. Flood (1898) AC 1 and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical Code, whereas every lawyer must acknowledge that the law is not always logical at all."*

We entirely agree with the above observations.

19. In the present case, we are satisfied that the application for withdrawal of the first petition under Section 25-O(1) was made bona fide because the respondent-company had received a letter from the Deputy Labour Commissioner on 5.4.2007 calling for a meeting of the parties so that an effort could be made for an amicable settlement. In fact, the respondent- company could have waited for the expiry of 60 days from the date of filing of its application under Section 25-O(1), on the expiry of which the application would have deemed to have been allowed under Section 25-O(3). The fact that it did not do so, and instead applied for withdrawal of its application under Section 25-O(1), shows its bona fide. The respondent- company was trying for an amicable settlement, and this was clearly bona fide, and it was not a case of bench hunting when it found that an adverse order was likely to be passed against it. Hence, Sarguja Transport case (supra) is clearly distinguishable, and will only apply where the first petition was withdrawn in order to do bench hunting or for some other mala fide purpose.

20. We agree with the learned counsel for the appellant that although the Code of Civil Procedure does not strictly apply to proceedings under Section 25-O(1) of the Industrial Disputes Act, or other judicial or quasi-judicial proceedings under in any other Act, some of the general principles in the CPC may be applicable. For instance, even if Section 11 of the CPC does not in terms strictly apply because both the proceedings may not be suits, the general principle of res judicata may apply vide Pondicherry Khadi & Village Industries Board vs. P. Kulothangan and another 2004 (1) SCC 68. However, this does not mean that all provisions in the CPC will strictly apply to proceedings which are not suits.

15. Yet again similar question came up for consideration before the Hon'ble Supreme Court in ***Ramesh Chandra Sankla and others vs. Vikram Cement and others (2008) 14 SCC 58***, wherein again the Hon'ble Apex Court distinguished the judgments in ***Sarguja Transport Service*** case (supra) and relying upon the judgment in **Sarva Shramik Sanghatana** case (supra), it was observed as under:-

60. We may also refer to a recent decision of this Court in Sarva Shramik Sangathan (KV), Mumbai v. State of Maharashtra and Ors.,. In that case, an application under Section 25O of the Industrial Disputes Act, 1947 was filed by the employer for closure of undertaking. The application was, however, withdrawn since attempts were made for settlement of the matter. The efforts were not successful and hence, the management filed fresh application. It was contended by the Union that since earlier application filed by the employer was withdrawn, the second application was hit by Order XXIII of the Code. The Union relied upon Sarguja Transport Service. Negativing the contention, holding the application maintainable and distinguishing Sarguja Transport Service, this Court held that the action of the Management of withdrawal of first petition was bona fide. It was not a case of Bench-hunting with a view to avoid an adverse order likely to be passed against it. Sarguja Transport Service had, therefore, no application. It was also observed that provisions of the Code of Civil Procedure do not strictly apply to industrial adjudication. The second application was, therefore, held maintainable.

61. From the above case law, it is clear that it is open to the petitioner to withdraw a petition filed by him. Normally, a Court of Law would not prevent him from withdrawing his petition. But if such withdrawal is without the leave of the Court, it would mean that the petitioner is not interested in prosecuting or continuing the proceedings and he abandons his claim. In such cases, obviously, public policy requires that he should not start fresh round of litigation and the Court will not allow him to re-agitate the claim which he himself had given up earlier.

62. In Sarguja Transport Service, extending the principles laid down in Daryao, Venkataramiah, J. (as His Lordship then was) concluded;

> *"9….We are of the view that the principle underlying Rule 1 of Order XXIII of the Code should be extended in the interests of administration of justice to cases of withdrawal of writ petition also, not on the ground of res judicata but on the ground of public policy as explained above. It would also discourage the litigant from indulging in bench-hunting tactics. In any event there is no justifiable reason in such a case to permit a petitioner to invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution once again. While the withdrawal of a writ petition filed in a High Court without permission to file a fresh writ petition may not bar other remedies like a suit or a petition under Article 32 of the Constitution of India since such withdrawal does not amount to res judicata, the remedy under Article 226 of the Constitution of India should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ petition when he withdraws it without such permission. (emphasis supplied)*

63. On the facts of the case, however, we are unable to uphold the argument on behalf of the workmen that the Company did not want to prosecute the petitions and had given up its claim against the order passed by the Labour Court and confirmed by the Industrial Court. The record reveals that the Company filed one writ petition against one employee which was registered as Writ Petition No. 3060 of 2005. It also filed another petition against the remaining employees (236) which was registered as Writ Petition No. 3471 of 2005. Since the other petition was against several employees, the Registry of the High Court raised an objection that it was under defect . It was, therefore, not placed for admission-hearing. In an order, dated October 3, 2005, the Court noted that the learned Counsel for the Company prayed for time "to remove the defects pointed by the office". The prayer was granted.

64. It also appears that according to the Registry, there were practical difficulties and logistic problems since the petition was against more than 200 employees. The

learned Counsel for the Company, therefore, on December 14, 2005, did not `press the petition and petition was accordingly dismissed `as not pressed . The said order was passed on December 14, 2005. Immediately thereafter, in January, 2006, separate petitions were filed by the Company against the workmen.

65. It is thus clear that it was not a case of abandonment or giving up of claim by the Company. But, in view of office objection, practical difficulty and logistic problem, the petitioner Company did not proceed with an `omnibus and composite petition against several workmen and filed separate petitions as suggested by the Registry of the High Court.

66. There is an additional reason also for coming to this conclusion on the basis of which it can be said that the Company was prosecuting the matter and there was no intention to leave the matter. As is clear, Writ petition No. 3060 of 2005 which was filed against one employee was very much alive and was never withdrawn/ note pressed . If really the Company wanted to give up the claim, it would have withdrawn that petition as well. Thus, from the circumstances in their entirety, we hold that the objection raised by the learned Counsel for the workmen has no force and is rejected.

16. Similar reiteration of law can be found in judgment rendered by learned Division Bench of this Court in ***LPA No. 374 of 2012***, titled ***Sunder Lal vs. Himachal Pradesh State Forest Corporation and others***; decided on 03.09.2015.

17. Bearing in mind the aforesaid exposition of law, it would be noticed that this is not a case where petitioner can be said to be indulging in Bench hunting or abusing the process of law.

18. The question No. 1 is answered holding that even though the earlier writ petition was unconditionally withdrawn without liberty to file the same afresh, however, still in the given facts and circumstances of the case, the subsequent writ petition is maintainable.

Question No. 2

19. Adverting to question No. 2, it would be noticed that petitioner alongwith others while approaching the Hon'ble Punjab and Haryana High Court by filing CWP No. 10808 of 1994 claiming the benefit of pay protection and continuity of service from the date they were absorbed in BBMB from the BCB and had further sought the quashing of the decision (Annexure P-6) therein by which their representations for grant of the same had been rejected.

20. As regards CWP No. 491 of 2001, the relief claimed therein was based upon the award of Industrial Tribunal in Reference No. 2-C of 1971, on the basis of which the petitioner had claimed the same scale of pay w.e.f. 01.02.1981 and to consider 14 years of service rendered by the petitioner in BCB towards pension.

21. Whereas in the instant petition, it would be noticed that the petitioner has sought direction to count work charge services rendered by him in BCB from 11.05.1966 to 31.01.1981 for the purpose of computation of pension as has been done in the case of other employees in terms of the Board's letters dated 30.01.1990 and 04.07.1991.

22. It would be evident from the above that the reliefs claimed in this petition were available to the petitioner even at the time when he alongwith others filed CWP No. 10808 of 1994 before the Hon'ble Punjab & Haryana High Court. Therefore, obviously even while filing CWP No. 491 of 2001, the pleas raised in the writ petition before the Hon'ble Punjab & Haryana High Court were available to him at that time. Yet, the petitioner did not choose to take those pleas and surprisingly after relinquishing the basis of his relief(s) as was claimed in CWP No. 10808 of 1994 before the Hon'ble Punjab & Haryana High Court and CWP No. 491 of 2001, the petitioner obviously cannot now base his claim on the basis of letters dated 30.01.1990 and 04.07.1991 on the principles of "*might and ought*" which is contained in Order 2 Rule 2 of the Code.

23. It is more than settled that although the Code of Civil Procedure does not apply to writ petition but the principles enshrined therein would certainly apply.

24. Moreover, the question posed before this Court already otherwise stands directly answered by Division Bench of this Court in ***Kundlu Devi and another vs. State of H.P. and others, Latest HLJ 2011 (HP) 579*** wherein it was held as under:

> *"4. The contention of the learned counsel for the petitioners is that though the grievance with regard to quantum was dealt with, the grievance with regard to the claim for rent and occupation charges during the period the property was in possession of the Government has not been dealt with. According to the petitioners, they are entitled to the same in view of the decision of the Apex Court in R.L. Jain Versus DDA, (2004) 4 Supreme Court Cases 79. We do not think that it will be proper for this Court at this stage in proceeding under Article 226 of the Constitution of India to go into the question as to whether the petitioners are entitled to that component of compensation. That grievance the petitioners have pursued in accordance with the procedure prescribed under the Land Acquisition Act, 1894 initially before the Collector, thereafter before the Civil Court and finally in appeal before the High Court.*
>
> *According to the petitioners, though this grievance was raised, the same has not been adverted to. If that be so, a civil writ petition or for that matter any other collateral proceeding is not the remedy. All contentions, which a party might and ought to have taken, should be taken in the original proceedings and not thereafter. That is the well settled principle under Order II Rule 2 CPC. Order II Rule 2 reads as follows:*
>
> *"2.Suit to include the whole claim. –*
>
> *(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.*
>
> *(2) Relinquishment of part of claim. – Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.*
>
> *(3) Omission to sue for one of several reliefs. – A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted."*
>
> *5. This Rule is based on the principle that the defendant shall not be vexed twice for one and the same cause. The Rule also seeks to prevent two evils, one the splitting of claims and the other splitting of remedies. If a plaintiff omits any portion of the claim or omits any of the remedies in respect of the cause, he shall not be permitted to pursue the omitted claim or the omitted remedy. The requirement of the Rule is that every suit should include the whole of the claim which the plaintiff is entitled to make in respect of a cause of action. Cause of action is a cause which gives occasion for and forms foundation of the suit. If that cause of action enables a person to ask for a larger and broader relief than to which he had limited his claim, he cannot thereafter seek the recovery of the balance of the cause of action by independent proceedings. This principle has been also settled by the Apex Court in Sidramappa versus Rajashetty, AIR 1970 SC 1059.*
>
> *6. Order II Rule 2 applies also to writ proceedings. The left out portion of a cause of action cannot be pursued in a subsequent writ proceedings. All claims which a petitioner might and ought to have taken, should be taken in one proceedings and only in one proceedings. {See the decision of the Supreme Court in Commissioner of Income tax vs. T.P. Kumaran, 1996(1) SCC 561}.*

7. Equally, a person who has filed the suit seeking certain relief in respect of a cause of action is precluded from instituting another suit for seeking other reliefs in respect of the same cause of action. He shall not be entitled to invoke the writ jurisdiction of the High Court for obtaining the very same relief. In other words, if a second suit is barred, a writ petition would also be barred. What is directly prohibited cannot be indirectly permitted. That is the principle underlying under Order II Rule 2 CPC."

25. In view of the above discussion, even though the petition is not barred by the principles laid down in Order 23 Rule 1 of the Code, yet the petition is barred by the principles as contained under Order 2 Rule 2 of the Code.

26. In view of the aforesaid discussion, question No. 2 is answered accordingly and the instant writ petition for the reasons stated above is held to be legally not maintainable and is accordingly dismissed, leaving the parties to bear their own costs. Pending application, if any, also stand disposed of.

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

Smt. Yeena Gupta ..Petitioner.

Versus

State of H.P.. ..Respondent.

Cr.MMO No. 183 of 2017
Date of decision: 19.12.2017

Code of Criminal Procedure, 1973- Section 482- Complainant moved an application under Section 156 (3) Cr.P.C. to the Magistrate- the learned Magistrate ordered the registration of FIR under Sections 420 and 406 IPC read with Section 34 I.P.C.- Police after investigation filed cancellation/closure report- Cancellation report was accepted by the learned Magistrate on the ground that dispute leading to the registration of FIR arose from a partnership agreement containing arbitration clause for redressal of grievances emerging from the said agreement- Revision before learned Sessions Judge also rejected- **Held**, that merely because there is an arbitration clause in the agreement, that cannot prevent criminal prosecution against the accused if an act constituting a criminal offence is made out even prima facie- orders of lower Courts set aside- revision petition allowed. (Para-1 and 2)

For the petitioner: Mr. N.S.Chandel, Advocate.
For the respondents: Mr. Vivek Singh Attri, Addl. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, J. (oral)

The petitioner herein instituted, a complaint, under the provisions of Section 156(3) Cr.P.C, before, the learned Magistrate concerned. The learned Magistrate concerned pronounced thereon, an order for registration of an F.I.R., against, one Mohinder Nath Sofath, for his allegedly committing offences, under, Sections 420 and 406 IPC read with Section 34 I.P.C. The Investigating Officer, after, completing Investigations, filed, a report before the learned Court concerned, wherein he made proposal(s) for cancelling the apposite F.I.R. The learned Magistrate concerned, accepted, the proposal meted before him, by the Investigating Officer concerned. The reason for his accepting, the proposals made by the Investigating Officer, arose (i) from existence of a partnership agreement inter se one Veena Gupta and one Mohinder Nath Sofat, wherewithin,

an arbitration clause No. 12 exists (ii) with echoing(s) therein of theirs ad-idem contracting to settle all contracted controversies erupting interse them, (iv) thereupon it, concluded, of the apposite arbitration clause, borne, in the apt agreement executed inter se Veena Gupta and one Mohinder Nath Sofat, rather warranting availment, by the aggrieved, (v) than her's instituting criminal proceedings against one Mohinder Nath Sofat. Hence the complainant ascribing penal misdemeanor(s) against, one Mohinder Nath Sofat, was dismissed, it being not maintainable. The complainant being aggrieved, by the pronouncement, made by the learned Judicial Magistrate concerned hence preferred a revision petition therefrom, before the revisional Court. However, the latter Court affirmed the order of the learned trial Court. The complainant being aggrieved, has instituted the instant petition under, Section 482 Cr. P.C. before this Court. The Hon'ble Apex Court has in a judgement reported in State of Orissa and others Vs. Ujjal Kumar Burdhan (2012) 4 SCC 547, relevant paragraphs whereof are extracted hereinafter:-

> "14. Further, the impugned order also notes that in view of the arbitration agreement between the agent and the Government, all the alleged violations fell within the purview of Arbitration and Conciliation Act, 1996 and therefore, the respondent could not be held liable for any criminal offence. This observation is against the well settled principle of law that the existence of an arbitration agreement cannot take the criminal acts out of the jurisdiction of the courts of law.
>
> On this aspect, in S.W. Palanitkar & Ors. Vs. State of Bihar & Anr.3, this Court has echoed the following views:
>
> " 15- Looking to the complaint and the grievances made by the complainant therein and having regard to the agreement, it is clear that the dispute and grievances arise out of the said agreement. Clause 29 of the agreement provides for reference to arbitration in case of disputes or controversy between the parties and the said 3 (2002) 1 SCC 241 clause is wide enough to cover almost all sorts of disputes arising out of the agreement. As a matter of fact, it is also brought to our notice that the complainant issued a notice dated 3-10-1997 to the appellants invoking this arbitration clause claiming Rs.15 lakhs. It is thereafter the present complaint was filed. For the alleged breach of the agreement in relation to commercial transaction, it is open to the Respondent 2 to proceed against the appellants for his redressal for recovery of money by way of damages for the loss caused, if any. Merely because there is an arbitration clause in the agreement, that cannot prevent criminal prosecution against the accused if an act constituting a criminal offence is made out even prima facie." (Emphasis supplied)

emphatically rested the legal conundrum, qua maintainability(s), of criminal complaints against the contracting party concerned, arising, from breach of contract (b) especially when the apposite contract also embodies thereon an arbitration clause, for settling, all contracted dispute(s) erupting inter se Veena Gupta and Mohinder Nath Sofath AND as arise from breach(s) of the apt contract. The empathetic pronouncement(s), made, in the apposite extracted paragraphs qua (b) dispute(s) qua breaches of contract, arising, inter se contracting parties also despite existence therein, of, an arbitration clause, not yet, snatching the rights of the aggrieved, to institute criminal proceeding(s) against the derelecting contracting party(s) concerned, hence constrain(s) this Court, to mete a deference thereto.

2. In the light of the above, the reason assigned, by the Courts below qua (i) with an arbitration clause, existing, in the relevant contract, executed inter se Veena Gupta and Mohinder Lal Sofat, with, portrayal(s) therein, of, breach(s) of contracts, being settleable besides resolvable, through, each availing the remedy(s) of arbitration (ii) AND thereupon the aggrieved being barred to prosecute the derelicting party(s) thereof, is obviously frail. Since the aforesaid reasons, suffer, from a grave legal fallacy, hence the impugned order is set-aside. Revision petition is allowed. The learned trial Magistrate is directed, to, in accordance with law, render,

direction(s) upon the I.O. concerned to (i) given investigation(s) thereon hence being not hold (ii) investigate alleged breach(es) of contract by one Mohinder Nath Sofat. (iii) AND also to in accordance with law direct him, to furnish a status report before him AND thereafter pronounce an order in accordance with law.

3. Before parting upon an incisive scrutiny of the relevant case law, the only exception vis-à-vis there being no bar against simultaneity of, occurrence of criminal proceedings, AND of civil proceedings IS (i) verdict(s) recorded by all statutory authorities concerned upon titles AND entitlements of the concerned qua property(ies) of any genre being binding upon criminal Courts, (ii) AND continuation of criminal proceedings qua alike therewith subject matter or qua titles(s) or entitlements(s) vis-à-vis all property(ies) of any genre being impermissible, till a clinching conclusive verdict, emanates from the Apex Court (ii) Conspicuously, when verdicts of all statutory authorities concerned qua titles or entitlements vis-à-vis property(ies) of any genre, emanate, prior to commencement of criminal proceedings AND before their termination.

The Registry is directed to forthwith circulate copies, of, this verdict, to all subordinate Courts AND to all Superintendents of Police in Himachal Pradesh.

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

Arvind Kumar Sankhyan ..... Petitioner/Accused.

Versus

Dr. M.P. Vaidya (since deceased) through his legal representatives Manchali Vaidya and others ..... Respondents.

Cr. MMO No.387 of 2017
Date of decision: 20.12.2017

Code of Criminal Procedure, 1973- Sections 482 and 311- Negotiable Instruments Act, 1881- Section 138- Petitioner who was the accused had filed an application under Section 311 Cr.P.C. seeking permission to recall the legal representatives of the deceased/complainant for cross-examination and to produce and prove the documents by which the original complainant had applied for termination and closure of the PMS account- The application came to be rejected – Hence, the Cr.MMO- **The High Court Held-** that Section 311 Cr.P.C has been enacted to enable the Court to find the truth and render a just decision, and with this object in mind the Court can examine or re-examine any person, who is expected to be able to throw light upon the matter in dispute- The object of the provisions as a whole is to do justice not only from the point of view of the accused and the prosecution but also from the point of view of an orderly society. (Para-10)

Code of Criminal Procedure, 1973- Sections 482 and 311- Negotiable Instruments Act, 1881- Section 138- The High Court further Held- that though the pleadings in such cases cannot be construed strictly but nonetheless specific replies to the allegations are required to be made and in case of failure to do so, there is no legitimate ground to oppose the application so filed under Section 311 Cr.P.C. by the complainant. (Para-13)

Code of Criminal Procedure, 1973- Sections 482 and 311- Negotiable Instruments Act, 1881- Section 138- The High Court further Held- that the discretion conferred under Section 311 Cr.P.C has to be exercised judicially for reasons stated- The rejection of the application merely on the ground that despite sufficient opportunities no steps were taken to lead evidence and, as such, no further opportunity could be granted was not legally sustainable. (Para-14)

Cases referred:

State of Haryana versus Ram Mehar and others (2016) 8 SCC 762

Amrutbhai Shambhubhai Patel versus Sumanbhai Kantibhai Patel and others, (2017) 4 SCC 177
Ratanlal versus Prahlad Jat and others AIR 2017 SC 5006
Ritesh Tewari and another versus State of Uttar Pradesh and others (2010) 10 SCC 677

For the Petitioner : Mr.Lalit K.Sharma, Advocate.
For the Respondents : None.

The following judgment of the Court was delivered:

***Tarlok Singh Chauhan, Judge* (Oral).**

This petition under Section 482 of the Code of Criminal Procedure (for short 'Code') is directed against the order passed by the learned Sessions Judge on 21.08.2017 whereby he affirmed the order passed by the learned Additional Chief Judicial Magistrate, Court No.1, Mandi, District Mandi, H.P. on 03.03.2016 rejecting the application filed by the petitioner/accused (hereinafter referred to as 'accused') under Section 311 Cr.P.C.

2. The facts as are relevant for the instant lis are that a complaint under Section 138 of the Negotiable Instruments Act (for short 'Act') came to be filed against the accused on the ground that he had issued a cheque No.002263 dated 07.04.2011 drawn at HDFC Bank Branch Mandi, H.P. towards Account No.730104000002073 amounting to Rs.13,86,250/-. The complainant presented the cheque before his bank, but the same was dishonoured. Despite legal notice, the accused did not pay any heed to pay the aforesaid amount, constraining the complainant to file the complaint against the accused under the Act.

3. The defence of accused infact appears to be that he along with his two other shareholders namely Rajesh Kumar and Chandermani Thakur formed a Company under the name and style of 'M/s Onam Stock Brokers Pvt. Ltd.' under the Companies Act, 1956, wherein the share of the accused was only 1%. The Company was registered as sub-broker of 'M/s Motilal Oswal Securities Ltd., Mumbai' which is alleged to have been terminated in July, 2011. The original complainant M.P.Vaidya had opened a D Mat & Trading Account and Port Folio Management Services (PMS) account with 'M/s Motilal Oswal Securities Ltd.' through the Company and had invested Rs.15,00,000/-. However, since the stock market was witnessing huge volatility, the original complainant insisted for his payment and the accused in good faith issued the aforesaid cheque.

4. During the trial, the accused led evidence and examined Shri Shakti Gupta, Authorized Representative of 'M/s Motilal Oswal Securities Ltd.' as AW-1, who tendered documents Ex. AW 1/A to G. It is averred that it was on the basis of these documents that the accused, for the first time, came to know about the fate of the investment made by the original complainant, who infact had applied for termination and closure of the PMS account on 28.07.2011 immediately after instituting the instant complaint.

5. It was in this background that the accused filed an application under Section 311 Cr.P.C. for permitting him to recall the legal representatives of the deceased-complainant for re-cross-examination and to produce and prove the documents by which the original complainant had already applied for termination and closure of the PMS account. However, this application was rejected by the learned trial Magistrate on the ground that several opportunities had already been afforded to the accused to lead his evidence, but he failed to do so. The revision filed against the said order also came to be dismissed and that is how the matter is now before this Court.

6. It may be noticed that the respondents despite service have failed to put in appearance.

I have heard the learned counsel for the petitioner and have also gone through the material placed on record.

7. At the outset, this Court is firstly required to deal with the scope and ambit of Section 311 Cr.P.C. The provisions have been considered in detail by the Hon'ble Supreme Court in ***State of Haryana*** *versus* ***Ram Mehar and others (2016) 8 SCC 762***, wherein the entire law on the subject was discussed in detail in the following manner:-

> *"26. Having dwelled upon the concept of fair trial we may now proceed to the principles laid down in the precedents of this Court, applicability of the same to a fact situation and duty of the court under Section 311 CrPC. The said provision reads as follows:-*
>
> > *"**311. Power to summon material witness, or examine person present**.- Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re- examine any such person if his evidence appears to it to be essential to the just decision of the case."*
>
> *27. A quarter of a century back, a two-Judge Bench in Mohanlal Shamji Soni v. Union of India 1991 Supp (1) SCC 271 has held that: (SCC pp.276-77, paras 7-9)*
>
> > *"7.....Section 311 is an almost verbatim reproduction of Section 540 of the old Code except for the insertion of the words 'to be' before the word 'essential' occurring in the old section. This section is manifestly in two parts. Whereas the word used in the first part is 'may' the word used in the second part is 'shall'. In consequence, the first part which is permissive gives purely discretionary authority to the Criminal Court and enables it 'at any stage of enquiry, trial or other proceedings' under the Code to act in one of the three ways, namely,*
> >
> > *(1) to summon any person as a witness, or*
> >
> > *(2) to examine any person in attendance, though not summoned as a witness, or*
> >
> > *(3) to recall and re-examine any person already examined.*
> >
> > *8. The second part which is mandatory imposes an obligation on the court —*
> >
> > *(1) to summon and examine, or*
> >
> > *(2) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.*
> >
> > *9. The very usage of the words such as 'any court', 'at any stage', or 'of any enquiry, trial or other proceedings', 'any person' and 'any such person' clearly spells out that this section is expressed in the widest possible terms and do not limit the discretion of the court in any way. However, the very width requires a corresponding caution that the discretionary power should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow for any discretion but it binds and compels the court to take any of the aforementioned two steps if the fresh evidence to be obtained is essential to the just decision of the case." (emphasis supplied)*
>
> *The aforesaid passages make it abundantly clear about the broad applicability of the provision and the role of the court in two distinct situations.*
>
> *28. In the said authority the Court referred to the earlier pronouncements in Rameshwar Dayal and others v. State of Uttar Pradesh (1978) 2 SCC 518, State of West Bengal v. Tulsidas Mundhra 1963 Supp (1) SCR 1, Jamatraj Kewalji Govani*

v. State of Maharashtra AIR 1968 SC 178 and proceeded to opine that: (Mohanlal Shamji Soni Case[21], SCC p.283, para 27)

> *"27.The principle of law that emerges from the views expressed by this Court in the above decisions is that the criminal court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case."*
>
> *(emphasis supplied)*

It is important to note here in the said case, it was also observed that: (SCC p.280, para 18)

> *"18….Though Section 540 (Section 311 of the new Code) is, in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the court should be exercised, or with regard to the manner in which they should be exercised, that power is circumscribed by the principle that underlines Section 540, namely, evidence to be obtained should appear to the court essential to a just decision of the case by getting at the truth by all lawful means. Therefore, it should be borne in mind that the aid of the section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results. Further it is incumbent that due care should be taken by the court while exercising the power under this section and it should not be used for filling up the lacuna left by the prosecution or by the defence or to the disadvantage of the accused or to cause serious prejudice to the defence of the accused or to give an unfair advantage to the rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties". (emphasis supplied)*

29. In Rajendra Prasad v. Narcotic Cell (1999) 6 SCC 110 occasion arose to appreciate the principles stated in Mohanlal Shamji Soni (supra). The two-Judge Bench took note of the observations made in the said case which was to the effect that while exercising the power under Section 311 of CrPC, the court shall not use such power "for filling up the lacuna left by the prosecution". Explaining the said observation Thomas, J. speaking for the Court observed: (Rajendra Prasad Case [25], SCC P.113, para 8)

> *"8.Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better." (emphasis supplied)*

30. After so stating the two-Judge bench referred to the exigencies of the situation and the ample power of the court as has been laid in Mohanlal Shamji Soni (supra)

and further referred to the authority in Jamatraj Kewalji Govani (supra) and opined thus (Rajendra Prasad case[25], SCC p.114, para 12)

> *"12.We cannot therefore accept the contention of the appellant as a legal proposition that the court cannot exercise power of resummoning any witness if once that power was exercised, nor can the power be whittled down merely on the ground that the prosecution discovered laches only when the defence highlighted them during final arguments. The power of the court is plenary to summon or even recall any witness at any stage of the case if the court considers it necessary for a just decision. The steps which the trial court permitted in this case for resummoning certain witnesses cannot therefore be spurned down or frowned at."*
>
> *(emphasis supplied)*

31. The aforesaid decision in Rajendra Prasad case has to be appropriately understood. It reiterates the principle stated in Mohanlal Shamji Soni's case. It has only explained the sphere of lacuna by elaborating the same which has taken place due to oversight and non-production of material evidence due to inadvertence. It is significant to note that it has also reiterated the principle that such evidence is necessary for a just decision by the Court.

32. In U.T. of Dadra & Nagar Haveli and another v. Fatehsinh Mohansinh Chauhan (2006) 7 SCC 529, the Court was dealing with an order passed by the High court whereby it had allowed the revision and set aside the order passed by the learned trial judge who had exercised the power under Section 311 CrPC to summon certain witnesses. The Court referred to the earlier authorities and ruled that it is well settled that the exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof of such facts which lead to a just and correct decision of the case, as it is the primary duty of a criminal court. Calling a witness or re-examining a witness already examined for the purpose of finding out the truth in order to enable the court to arrive at a just decision of the case cannot be dubbed as "filling in a lacuna in the prosecution case" unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused resulting in miscarriage of justice. Be it stated, in the said case the court came to held that summoning of the witnesses was necessary for just and fair decision of the case and accordingly it allowed the appeal and set aside the order passed by the High court.

33. In Rajaram Prasad Yadav v. State of Bihar and another (2013) 14 SCC 461 the Court after referring to Section 311 CrPC and Section 138 of the Evidence Act observed that Section 311 CrPC vest widest powers in the court when it comes to the issue of summoning a witness or to recall or re-examine any witness already examined. Analysing further with regard to "trial", "proceeding", "person already examined", the Court ruled that invocation of Section 311 CrPC and its application in a particular case can be ordered by the court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case. The Court observed that the power vested under the said provision is made available to any court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined is concerned, the court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the court to be essential for the just decision of the case. The learned Judges further ruled that the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to

be ascertained. It was also stated that while such a widest power is invested with the court, exercise of such power should be made judicially and also with extreme care and caution.

34. The Court referred to the earlier decisions and culled out certain principles which are to be kept in mind while exercising power under Section 311 CrPC. We think it seemly to reproduce some of them: (Rajaram Prasad case[27], SCC pp. 473-74, para 17)

> *"17.2. The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.*
>
> *17.3. If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person.*
>
> *17.4. The exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.*
>
> *17.5. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.*
>
> *17.6. The wide discretionary power should be exercised judiciously and not arbitrarily.*
>
> *17.7. The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.*
>
> *x x x x x x x x x*
>
> *17.10. Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified.*
>
> *17.11. The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.*
>
> *x x x x x x x x x*
>
> *17.14. The power under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."*
>
> *(emphasis supplied)*

35. Recently in Shiv Kumar Yadav (supra), the Court reproduced the principles culled out in Rajaram Prasad Yadav's case and thereafter referred to the authority in Hoffman Andreas (supra) wherein it has been laid down that: (Shiv Kumar Yadav case[9], SCC p.416, para 14)

> *"14…'6……The counsel who was engaged for defending the appellant had cross-examined the witnesses but he could not complete the trial because of his death. When the new counsel took up the matter he would certainly be under the disadvantage that he could not ascertain from the erstwhile counsel as to the scheme of the defence strategy which the predeceased advocate had in mind or as to why he had not put further questions on certain aspects. In such circumstances, if the new counsel thought to have the material witnesses further examined the Court could adopt latitude and a liberal view in the interest of justice, particularly when the Court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible". (Hoffman Andreas case, SCC, p.432, para 6)"*

The Court in Shiv Kumar Yadav (supra) case explained the said authority by opining thus:(SCC p.416, para 15)

> *"15. …..While advancement of justice remains the prime object of law, it cannot be understood that recall can be allowed for the asking or reasons related to mere convenience. It has normally to be presumed that the counsel conducting a case is competent particularly when a counsel is appointed by choice of a litigant. Taken to its logical end, the principle that a retrial must follow on every change of a counsel, can have serious consequences on conduct of trials and the criminal justice system. The witnesses cannot be expected to face the hardship of appearing in court repeatedly, particularly in sensitive cases such as the present one. It can result in undue hardship for the victims, especially so, of heinous crimes, if they are required to repeatedly appear in court to face cross- examination."*

We respectfully agree with the aforesaid exposition of law.

36. Keeping in mind the principles stated in the aforesaid authorities the defensibility of the order passed by the High Court has to be tested. We have already reproduced the assertions made in the petition seeking recall of witnesses. We have, for obvious reasons, also reproduced certain passages from the trial court judgment. The grounds urged before the trial court fundamentally pertain to illness of the counsel who was engaged on behalf of the defence and his inability to put questions with regard to weapons mentioned in the FIR and the weapons that are referred to in the evidence of the witnesses. That apart, it has been urged that certain suggestions could not be given. The marrow of the grounds relates to the illness of the counsel. It needs to be stated that the learned trial Judge who had the occasion to observe the conduct of the witnesses and the proceedings in the trial, has clearly held that recalling of the witnesses were not necessary for just decision of the case. The High Court, as we notice, has referred to certain authorities and distinguished the decision in Shiv Kumar Yadav (supra) and Fatehsinh Mohansinh Chauhan (supra). The High Court has opined that the court has to be magnanimous in permitting mistakes to be rectified, more so, when the prosecution was permitted to lead additional evidences by invoking the provisions under Section 311 CrPC. The High Court has also noticed that the accused persons are in prison and, therefore, it should be justified to allow the recall of witnesses.

37. The heart of the matter is whether the reasons ascribed by the High Court are germane for exercise of power under Section 311 CrPC. The criminal trial is

required to proceed in accordance with Section 309 of the CrPC. This court in Vinod Kumar v. State of Punjab (2015) 3 SCC 220, while dealing with delay in examination and cross-examination was compelled to observe thus:(SCC pp. 226-27, para 1)

> *"1.If one is asked a question, what afflicts the legally requisite criminal trial in its conceptual eventuality in this country the two reasons that may earn the status of phenomenal signification are, first, procrastination of trial due to non-availability of witnesses when the trial is in progress and second, unwarranted adjournments sought by the counsel conducting the trial and the unfathomable reasons for acceptation of such prayers for adjournments by the trial courts, despite a statutory command under Section 309 of the Code of Criminal Procedure, 1973 (CrPC) and series of pronouncements by this Court. What was a malady at one time, with the efflux of time, has metamorphosed into malignancy. What was a mere disturbance once has become a disorder, a diseased one, at present".*

And again: (SCC p.246, para 57.5)

> *"57.5. The duty of the court is to see that not only the interest of the accused as per law is protected but also the societal and collective interest is safeguarded. It is distressing to note that despite series of judgments of this Court, the habit of granting adjournment, really an ailment, continues. How long shall we say, "Awake! Arise!". There is a constant discomfort."*

38. Yet again, in Gurnaib Singh v. State of Punjab (2013) 7 SCC 108, the agony was reiterated in the following expression: (SCC p.124, para 35)

> *"35. We have expressed our anguish, agony and concern about the manner in which the trial has been conducted. We hope and trust that the trial courts shall keep in mind the statutory provisions and the interpretation placed by this Court and not be guided by their own thinking or should not become mute spectators when a trial is being conducted by allowing the control to the counsel for the parties. They have their roles to perform. They are required to monitor. They cannot abandon their responsibility. It should be borne in mind that the whole dispensation of criminal justice at the ground level rests on how a trial is conducted. It needs no special emphasis to state that dispensation of criminal justice is not only a concern of the Bench but has to be the concern of the Bar. The administration of justice reflects its purity when the Bench and the Bar perform their duties with utmost sincerity. An advocate cannot afford to bring any kind of disrespect to fairness of trial by taking recourse to subterfuges for procrastinating the same."*

It was thereafter observed as under:-

> "*39. There is a definite purpose in referring to the aforesaid authorities. We are absolutely conscious about the factual matrix in the said cases. The observations were made in the context where examination-in- chief was deferred for quite a long time and the procrastination ruled as the Monarch. Our reference to the said authorities should not be construed to mean that Section 311 CrPC should not be allowed to have its full play. But, a prominent one, the courts cannot ignore the factual score. Recalling of witnesses as envisaged under the said statutory provision on the grounds that accused persons are in custody, the prosecution was allowed to recall some of its witnesses earlier, the counsel was ill and magnanimity commands fairness should be shown, we are inclined to think, are not acceptable in the obtaining factual matrix. The decisions which have used the words that the court should be magnanimous, needless to give special emphasis, did not mean to convey individual generosity or magnanimity which is founded on*

any kind of fanciful notion. It has to be applied on the basis of judicially established and accepted principles. The approach may be liberal but that does not necessarily mean "the liberal approach" shall be the rule and all other parameters shall become exceptions. Recall of some witnesses by the prosecution at one point of time, can never be ground to entertain a petition by the defence though no acceptable ground is made out. It is not an arithmetical distribution. This kind of reasoning can be dangerous."

8. The scope of the aforesaid provisions of Sections 311 and 319 Cr.P.C. again came up for consideration before the Hon'ble Supreme Court recently in ***Amrutbhai Shambhubhai Patel*** *versus* ***Sumanbhai Kantibhai Patel and others, (2017) 4 SCC 177,*** wherein it was observed as under:-

"48. As adverted to hereinabove, whereas Section 311 of the Code empowers a Court at any stage of any inquiry, trial or other proceeding, to summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined, if construed to be essential to be just decision of the case, Section 319 authorizes a Court to proceed against any person, who though not made an accused appears, in course of the inquiry or trial, to have committed the same and can be tried together. These two provisions of the Code explicitly accoutre a Court to summon a material witness or examine a person present at any stage of any inquiry, trial or other proceeding, if it considers it to be essential to the just decision of the case and even proceed against any person, though not an accused in such enquiry or trial, if it appears from the evidence available that he had committed an offence and that he can be tried together with the other accused persons."

9. Yet, again the scope of Section 311 Cr.P.C. was a subject matter of recent decision of the Hon'ble Supreme Court in ***Ratanlal*** *versus* ***Prahlad Jat and others AIR 2017 SC 5006*** wherein it was observed as under:-

"17. In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 311 are enacted whereunder any court by exercising its discretionary authority at any stage of inquiry, trial or other proceeding can summon any person as witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person already examined who are expected to be able to throw light upon the matter in dispute. The object of the provision as a whole is to do justice not only from the point of view of the accused and the prosecution but also from the point of view of an orderly society. This power is to be exercised only for strong and valid reasons and it should be exercised with caution and circumspection. Recall is not a matter of course and the discretion given to the court has to be exercised judicially to prevent failure of justice. Therefore, the reasons for exercising this power should be spelt out in the order.

18. In Vijay Kumar v. State of Uttar Pradesh and Anr., (2011) 8 SCC 136: (2011 AIR SCW 6236), this Court while explaining scope and ambit of Section 311 has held as under:-

> *"Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of CrPC and the principles of criminal law. The discretionary power conferred under Section 311 has to be exercised judicially for reasons stated by the court and not arbitrarily or capriciously".*

19. In Zahira Habibullah Sheikh (5) and Anr. v. State of Gujarat and Others, (2006) 3 SCC 374: (AIR 2006 SC 1367), this Court has considered the concept underlining under Section 311 as under:-

> *"The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of any inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind".*

20. In State (NCT of Delhi) v. Shiv Kumar Yadav & Anr., (2016) 2 SCC 402 : (AIR 2015 SC 3501), it was held thus:-

> *"..... Certainly, recall could be permitted if essential for the just decision, but not on such consideration as has been adopted in the present case. Mere observation that recall was necessary "for ensuring fair trial" is not enough unless there are tangible reasons to show how the fair trial suffered without recall. Recall is not a matter of course and the discretion given to the court has to be exercised judiciously to prevent failure of justice and not arbitrarily. While the party is even permitted to correct its bona fide error and may be entitled to further opportunity even when such opportunity may be sought without any fault on the part of the opposite party, plea for recall for advancing justice has to be bona fide and has to be balanced carefully with the other relevant considerations including uncalled for hardship to the witnesses and uncalled for delay in the trial. Having regard to these considerations, there is no ground to justify the recall of witnesses already examined".*

10. Thus, what can be clearly gathered from the aforesaid exposition of law is that Section 311 Cr.P.C. has been enacted to enable the Court to find the truth and render a just decision whereunder any Court by exercising its discretionary authority at any stage of inquiry, trial or other proceedings can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person already examined, who is expected to be able to throw light upon the matter in dispute. The object of the provision as a whole is to do justice not only from the point of view of the accused and the prosecution but also from the point of view of an orderly society. Yet, this power has to be exercised only for strong and valid reasons that too with care, caution and circumspection. Recall is not a matter of course and the discretion given to the Court has to be exercised judicially to prevent failure of justice.

11. Bearing in mind the law propounded by the Hon'ble Supreme Court in the aforesaid cases, it would be noticed that in the application filed by the accused under Section 311 Cr.P.C., he had specifically stated that during the trial, defence witness Shakti Gupta, authorized representative of 'M/s Motilal Oswal Securities Ltd' has appeared as AW-1 on 29.04.2015 and tendered documents Ex. AW 1/A, B, C, D, E, F and G and it was then that the accused, for the

first time, came to know about the fate of the investment against which the security cheques have been issued by the accused. In fact, the statement of Shri Gupta clearly depicted that the original complainant had applied for termination and closure of PMS account on 28.07.2011 i.e. within three days of his instituting the present complaint and thereafter had withdrawn the entire value of his investment on 08.08.2011 and on the said date the value of the investment amounted to Rs.13,77,840/-. The investment from PMS was clandestinely transferred by the original complainant to his D Mat Account with Elite Stock Management Ltd., New Delhi A/c No. IN 301670-10010508. Entire investment comprising of shares of 15 different companies was transferred by 'Motilal Oswal Securities Ltd.' as per the written request of the original complainant while the complainant in his cross examination had deposed that he had paid Rs.13,86, 250/- and received back Rs.5,00,000/-.

12. Now in case the reply to the application is adverted to, it would be noticed that the aforesaid averments are contained in paras 9 to 12 of the application and, therefore, it is apt to reproduce the corresponding reply to these paras which reads thus:-

> *"9. That Para No.9 to 11 are wrong hence denied.*
>
> *10. In reply to para 12 it is submitted that there are two complaints pending in the court against accused and accused has made the payment of Rs.5,00,000/- as part payment which goes to show that accused is having legal liability to discharge qua complainant."*

13. Undoubtedly, the pleadings in such like cases cannot strictly be construed, but nonetheless the least that the complainant was required to do was to have given specific reply to the specific allegations. Having failed to do so, there is no legitimate ground on which the application filed by the accused under Section 311 Cr.P.C. could have been opposed by the complainant.

14. Now adverting to the reasons assigned by the learned trial Magistrate, it would be noticed that the learned trial Magistrate has rejected the application only on the ground that sufficient opportunities had been granted to the accused for leading his evidence and having failed to do so, no further opportunity could be granted to him and such reasonings unfortunately stand affirmed even by the learned Sessions Judge.

15. What appears to have clearly been ignored by both the learned Courts below is the salutary provision for which Section 311 Cr.P.C. has been enacted as has otherwise been already discussed above. Both the learned Courts below have failed to adhere to the well known adage that every trial is a voyage, in which quest for truth is the goal.

16. In ***Ritesh Tewari and another*** *versus* ***State of Uttar Pradesh and others (2010) 10 SCC 677***, the Hon'ble Supreme Court observed as under:-

> "*Every trial is voyage of discovery in which truth is the quest."*

17. In the administration of justice, Judges and Lawyers play equal roles. Like Judges, Lawyers must also ensure that truth triumphs in the administration of justice. Truth is the foundation for justice. It is incumbent upon all the Judicial Officers to make an endeavour to ascertain truth in every matter and to leave no stone unturned in achieving this object.

18. In view of the aforesaid discussion, the orders impugned herein cannot withstand judicial scrutiny and are accordingly set aside. The application is accordingly allowed.

19. The petition stands disposed of in the aforesaid terms, so also the pending application(s), if any.

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

Jiwan Lal & another ..petitioners
Versus
Varinder Kumar ..Respondent

CMPMO No. 467 of 2017.
Decided on : 20.12.2017

Code of Civil Procedure, 1908- Order 9 Rule 7 read with Section 151- Application under Order 9 Rule 7 readwith Section 151 CPC allowed by the learned Trial Court below by way of a non-speaking order - Challenged before the High Court- **Court Held-** that an order passed by the judicial authority or a quasi judicial authority has to be both reasoned and speaking and the rational behind it is that it enables one to understand as to how the Court has arrived at that conclusion. (Para-2 to 4)

For the petitioners : Mr. Dheeraj Kumar Vashisht, Advocate.
For the respondent: Mr. Y.P.S. Dhaulta, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (oral)

Having heard the learned Counsel for the parties and having perused the impugned order dated 26.05.2017, passed by the learned Civil Judge, Court No. III, Amb, Distt. Una, (HP), in my considered view, the same is not sustainable in the eyes of law, as the order is both un-reasoned and non-speaking.

2. It is settled law that any order, be it passed by a judicial authority or a quasi judicial authority, has to be both reasoned and speaking. The rational, as to why the Court has to pass a reasoned and speaking order, is that a perusal of the order should be self demonstrative as to why the Court has arrived at that conclusion. This is missing in the impugned order, as no reasoning has been assigned by the learned Judge as to what weighed with it, while it allowed the application so filed by the present respondent under Order 9 Rule 7 read with Section 151 of the Code of Civil Procedure at a belated stage. In my considered view, it was not enough for the learned Court below to have simply said that though the application was filed at belated stage, but sufficient reasons stood assigned as to why there was delay in filing the application. There ought to have judicial reasons assigned by the learned Judge as to why the averments so contained in the application found merit with the Court.

3. In view of the above, this petition is allowed. Impugned order dated 26.05.2017, passed by the learned Civil Judge, Court No. III, Amb, Distt. Una, (HP), is set aside and the matter is remanded back to the learned Court below with the direction to decide the application, so filed by the present respondent under Order 9 Rule 7 read with Section 151 of the Code of Civil Procedure, afresh after hearing both the parties.

4. It is clarified that what order the learned Court below has to pass on the application, is the prerogative of the learned Court below and all that this Court expects, is that the order which shall be passed by the learned Court below, should be reasoned and speaking one. It is further clarified that this Court has not expressed any opinion on the merits of the application, so filed by the present respondent, under Order 9 Rule 7 read with Section 151 of the Code of Civil Procedure.

5. Parties through their Counsel are directed to appear before the learned Court below on **17.01.2018.**

6. Accordingly, the petition is disposed of, so also the pending application, if any.

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

State of H.P. and others ....Appellants.

Versus

Lekh Ram (died) through LRs & others ....Respondents

RFA Nos. 255 of 2011 and 256 of 2011 with
Cross objections No. 453 of 2011 & 454 of 2011
Date of Decision 20th December, 2017

Land Acquisition Act, 1894- Section 4- Regular First Appeal- An award passed by the Referral Court challenged by way of an appeal and cross-objections- Moot Question being whether deduction of 30% from the exemplar's sale deed on the ground that when large tracks are acquired, the transaction in respect of small properties do not offer a proper guideline and valuation of small transaction cannot be taken as a real basis for determining the compensation for larger tracks of land- **Held-** that the aforesaid deduction can be made- Deduction made for the purposes of development of the site also distinguished from the deduction made on the basis of small tracks of land required to be carried out in an exemplar's sale transaction. (Para- 16 to 20)

Land Acquisition Act, 1894- Section 4- Regular First Appeal- Further Held- that the respondents/claimants were also entitled to an additional interest by way of damages @ 15% per annum from the date of taking the actual possession till the date of notification under Section 4 of the Act. (Para-24 to 28)

Cases referred:

HP Housing Board vs. Ram Lal, 2003(3) Shim.LC (64),
Union of India vs. Harinder Pal Singh, 2005(12) SCC 564
Gulabi vs. State of H.P. 1998(1) Shim.LC 41
Executive Engineer and another vs. Dilla Ram Latest HLJ (2008)2 HP 1007.
Kaushlya Devi Bogra and others vs. Land Acquisition Collector Aurangabad, AIR 1984 SC 812
State of H.P. and another vs. Sanjeev Kumar and another 2010(2) SLJ (HP) 1225
The Collector of Lakhimpur vs. Bhuban Chandra Dutta AIR 1971 SC 2015
Union of India vs. Joginder Singh and other connected matters Latest HLJ 2009 (HP) 416
GM, Northern Railway vs. Guzar Singh and others 2014(3) Shim.LC 1356
Indian Council of Medical Research vs. T.N.Sanikop and another 2014(16) SCC 274
Major General Kapil Mehra and others vs. Union of India and another 2015(2) SCC 262
Chandrashekar (dead) by LRs and others vs. Land Acquisition Officer, (2012)1 SCC 390
Atma Singh (dead) through LRs and others vs. State of Haryana and anothers (2008)2 SCC 568
Balwan Singh and others vs. Land Acquisition Collector and another (2016)13 SCC 412

For the Appellants /Non-objectors: Mr. Pankaj Negi, Deputy Advocate General.

For the Respondents/Objectors: Mr. J.L.Bhardwaj and Mr.Sanjay Bhardwaj Advocates, for the respondents in both appeals.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.(Oral)

These appeals and Cross Objections arising out of common award passed by learned District Judge, Bilaspur in Land Reference Petitions Nos. 145 and 147 of 2008 involves common questions of law and facts and are being disposed of by a common judgment.

2. Brief facts of the case, necessary for deciding these appeals and cross objections, are that land of respondents/cross-objectors, situated in village Tepra, Sub Tehsil Namhol, District Bilaspur was utilized for construction of Tepra Kuhal Katal road and Notification dated 14.3.2006 under Section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as 'the Act') issued, subsequent thereto, on 8.4.2006, was published in official gazette as well as in two daily newspapers on 9.4.2006, whereafter, completing codal fomalities, Land Acquisition Collector passed a common award No. 12 dated 8.10.2007 with respect to land of respondents/cross-objectors by assessing market value of acquired land on the basis of classification of land as under:-

Classification of land	**Rate per Bigha**
1.Kohali Aval	Rs.2,18,356.00
2.Kohali Doem	Rs.1,99,089.00
3.Anderli Aval	Rs.1,60,556.00
4.Anderli Doem	Rs.1,25,233.00
5.Baharli Aval	Rs. 80,728.00
6.Bharli Doem	Rs. 38,533.00
7. Khariyater & Banjer	Rs. 19,267.00

3. Respondents/Cross-objectors had preferred land references under Section 18 of the Act mentioned supra, against the award of Land Acquisition Collector before learned District Judge, who on the basis of material before him, had enhanced the compensation by awarding uniform rate of Rs.7.00 lakhs per bigha for all categories of land, irrespective of its classification, along with other consequential benefits in accordance with provisions of the Act. The said award is under challenge in these appeals and cross objections.

4. I have heard learned Deputy Advocate General as well as learned counsel for respondents/cross-objectors and have also gone through the entire record of the case.

5. Both these reference petitions were clubbed together by learned District Judge and evidence has been led only in the lead case. Five witnesses have been examined on behalf of respondents/cross-objectors. PW1 Babu Ram, Registration Clerk, office of Sub Registrar-cum-Naib Tehsildar, Sadar Bilaspur has proved execution and registration of sale deed of the land measuring 0-1 bigha (1 biswa) situated in mauja Tepra, Tehsil Sadar, District Bilaspur by PW2 Garja Ram in favour of PW3 Kuldip for a consideration of Rs.50,000/-. In cross examination, he has expressed his ignorance about the fact that PW2 has sold his land for lesser consideration than amount of consideration shown in the sale deed. He has shown his inability to tell actual sale value of land in question at that time.

6. PW2 Garja Ram, vendor has endorsed the execution of sale deed Ext.PW1/A on 24.11.2004 for the reason that he was in dire need of money on account of marriage of his daughter. He has denied the suggestion that sale consideration was lesser than that of shown in sale deed and higher sale consideration has been depicted in sale deed to claim higher compensation. PW3 Vendee, in his statement, has also reiterated the versions of PWs 1 and 2 and further stating that land in question was purchased by him as it was abutting to his land.

7. Land owner, PW4 Lekh Ram has also been examined on behalf of all land owners. He, in his statement in Court, has deposed that vehicular traffic on the Namhol-

Bahadurpur road constructed in the year 1986 was started in the year 1988 and for construction of the said road their land was utilized and the value of their land was about Rs.50,000/- per biswa at that time, various trees standing on their land were also uprooted and they were sowing cash vegetables in the said land and further that Cellular Companies are paying Rs.4000/- per month for raising tower upon their land. He has prayed for compensation w.e.f. 1988. He has alleged that stones excavated from their land were also utilized by the department for raising retaining walls during construction of road. In cross examination, he has denied all suggestions including the suggestion that road was not constructed in the year 1986 and adequate compensation in accordance with law has been awarded keeping in view the nature and market value of the land. However, he admitted that towers by Cellular Companies were installed later on after construction of the road.

8. During the pendency of appeals and cross objections in this Court, respondents/cross-objectors have also placed on record a certified copy of reply of the State filed in CWP No. 735 of 2004 wherein it is stated by State that road "Namhol-Bahadurpur road" in question was constructed during in the year 1988 and was opened for vehicular traffic and it is also averred in the said reply that said road was constructed on public demand.

9. Appellants/respondents have not chosen to lead any oral or documentary evidence, except tendering the sale deed Ext.RA dated 18.1.2003 pertaining to the land situated in village Tayaman, Pargana Bahadurpur, Tehsil Sadar, District Bilaspur.

10. In the light of aforesaid oral and documentary evidence and also settled law of land, merits of rival contentions of parties are to be assessed.

11. For purpose of acquisition in present case i.e. construction of road, classification completely looses significance as the acquired land is to be used as a single unit for construction of road. It is well settled that at the time of determining of market value of land for acquisition, the purpose for which the land is acquired is relevant and not nature and classification of land and where nature and classification of the land has no relevance for purpose of acquisition, the market value of the land is to be determined as a single unit irrespective of nature and classification of the land. Therefore, award of uniform rate to all kinds of land under acquisition as a single unit irrespective of their nature and classification by learned District Judge does not warrant interference. ***(See HP Housing Board vs. Ram Lal***, reported in ***2003(3) Shim.LC (64), Union of India vs. Harinder Pal Singh,*** reported in ***2005(12) SCC 564*** and in case ***Gulabi vs. State of H.P.*** reported in ***1998(1) Shim.LC 41*** and ***Executive Engineer and another vs. Dilla Ram Latest HLJ (2008)2 HP 1007.)***

12. The State of Himachal Pradesh has preferred these appeals on the ground that impugned award has not only been passed by ignoring sale deed Ext.RA produced by the appellants pertaining to the same village but also taking into consideration the sale deed Ext.PW1/A pertaining to small chunk i.e. one biswa of land, giving abnormal hike in the market value of the acquired land. During arguments, learned Deputy Advocate General has contended that learned District Judge has deducted only 30% of the market value arrived at on the basis of Ext.PW1/A whereas deduction of 40% to 50% was required to be made on the basis of pronouncements of the Court.

13. Plea of State that at the time of determining market value of land in question learned District Judge should have considered the sale deed Ext.RA tendered in evidence by the State is not sustainable for the reasons; (a) that the said sale deed was executed in 18.1.2003, whereas date of publication of Notification under Section 4 of the Act in official gazette is 8.4.2006 and sale deed produced by respondents/cross-objectors Ext.PW1/A is dated 24.11.2004; (b) that the sale deed Ext.RA pertains to a different area i.e. village Dabar, whereas Ext.PW1/A pertains to the same village Tepra, land of which village is in question for acquisition. The sale deed Ext.PW1/A is more proximate than Ext.RA in time with respect to Notification under Section 4 of the Act and also in location with the land acquired by appellants/non-objectors. Ext.PW1/A is proximate to the time and location as required under law for an

exemplars' sale deed to be taken into consideration for determining of market value of the land to be acquired.

14. Learned District Judge has deducted 30% from the market value calculated on the basis of exemplar's sale deed Ext.PW1/A by relying upon judgment of Apex Court in ***Kaushlya Devi Bogra and others vs. Land Acquisition Collector Aurangabad,*** reported in ***AIR 1984 SC 812*** on the ground that when large tracks are acquired, the transaction in respect of small properties do not offer a proper guideline and valuation in transaction related to smaller property cannot be taken as real basis for determining the compensation for large tracks of property and therefore, for determining market value of large property on the basis of sale transactions for smaller property, a deduction should be made. Learned District Judge has also placed reliance upon the judgment of Coordinate Bench of this Court in case ***State of H.P. and another vs. Sanjeev Kumar and another*** reported in ***2010(2) SLJ (HP) 1225*** wherein after relying upon pronouncements of Apex Court in ***The Collector of Lakhimpur vs. Bhuban Chandra Dutta*** reported in ***AIR 1971 SC 2015*** and ***Kaushalya Devi Bogra's*** case supra, a deduction of 30% was permitted on the ground that the sale deed of smaller piece of land was relied upon for determining the price of large area in question under acquisition.

15. On contrary, on the basis of cross objections filed on behalf of respondents/cross-objectors, learned counsel for them contended that learned District Judge has committed a mistake by deciding market value of the acquired land after deducting 30% from the rate of land proved on the basis of sale transactions Ext.PW1/A as according to him, it is settled that exemplars' sale deed cannot be discarded on this ground that it is of small piece of land and it also cannot be a ground to make deduction from the market value of land proved on the basis of such sale transaction.

16. Learned counsel for respondents/cross-objectors has relied upon judgment of this Court in case ***Union of India vs. Joginder Singh and other connected matters*** reported in ***Latest HLJ 2009 (HP) 416,*** wherein it is held that no deduction is required to be carried out in an exemplar's sale transactions pertaining to the very same village having proximity of the time of acquisition where it is proved that land in question is having the same advantage as the land in exampler's sale deed has and also that big chunk is not to be seen in relation to area of acquired land but in relation to the individual holdings. In the present case, there is no iota of evidence on this count. Therefore, 30% deduction from the market value of land proved by exemplars; sale deed has correctly been made by the learned District Judge. Judgment in ***Sanjeev Kumar's case supra,*** relied upon by learned District Judge for 30% deduction, is based on the pronouncement of the Apex Court and is also later in time and therefore, learned District Judge has not committed any error in relying upon the said judgment.

17. Learned counsel for respondents/cross-objectors have also relied upon pronouncement in case ***GM, Northern Railway vs. Guzar Singh and others*** reported in ***2014(3) Shim.LC 1356*** wherein no deduction was permitted for determining the market value of land under acquisition on the basis of exemplar sale deed of smaller plot. Perusal of this judgment shows that in that case, it was proved on record that land involved in exemplar's sale deed was in close proximity with the land under acquisition having the same potential, whereas in the present case, neither in reference petitions nor in deposition of the witnesses examined in the Court on behalf of respondents/cross-objectors,

it has been stated that land under acquisition was having quality and potential equivalent to the land involved in exemplars' sale deed. Therefore, ratio of law based on different facts as laid in ***Gujar Singh's case supra*** is not applicable in present case.

18. It is also contended on behalf of State that learned District Judge has committed mistake by allowing only 30% deduction whereas deduction upto 40-50% was required to be made for development. Heavy reliance has been placed on judgments passed in cases titled as ***Indian Council of Medical Research vs. T.N.Sanikop and another*** reported in ***2014(16) SCC***

274 & Major General Kapil Mehra and others vs. Union of India and another reported in ***2015(2) SCC 262*** wherein deduction upto 75% has been held to be permissible.

19. Plea of the State on this issue is misconceived. In present case, acquisition is not for the purpose of developing a Housing Colony, setting up a commercial unit or any other purpose of like nature which may have resulted development of area on the cost of the State. In the judgments relied upon by the appellant-State, the deductions were allowed for two purposes i.e. (a) deduction for providing development infrastructure and (b) deduction for developmental expenditure/expense and these deduction have been explained by the Apex Court in case titled ***Chandrashekar (dead) by LRs and others vs. Land Acquisition Officer,*** reported in ***(2012)1 SCC 390,*** which is as under:-

> ***"19. Based on the precedents on the issue referred to above it is seen, that as the legal proposition on the point crystallized, this Court divided the quantum of deductions (to be made from the market value determined on the basis of the developed exemplar transaction) on account of development into two components.***
>
> ***19.1 Firstly, space/area which would have to be left out, for providing indispensable amenities like formation of roads and adjoining pavements, laying of sewers and rain/flood water drains, overhead water tanks and water lines, water and effluent treatment plants, electricity sub-stations, electricity lines and street lights, telecommunication towers etc. Besides the aforesaid, land has also to be kept apart for parks, gardens and playgrounds. Additionally, development includes provision of civic amenities like educational institutions, dispensaries and hospitals, police stations, petrol pumps etc. This "first component", may conveniently be referred to as deductions for keeping aside area/space for providing developmental infrastructure.***
>
> ***19.2 Secondly, deduction has to be made for the expenditure/expense which is likely to be incurred in providing and raising the infrastructure and civic amenities referred to above, including costs for levelling hillocks and filling up low lying lands and ditches, plotting out smaller plots and the like. This "second component" may conveniently be referred to as deductions for developmental expenditure/expense.***
>
> ***20. It is essential to earmark appropriate deductions, out of the market value of an exemplar land, for each of the two components referred to above. This would be the first step towards balancing the differential factors. This would pave the way for determining the market value of the undeveloped acquired land on the basis of market value of the developed exemplar land.***

20. In the present case, acquisition is for the purpose of construction of road and therefore, deduction price of development on the basis of either of the aforesaid two components is not applicable.

21. Prouncements of the Apex Court in case ***Atma Singh (dead) through LRs and others vs. State of Haryana and anothers*** reported in ***(2008)2 SCC 568*** relied upon by appellant-State is also not applicable in the present case as in that case land was acquired for setting up a Sugar Factory and deduction upto 10% for development of the site was permitted, keeping in view the substantial profit from the Sugar Factory to be earned by beneficiary of acquisition.

22. It is further contended that the land of respondents/cross-objectors was utilized for construction of road in the year 1988 but the same was not acquired at that time and it was only on the filing of Civil Writ Petition No. 735 of 2004, titled Kanshi and others vs. State of Himachal Pradesh, by and on behalf of respondents/cross-objectors in the year 2004, the State

had initiated acquisition proceedings in the year 2005 and therefore, on the basis of pronouncements of the Apex Court, it is further contended that respondents/cross-objectors are also entitled for rent/damages for use and occupation of their land by the State for road in question since 1988 till the date of Notification under Section 4 of the Act i.e. 09.04.2006.

23. In para 5 of reference petition preferred under Section 18 of the Act, it is specifically averred that State had acquired the land of respondents/cross-objectors in pursuance to direction passed by this Court. In reply thereto, filed by State and Land Acquisition Collector, this fact is not denied specifically but stated that the contents of this para are wrong, whereas in reply on behalf of the State, acquisition of land and determination of compensation by Land Acquisition Collector vide impugned award is admitted and rest of contents of para are denied in general without specifically denying the fact related to direction of the High Court.

24. In para 4 of the reference petition, respondents/cross-objectors have categorically stated that possession of land was admittedly taken in the year 1988 but no interest on compensation amount from the actual date of taking over possession of the land was granted. In reply to that, Land Acquisition Collector has only stated that contents of said para are wrong and hence denied. Similarly, in reply to the said para by the State, it is stated that contents of this para are denied being incorrect with further averments that compensation has been paid as per law. In rejoinder, respondents/cross-objectors have reiterated their claim set up in the reference petition.

25. Plea of the respondents/cross-objectors regarding taking possession of their land for construction of road in the year 1988 categorically averred in reference petition, has neither been specifically denied nor replied in response to the reference petition. Respondents/cross-objectors have also substantiated their plea by leading oral evidence with respect to the said fact, whereas appellants/State has chosen not to lead any oral or documentary evidence in this regard. It is contended on behalf of respondents/cross-objectors that the acquisition of land was initiated in pursuance to the directions of this Court in CWP No. 735 of 2004 wherein stand of State, as per their reply, was specific and categrical that the land in question was utilized for construction of road in the year 1988 on public demand. To prove this fact though respondents/cross-objectors have also placed on record reply filed by the State as Mark 'X' during the pendency of present appeal/cross objections to substantiate their plea by referring admission/stand of appellant-State in the said reply, but, for not proving the said document/reply on record in accordance with law, the same cannot be considered for want of admissibility thereof in evidence. However, specific plea of land owners, taken in reference petition supported by their oral evidence has not been rebutted by appellant-State either in reply or by leading oral or documentary evidence. It is settled law that denial simplicitor of a fact is not sufficient to rebut the plea of either party. Denial must be specific and supported by evidence. In present case, as discussed above, neither averment made in reference petition has been rebutted in reply thereto nor oral evidence of respondents/cross-objectors has been repelled by leading any cogent evidence on behalf of the State. Therefore, plea of respondents/cross-objectors taking of possession of land in question for construction of Namhol-Bahadurpur road in the year 1988 is duly proved.

26. Admittedly, notification under Section 4 of the Act was published in official gazette on 8.4.2006 and Land Acquisition Collector or learned District Judge has not awarded any rent or damages for utilization of land of respondents/cross-objectors since 1988 till 8.4.2006. The said rent/damage was required to be determined by the Land Acquisition Collector at the time of annoucing award for compensation.

27. Learned counsel for respondents/cross-objectors have also placed reliance upon the pronoucement of the Apex Court in case ***Balwan Singh and others vs. Land Acquisition Collector and another*** reported in ***(2016)13 SCC 412*** wherein after considering and relying upon judgment passed in cases R.L.Jain(D) by LRs vs. DDA reported in (2004)4 SCC 79, Madishetti Bala Ramul vs. Land Acquisition Officer reported in (2007)9 SCC 650 and Tahera Khotoon vs. Land Acquisition Officer (2014) 13 SCC 613, land owners in the similar

circumstances were awarded an additional interest by way of damages at the rate of 15% per annum from taking the actual possession till the date of notification under Section 4 of the Act.

28. In present case, there is no specific date on record with respect to taking of possession by the State in the year 1988. Therefore, respondents/cross-objectors are awarded additional interest @ 15% per annum on the market value of land fixed by reference Court, since 1.1.1989 till the date of notification under Section 4 of the Act i.e. 8.4.2006 as damages for utilization of land for road.

29. In view of the above discussion, appeals filed by the State are dismissed and the Cross objections filed by respondents/cross-objectors are allowed in the above terms and impugned award is modified to that extent. The State is directed to calculate the damages accordingly by ***31st January, 2018*** and pay the same on or before ***30th April, 2018*** to the respondents/cross-objectors.

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

State of H.P. .....Appellant.

Versus

Sanjeev Kumar and others .....Respondents.

Cr. Appeal No. 603 of 2008
Decided on : 20.12.2017

Indian Penal Code, 1860- Sections 451, 147, 149, 323, 427 and 506- Indian Evidence Act, 1872- Section 27- Allegation against the accused persons is that they constituted an unlawful assembly and tresspassed in the house of complainant- accused armed with dandas and hockey sticks, beat the complainant and his family members- The learned Trial Court acquitted the accused persons for want of legally valid and admissible evidence- **Held**, that the mere fact that the weapon of offence was recovered at the instance of the accused does not lead to the conclusion of involvement of the accused persons in the commission of offence, unless, it is not established that said weapon of offence was actually used for commission of the offence – no merit in the appeal- appeal dismissed. (Para-9 and 10)

For the appellant: Mr. R.S.Thakur, Addl. A.G.

For the respondents No. 1 to 5 and 7 : Mr. Y.P.S. Dhaulta, Advocate Legal Aid Counsel.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed against the impugned judgement of acquittal recorded by the learned Chief Judicial Magistrate, Kangra at Dharamshala, District Kangra upon Crl. Case No. 77-II/2004, whereby, he pronounced an order of acquittal, upon, the accused qua the offences in respect whereof, they stood charged.

2. The brief facts of the case are that on 19.08.2004 at about 9.30 p.m the complainant, Sh. Ashwani Kumar was present in his house alongwith other members of the family. They are talking with a guest and were about to take the dinner when the accused armed with Dandas and Hockey sticks entered in the Courtyard of the complainant and started using filthy language. Accused Sandeep Kumar hit the complainant with hockey stick and the accused Ashok Kumar used the Danda to beat Rajiv Kumar. Accused Sanjeev Kumar gave a Danda blow to the wife of the complainant. The other two accused surrounded Sawarna Devi and she was also beaten. On hearing the cries of the complainant and other members of his family Moti Ram

S/o Chamaroo, Surinder Nath, Bimla Devi and Gulshan reached there and they rescued the complainant and others. The matter was reported to the police and on completion of the investigation, into the offences, allegedly committed by the accused, the Investigating Officer concerned filed a report under Section 173 Cr. P.C. before the Court concerned.

3. Thereupon, the accused stood charged by the learned trial Court for theirs allegedly committing offences punishable under Sections 451, 147, 149, 323, 427 and 506 of the Indian Penal Code, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 11 witnesses. On closure of prosecution evidence, the statements of the accused, under, Section 313 of the Code of Criminal Procedure were recorded, wherein, they pleaded innocence and claimed false implication. They choose not to lead any defence evidence.

5. The State of H.P. is aggrieved by the judgment of acquittal recorded, upon, the accused/respondents, by the learned Court below. The learned Addl. Advocate General, has concertedly and vigorously contended that the findings of acquittal recorded by the learned Court below, being not harbored upon a proper appreciation “by it” of the evidence on record rather theirs standing sequelled by gross mis-appreciation “by it" of the material evidence on record. Hence, he, contends that the findings of acquittal warranting reversal by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction besides concomitantly, appropriate sentence(s) being imposed upon the accused/respondent.

6. On the other hand, the learned defence counsel has with considerable force and vigour, contended that the findings of acquittal recorded by the learned Court below being based on a mature and balanced appreciation “by it” of the evidence on record, hence theirs not warranting any interference, rather theirs meriting vindication.

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

8. The learned Additional Advocate General has contended that the affording, by the learned trial Court vis-à-vis the accused, the benefit of doubt being hinged, upon untenable grounds besides is engendered, from, its irreverence to the gravity of evidence of probative vigour, hence necessitates interference by this Court. He has further argued that the findings of acquittal recorded upon the accused, for theirs allegedly committing offence(s) punishable under Sections 147, 148, 149, 341, 325 and 506 of the Indian Penal Code, being not anvilled, upon proper appreciation of evidence, as such, they necessitate interference by this Court.

9. The victims PW-2 and PW-7 supported the version qua the occurrence embodied in the F.I.R also the MLC prepared in their regard, by the doctor concerned stand proven by PW-1. However, even though on anvil, of, the aforesaid prosecution evidence, this Court would be constrained to reverse the findings of acquittal returned upon the accused (i) yet with the prosecution also leading into the witness box purported eye witness(es) to the relevant occurrence, who respectively deposed as PW-8 and PW-9, hence enjoined the latter to testify in harmony therewith. However, PW-9 as purported eye witness, has completely reneged from his previous rendered statement, hence, this witness was declared hostile AND on permission being, accorded, to the learned Public Prosecutor, on a request made by him before the learned trial Court, to cross-examine this witness, yet in course thereof also he has not supported the prosecution case, thereupon it is to be concluded of the aforesaid purported independent witnesses, not, meteing succor to the genesis of the occurrence. The other ocular witness who testified as PW-8 has not rendered a version, wherefrom, it would be befitting to draw a firm inference, of, eye witness(es) to the alleged misdemonor(s) of the accused inflicting simple injuries on the person of the victim hence firmly sustaining them. Moreover, the apposite recovery memo comprised in Ex. PW-2/B, is, the incriminating piece of evidence, against, the accused. Normally, recovery of any weapon of offence, has, to occur, within the domain of Section 27 of the Indian Evidence Act, wherein for any effectuation of recovery of any weapon of offence, at, the instance of the accused by the Investigating Officer concerned, to hence acquire statutory vigour, enjoins the Investigating officer concerned to preceding his making the relevant recoveries, his recording a

disclosure statement of the accused concerned. However, the Investigating Officer neither within the precincts of Section 27, of, the Indian Evidence Act hence recorded a disclosure statement, of, any of the accused concerned nor he proceeded to subsequent thereto hence effect the relevant recoveries. Contrarily, he for reason(s) hereafter stated rather inefficaciously/fictitiously prepared Ext. PW-2/B, with a recital therein qua PW-2 hading over "Danda" to him. The aforesaid incriminatory piece of evidence against the accused, yet stands canvassed by the learned Additional Deputy Advocate General, to be, not warranting disimputation of credence nor also it being open for this Court, to discard its probative vigour, given the accused after using it, leaving it at the site of occurrence, whereafter, they fled therefrom. Hence, he contends that thereupon PW-2 proceeded to handover "danda" to the Investigating Officer concerned. He also proceeds to contend that since the Investigating Officer concerned, not, within the domain of Section 27 of the Indian Evidence Act hence effectuating its recovery, hence, there was no legal necessity cast upon him to obey its mandate nor hence on its mandate standing infringed, would give any capital to the accused. However, the aforesaid submission warrants rejection, (i) as the aforesaid manner of effectuation of recovery of the purported weapon of offence, appears to be made by the Investigating Officer concerned, by his, actively circumventing the mandate of Section 27 of the Indian Evidence Act, (ii) whereas, with the aforesaid weapon of offence rather comprising the best incriminatory piece of evidence also when with respect to validity(s) of recovery thereof, apt provisions are encapsulated in the relevant Indian Evidence Act, (iii) hence, he was enjoined, to, for dispelling arousal of suspicion(s), with respect to the efficacy of the relevant recovery, hence, revere mandate thereof rather than his proceeding to engineer an ingenious method, to proceed to make recovery of weapon, of offence, in the manner he did under memo Ex.PW2/B The provisions of Section 27 of the Indian Evidence Act read as under:-

> "27. How much of information received from accused may be proved. -Provided that, when any fact is deposed to as is covered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

10. For the reasons which have been recorded hereinabove, this Court holds that the learned Chief Judicial Magistrate has hence appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom, the analysis of material on record by him, does not, suffer from any gross perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather he has aptly appreciated the material available on record. Consequently, with this Court concluding that recovery of Danda, not holding any vigour, it is apt to conclude that the prosecution has failed to establish that the Danda was used by the accused concerned, to inflict blows on the person of the victim/complainant.

11. In view of the above, I find no merit in this appeal which is accordingly dismissed. In sequel, the impugned judgement is affirmed and maintained. Record of the learned trial Court be sent back forthwith. Personal and surety bonds, if any, stand cancelled and discharged.

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

Anita Chandel .....Appellant.

Versus

Maneet Khanel and others .....Respondents.

FAO No.: 363 of 2017
Date of Decision : 21/12/2017

Hindu Marriage Act, 1955- Section 13- Petition for Desertion of marriage and claim of compensation to the tune of Rs.50 lacs- Objection qua non-fixation of ad-volerem Court fee in

respect of claimed compensation amount - Petitioner abandoned the claim of compensation and moved an amendment application for seeking appropriate relief- Respondent moved an application under Order 7 Rule 11 CPC for rejecting the petition for non fixing of requisite court fee on the compensation amount originally claimed - application allowed by the concerned Court and petition rejected- **Held**, that the learned District Judge erred in rejecting the petition on the ground of non-payment of court fee as no court can insist a party to prosecute any cause of action and to pay ad-volerem court fee on originally incorporated relief- order set aside- petition allowed. (Para-1 and 2)

For the Appellant: Mr. Jiya Lal Bhardwaj, Adv.
For the respondents: Mr. Naresh Sharma, Adv. for respondents No. 1 to 3.

The following judgment of the Court was delivered:

Sureshwar Thakur, *Judge (oral)*

The petitioner herein, filed on 10.06.2016, a petition before the learned District Judge, concerned, petition whereof is cast under the provisions of Section 12(1)(a) of the Hindu Marriage Act, 1955. In the petition, the petitioner prays, for, dissolution of marital ties, with, her legally wedded husband AND also claims compensation, of, Rs.50lacs, from the respondents. However, Court fees ad-valorem vis-à-vis relief of compensation, was not appended with the Hindu Marriage Petition. Also apparently, despite, opportunity(s) being granted to the petitioner herein, to make good deficiency(s) in the ad-valorem Court fees, to be affixed vis-à-vis her claim for compensation(s), she yet omitted to do so. However, it is apparent, on, reading(s), of, a recorded statement made by the petitioner on 18.4.2017, statement whereof exists on the paper book, of, its disclosing of hers' communicating therein, of, hers not pressing for relief(s) of compensation, against, the respondent and his parents. However, subsequent thereto, the petitioner also instituted an application, cast under the provision of Order 6 Rule 17, of the Code of Civil Procedure, for begetting appropriate amendments in consonance therewith. The respondents herein also instituted an application, under, Order VII Rule 11 of CPC seeking therein, relief, of rejection of the Hindu Marriage Petition. Under the impugned order, the learned District Judge concerned, accepted, the prayer made by the respondents in their application borne hence under the provision(s) of under Order VII Rule 11 CPC, whereas, he proceeded to obviously also decline relief, to, the petitioner herein, upon, her application preferred before him, for begetting amendment(s) in the Hindu Marriage Petition.

12. A reading of Section 21 of the Hindu Marriage Act provisions whereof stands extracted hereinafter:-

> "21 Application of Act 5 of 1908. —Subject to the other provisions contained in this Act and to such rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908."

Make(s) a categorically display, of the mandate of CPC, regulating, the conduct of proceeding, drawn, under the Hindu Marriage Act. Even though the hereinabove extracted provisions, of the Hindu Marriage Act also contain an exception thereto (i) comprised in those provisions of the CPC being unattractable vis-a-vis proceedings, drawn upon, a Hindu Marriage Petition vis-à-vis whereof specific statutory provisions, are borne in the Hindu Marriage Act, (ii)whereby hence clout of, certain specific provisions of the CPC are statutorily ousted. (ii) whereas with no statutory provision being borne in the Hindu Marriage Act, for, hence expressly excluding the mandate, of Order 6 Rule 17 of the CPC, (ii) or of the mandate of Order VII Rule 11 of the CPC, hence render both to be attractable, vis-à-vis proceedings, drawn, under the Hindu Marriage Act.

2. Be that as it may, the petitioner could not be compelled, as untenably done, by the learned District Judge concerned, to retain all cause(s) of action, especially, those initially borne in the Hindu Marriage Petition, importantly, the one appertaining vis.a.vis relief of compensation. The learned District Judge concerned was also hence enjoined, to, mete reverence, to the statement recorded by the petitioner, whereby, she abandoned her claim vis-à-vis relief of compensation. The petitioner had also subsequent thereto, moved, an application for begetting amendments in consonance therewith, in the Hindu Marriage petition. Consequence, thereof being, of, the learned District Judge concerned, being barred from insisting upon the petitioner, to, affix upon the apposite petition, Court fees ad-volerem vis.a.vis her initially incorporated therein relief of compensation, plea whereof rather was explicitly abandoned, also he was enjoined to, mete relief vis-à-vis the, petitioner, upon her application cast under Order 6 Rule 17 of the CPC. Corollary thereof(s), is, of the learned District Judge, rather attracting, the provisions of Order VII Rule 11 CPC vis-à-vis the Hindu Marriage Petition, has hence committed an illegality. In aftermath, the impugned order is quashed and set-aside. The parties are directed to appear before the learned District Judge (Forests), Shimla on 12th January, 2018. No costs.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

CWPIL No. 139 of 2017 with
COPC No. 328 of 2017
Date of Decision: December 21, 2017

1. CWPIL No. 139 of 2017
Court on its own motion ...Petitioner.
Versu
State of H.P. & others ...Respondents.
2. COPC No. 328 of 2017
Sonali Purewal ...Petitioner.
Versus
Rohan Chand Thakur & another ...Respondents.

Constitution of India, 1950- Article 226- Bull fighting performed in Sair Mela at Mashobra, Shimla on 16.9.2017- An FIR registered and magisterial inquiry ordered- It is directed that the investigation be completed within two months and inquiry be completed within three months and the compliance be communicated to the Court by filing affidavit within four months and further directed that fair shall not be allowed to be organized till such time there is deployment of adequate police force for ensuring that no bull fighting takes place in the fair besides Temple Committee shall give under taking to the District Collector to this effect- The administration shall ensure that directions issued by Hon'ble Supreme Court in Animal Welfare Board of India vs. Nagaraja and others, (2014) 7 SCC 547 and by Hon'ble High Court in *Sonali Purewal vs. State of H.P. and others* in CWPIL No. 3 of 2015 be complied with in letter and spirit- Petition stands disposed of. (Para-15)

Case referred:
Animal Welfare Board of India vs. Nagaraja and others, (2014) 7 SCC 547

For the Petitioners: Mr.Deven Khanna, Advocate as Amicus Curiae in CWPIL No.139 of 2017.
Ms.Vandana Mishra, Advocate, for the petitioner.

For the Respondents: Mr. Shrawan Dogra, Advocate General, with M/s Anup Rattan, Romesh Verma, Additional Advocate Generals and J.K. Verma Deputy Advocate General, for respondents No.1 to 5.
Mr.G.D.Verma, Sr.Advocate, with Mr.B.C.Verma, Advocate, for respondents No.6 to 16.

The following judgment of the Court was delivered:

Sanjay Karol, Aciting Chief Justice

On the basis of news paper report dated 17.09.2017, with regard to illegal activity of bull fighting allowed to be performed, despite the same being banned, this Court vide judgment dated 21.07.2015, passed in CWPIL No. 3 of 2015, titled as *Sonali Purewal vs. State of H.P. and others,* reiterated the directions issued by Hon'ble the Supreme Court in *Animal Welfare Board of India vs. Nagaraja and others,* (2014) 7 SCC 547.

2. Mr.Deven Khanna, Advocate, was requested to assist the Court as Amicus Curiae.

3. In essence, bull fighting as an activity stands prohibited, more specifically in view of the provisions of Prevention of Cruelty to Animals Act, 1960 (hereinafter referred to as the PCA Act).

4. On the basis of a letter petition, alleging such illegal activity to have taken place in a fair held on 16.09.2017 at Mashobra, Shimla, this Court issued notice to the State.

5. The Superintendent of Police, Shimla, vide her affidavit dated 05.10.2017, informed the Court that an FIR under the provisions of the Prevention of Cruelty against the Animals and Indian Penal Code stand registered against the organizer and Temple Committee of Sair Mela and the matter was under investigation. She had further wanted the Court to believe that the alleged bull fight did not take place as an organized activity, more so in the presence of the police officials.

6. The Deputy Commissioner, Shimla, vide his affidavit dated 07.10.2017, took a similar stand. Since there were news reports about the bull fighting having taken place during the Mela, Deputy Commissioner filed yet another affidavit dated 29.11.2017 *inter alia* stating as under:-

> "3. That in compliance to the direction issued by the Hon'ble High Court, it is humbly submitted that keeping in view the apprehension of bull fighting during the Sair Mela, Superintendent of Police Shimla was directed vide this office of letter No SML/ADM(L&A)/2017-2030 dated 15-9-2017, to deploy adequate police force to restrict bull fighting. (The copy of the letter No 2030 dated 15-9-2017 is Annexed as annexure-R/1). It is further submitted that the members of the Mela Committee were well aware about the fact that the bull fighting is a cruelty on animals and is illegal in the eyes of law, so the bull fighting was not organized by the Mela Committee from the last two years. In this regad they were directed time and again by the replying deponent to ensure that there should not be any bull fighting during such type of Mela. Further is it also submitted that the replying deponent has already supplied the copy of the directions issued by the Hon'ble High Court regarding cruelty on animal to Superintendent of Police shimla and all the Sub-Divisional Magistrates in Shimla District and were directed to comply with these directions in letter and spirit.
>
> 4. ... ... It is further submitted that the Superintendent of Police Shimla has reported that the Police have lodged an FIR No. 132/2017 under the prevention of cruelty against animals and section 188 of the Indian Penal Code

against the organizer and Temple Committee of Sair Mela, which is still under investigation and strict action against the violators will be taken.

5. That besides above replying deponent vide office order No SML/PSH(Animal Cruelty)/2015- 25-9-2017 (Annexure R-1) has also ordered a Magisterial inquiry to be conducted by Additional District Magistrate (P) Shimla and has been directed to submit his report within stipulated period. The Additional District Magistrate (P) Shimla has reported that the enquiry is at the final stage and will be completed within two weeks time.

6. … … … In future all remedial measures will be taken prior to the celebration of such Mela and through vide publicity, general public will be made aware about the Provisions of Cruelty to Animal Act and to the directions issued by the Hon'ble High Court."

7. Vide her another affidavit dated 29.11.2017, Superintendent of Police, Shimla further informed that five persons were arrested in connection with the crime and that "*All remedial measures will be taken prior to the celebration of such type of Mela by spreading awareness among the general public about the provisions of Prevention of cruelty to Animal Act in religious rituals and enough deployment of Admin and Police will be ensured. It is further submitted that strict action will be taken against the violators and the order of the Hon'ble Court will be complied in letter and spirit."*

8. On 30.11.2017, this Court impleaded the office bearers of the Mandir Committee, organizing the fair as party respondents. Also on 14.12.2017, local Member of Legislative Assembly Sh.Anirudh Singh and four other persons were impleaded as party respondents, for allegedly they were in the know of such an event, which was likely to take place, if not being party thereto.

9. On 20.12.2017, this Court recorded the presence of Sh.Ashwani Sharma, Bureau Chief, the Indian Express, Shimla, when the contents of the news items with regard to bull fight having taken place were reiterated.

10. On 21.12.2017, both learned Advocate General and Mr.G.D. Verma, learned Senior Counsel**,** persuaded us to drop the proceedings on account of three factors: (a) police had already taken action and FIR No.132/2017 stood registered; (b) Magisterial inquiry already stands ordered; and (c) the private respondents have expressed their unconditional apology with an assurance that in future they shall be vigilant and not allow any bull fight to take place.

11. Having heard learned Amicus, we are of the considered view that interest of justice warrants the matter to be put to rest with certain directions.

12. We notice that the local MLA, Sh.Anirudh Singh, has filed his personal affidavit stating that every year on the occasion of 'Sakranti', near Bhadrakali Mata Temple, a fair, commonly known as Sair fair is being organized. A duly constituted Committee organizes such fair. However, the said Committee is not constituted by him. He admits to be present on the spot, but clarifies that no bull fight took place in his presence nor is he in any manner connected with the same. However, he further assures the Court with the following averments:-

"That in the Sair fair to be held/organized during the tenure of deponent as M.L.A. The deponent assures this Hon'ble Court that illegal act/events shall not be organized/conducted at the deponent behest and the present proceedings against the deponent be dropped."

13. Affidavits of S/Sh.Amar Singh, Paras Ram son of Sh.Krishan Chand, Baldev, Paras Ram son of late Sh.Senu Ram and Devi Ram, are also on record, wherein commonly they have also deposed as under:-

"2. The deponent assures this Hon'ble Court that being owner of Buffalo, deponent will not involve/participate in any legal act/events to be

organized/conducted in future and the present proceedings against the deponent be dropped."

14. Sh.Balak Ram has also filed his affidavit to the following effect:-

"3. That keeping in view the bar imposed by the Hon'ble High Court of HP in connection with buffalo fighting was arranged by the Mandir Committee of Shri Bhadarkali Mata, Talai, Mashobra after 2014. No such fighting was arranged by the Mandir Committee, Shri Bhadarkali Mata, Talai, Mashobra in the year 2015, 2016 and 2017. I am President of this Committee and all the Members of this Mandir Committee are opposed to any kind of cruelties towards animals. We have no concern with the affairso of "Sair-Mela-Committee, Talai at Mashobra.

4. That I as well as all other members of Mandir Committee Shri Bhadarkali Mata, Talai, Mashobra, make it clear that neither we contribute to the idea of bull fighting and fighting of buffalo nor we will arrange any such fighting in future also and therefore, the present proceedings against us be dropped."

15. In view of the aforesaid, we dispose of both the petitions, in the following terms:-

i. Directions issued by Hon'ble the Supreme Court of India in *Animal Welfare* (supra) as stands reiterated by this Court in *Sonali Purewal* (supra), shall be followed in letter and spirit by all concerned;

ii. Police shall complete the investigation, in relation to FIR No.132/2017, registered under the provisions of PCA Act and Indian Penal Code, within a period of two months and present challan before the appropriate Court for further consequential action, in accordance with law;

iii. Magisterial inquiry shall be completed within a period of three months and necessary action taken, if any, against the officers/officials found guilty;

iv. Affidavit of compliance be filed in the Registry of this Court within a period of four months;

v. Henceforth fair shall not be allowed to be organized till such time there is deployment of adequate police force, and the Superintendent of Police shall personally ensure that no bull fight ever takes place during the Sair Mela.

vi. The District Collector shall obtain undertaking from the Temple Committee as also the Committee conducting Sair Mela that they shall also ensure that no illegal activity in the shape of bull fight takes place.

vii. The unconditional apology tendered by the local MLA and the members of the Committee is accepted and taken on record with the word of caution that their participation in any fair where such bull fight takes place in future, would only tantamount to aggravation of violation of the orders passed by this Court from time to time.

viii. To similar effect, unconditional apology of the Superintendent of Police and the Deputy Commissioner, Shimla, is accepted and taken on record.

16. Before parting, we wish to place on record appreciation qua the efforts put in by Mr.Deven Khanna, Amicus Curiae, who, on the instructions of this Court, contacted the letter petitioner and obtained necessary feedback.

17. Also learned Amicus Curiae undertakes to communicate the outcome of the present petition to the letter petitioner.

With the aforesaid observations, present petition stands disposed of.

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

Rajeev Sharma ....Petitioner.
Versus
State of H.P. ....Respondent.

Cr. Revision No. 323 of 2016
Decided on : 21.12.2017

Indian Penal Code, 1860- Section 307 read with Section 120-B- The learned Trial Court framed charge against the accused/petitioner- Assailed on the ground that FIR did not provide any material wherefrom engaging of the petitioner in the conspiracy could be inferred - **Held**, that role of conspirator is always hidden- Investigating Officer was within his powers to collect evidence of criminal conspiracy and furnish same before the Court- The learned Trial Court was right in relying upon the report of the investigating officer and framed charge under Section 307 read with Section 120-B of I.P.C as for framing the charge, Court needs to prima facie satisfy over the existence of such charge- no merits in the petition- petition allowed. (Para-2 to 5)

For the petitioner: Mr. Peeyush Verma, Advocate.
For the respondent: Mr. Vivek Singh Attri, Addl. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The instant petition is directed, against, the order of 30.8.2016, pronounced by the learned Sessions Judge-II, Mandi, H.P., whereby he proceeded to order, for framing of charge(s) against the accused/petitioner, for his committing offences punishable under Section 307 read with Section 120-B IPC.

2. The learned counsel for the petitioner herein, has contended with vigour, that, with in the apposite FIR, occurring, no, reference qua the conspiratorial role of the petitioner vis-a-vis the offences committed by the principal accused. Consequently, he submits that it was not appropriate, for the learned Additional Sessions Judge concerned, to frame charge against the petitioner, for his holding criminal conspiracy, with the principal accused, for the latters' committing offences punishable under Sections 307, 147, 148, 149, 324, 341, 326 read with Section 120-B IPC. However, the aforesaid submission is not accepted, (i) as the role of a conspirator is always hidden besides remains camouflaged, (ii) thereupon when besides when, hence it may not have been possible, for the complainant to be aware qua the conspiratorial role of the accused, in the offence, alleged vis-à-vis the principal accused, more especially, in contemporanety of lodging of the FIR, (iii) rather unfoldment(s) thereof, emanating upon the Investigating Officer, during, his holding investigation(s) making disinterrings thereof, (iv) whereafter, in, his report furnished before the court concerned, his ascribing on anvil, of, evidence collected by him, the penal misdemeanor(s), of, criminal conspiracy(s) vis-à-vis the petitioner herein, (v) thereupon in the learned Additional Sessions Judge concerned, bearing in mind the aforesaid report AND his proceeding to order, for, framing of the charge against the petitioner herein, for his committing the offences punishable under Section 307 and 120-B IPC, has hence not committed any apparent illegality or impropriety.

3. Furthermore, since the adduction of prosecution evidence has yet to commence, thereupon at this stage, it would not be appropriate, to discern the worth of the evidence collected by the prosecution vis-a-vis the incriminatory role of the petitioner herein, qua his holding criminal conspiracy(s) with the principal accused.

4. In view of the above, there is no merit in the present petition and it is dismissed. Impugned order stands maintained and affirmed. All pending applications stand disposed of accordingly.

5. 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 SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Abhimanyu Rathor ....Petitioner.

Versus

State of H.P. & others ...Respondents.

CWPs No.612,704 & 819 of 2017
Reserved on: September 20, 2017
Re-heard on: December 18, 2017
Date of Decision: December 22, 2017

Constitution of India, 1950- Article 226- Civil Writ Petition- Section 30-B of the Himachal Pradesh Town and Country Planning (Amendment) Act, 2016- Himachal Pradesh Town & Country Planning Act, 1977- The question raised before the Hon'ble High Court was whether insertion of Section 30-B by virtue of the H.P. Town and Country Planning (Amendment) Act, 2016, in the H.P. Town and Country planning Act, 1977 was contrary to the object and purpose of the Principal Act, as also was ultra vires the Constitution of India- **The High Court Held-** that insertion of Section 30-B by amending the Act was contrary to the object and purpose of the Principal Act as also ultra vires the Constitution of India and Section 30-B struck down as unconstitutional and illegal.

Constitution of India, 1950- Article 226- Civil Writ Petition- Section 30-B of the Himachal Pradesh Town and Country Planning (Amendment) Act, 2016- Himachal Pradesh Town & Country Planning Act, 1977- Also held - Laws/legislations can be struck down on the ground of arbitrariness, if found to be violative of Article 14 of the Constitution of India. (Para-86 to 88)

Constitution of India, 1950- Article 226- Civil Writ Petition- Section 30-B of the Himachal Pradesh Town and Country Planning (Amendment) Act, 2016- Himachal Pradesh Town & Country Planning Act, 1977- Further Held- that duty of the State is the correct implementation of the Statutes in existence – The failure to do so amounts to failure in governance and the same cannot be condoned by incorporation of such amendments, resulting in regularization of unauthorized constructions- On facts the legislations i.e. the Amended Act, held, not to be one time measure, as at least seven policies of retention of unauthorized construction brought by the State in the last one decade- Action of the State held to be arbitrary. (Para-91 to 93)

Constitution of India, 1950- Article 226- Civil Writ Petition- Section 30-B of the Himachal Pradesh Town and Country Planning (Amendment) Act, 2016- Himachal Pradesh Town & Country Planning Act, 1977- Further Held- that a statutory provisions which is destructive of the aim and object of the parent Act and is demonstratively excessive and contradictory is also arbitrary and against the "rule of law", hence violative of Articles 14 and 21 of the Constitution of India. (Para-94 to 96)

Constitution of India, 1950- Article 226- Civil Writ Petition- Section 30-B of the Himachal Pradesh Town and Country Planning (Amendment) Act, 2016- Himachal Pradesh Town & Country Planning Act, 1977- Further Held- that conferment of unfettered powers upon any authority to regularize unauthorized construction is also violative of Article 14 of the Constitution

of India as it envisages equality before law and equal protection of law- Unequals cannot be treated alike, by condoning the illegal act of the violators, who carry out construction by violating the provisions of the Planning Act, cannot be treated at par with people following the law- The act is not only arbitrary but violative of Article 14 of the Constitution of India. (Para-97 to 106)

Constitution of India, 1950- Article 226- Civil Writ Petition- Section 30-B of the Himachal Pradesh Town and Country Planning (Amendment) Act, 2016- Himachal Pradesh Town & Country Planning Act, 1977- Further Held- that if the impugned amendment if permitted to remain in the Statute it would violate the very edifice of the Principal Statute- The amending Act also seeks to distinguish between those who carried out unauthorized and illegal construction for residential purposes or personal use, and also those who carried out such construction purely with professional motive – In fact, the amendment puts a person who violated the law with impunity on a higher pedestal than the one who made deviations from the sanctioned plan- The Amending Act thus violate the very aim and object of the principal statute i.e. to make provisions for the preparation of development plans and sectoral plans with a view to ensure that town planning schemes are made properly and are executed efficiently. (Para-107 to 110)

Constitution of India, 1950- Article 226- Civil Writ Petition- Section 30-B of the Himachal Pradesh Town and Country Planning (Amendment) Act, 2016- Himachal Pradesh Town & Country Planning Act, 1977- Further Held- that the importance and significance of plan of strict adherence and application of the Municipal Laws are an integral part of sustainable development which is to be treated as an important facet of Article 21 of the Constitution of India- Planning and development being one of the important attributes of the right to life under Article 21 of the Constitution of India. (Para-122 to 124)

Constitution of India, 1950- Article 226- Civil Writ Petition- Section 30-B of the Himachal Pradesh Town and Country Planning (Amendment) Act, 2016- Himachal Pradesh Town & Country Planning Act, 1977- Further Held- that doctrine of severability is also not applicable to save the Amending act- The provisions in its entirety also liable to be struck down as ultra vires the constitution and the principal Act- Section 30-B of the Amending Act struck down being unconstitutional, illegal and arbitrary. (Para-125 to 128)

Cases referred:

Commissioner of Municipal Corporation, Shimla v. Prem Lata Sood and others, (2007) 11 SCC 40

Society for Preservation of Kasauli v. State of Himachal Pradesh, 1994 Supp. SLC 450

Court on its own motion v. State of H.P. & others, ILR 2015 (III) HP 569 (D.B.)

Manohar Joshi v. State of Maharashtra, (2012) 3 SCC 619

Pratibha Co-operative Housing Society v. State of Maharashtra, (1991) 3 SCC 341

Padma v. Hirala Motilal Desarda and others, (2002) 7 SCC 564

Howrah Municipal Corporation & others v. Ganges of Rope Co. Ltd. & others, (2004) 1 SCC 663

Friends Colony Development Committee v. State of Orissa and others, (2004) 8 SCC 733

Royal Paradise Hotel (P) Ltd. v. State of Haryana and others, (2006) 7 SCC 597

Chairman, Indore Vikas Pradhikaran v. Pure Industrial Coke & Chemicals Ltd. and others, (2007) 8 SCC 705

Shanti Sports Club and another v. Union of India and others, (2009) 15 SCC 705

Priyanka Estates International Private Limited & others v. State of Assam & ors, (2010) 2 SCC 27

M.C. Mehta v. Union of India & others, (2006) 3 SCC 399

Dipak Kumar Mukherjee v. Kolkata Municipal Corporation and others, (2013) 5 SCC 336

Esha Ekta Apartments Cooperative Housing Society Limited and others v. Municipal Corporation of Mumbai and others, (2013) 5 SCC 357

M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu, (1999) 6 SCC 464

Bihar Finance Service House Construction Cooperative Society Ltd. v. Gautam Goswami & others, (2008) 5 SCC 339

Rameshwar Prasad and others (VI) v. Union of India and another, (2006) 2 SCC 1

I.R. Coelho (Dead) by LRs v. State of T.N., (2007) 2 SCC 1
Subramaniam Swamy v. Director, Central Bureau of Investigation and another, (2014) 8 SCC 682
Mrs. Maneka Gandhi v. Union of India & another, (1978) 1 SCC 248
State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat & others, (2005) 8 SCC 534
State of Andhra Pradesh v. McDowell & Co., (1996) 3 SCC 709
K.R. Lakshmanan (Dr.) v. State of Tamil Nadu, (1996) 2 SCC 226
Fuljit Kaur v. State of Punjab and others, (2010) 11 SCC 455
Nagpur Improvement Trust and Anr v Vithal Rao and Ors, (1973) 1 SCC 500
Sayyed Ratanbhai Sayeed (Dead) through LRs & others vs. Shirdi Nagar Panchayat & another, (2016) 4 SCC 631
Supreme Court Advocates-on-Record v. Union of India, (2016) 5 SCC 1
Indira Nehru Gandhi v. Raj Narain, AIR 1975 SC 2299 : 1975 (Supp1) SCC 1
Milk Producers Association, Orissa & others v. State of Orissa & others, (2006) 3 SCC 229
Kihoto Hollohan vs. Zachillhu & others, 1992 Supp (2) SCC 651
Suresh Kumar Koushal & another vs. Naz Foundation & others, (2014) 1 SCC 1
Delhi Transport Corporation v. D.t.C. Mazdoor Congress & others, 1991 Supp (1) SCC 600
Guruvayoor Devaswom Managing Committee and another v. C.K. Rajan & ors, (2003) 7 SCC 546
Centre for Public Interest Litigation v. Union of India and others, (2016) 6 SCC 408
R.K. Garg v. Union of India, (1981) 4 SCC 675
Karnataka Bank Ltd. vs. State of Andhra Pradesh & others, (2008) 2 SCC 254
State of Madhya Pradesh vs. Rakesh Kohli & another, (2012) 6 SCC 312
Government of Andhra Pradesh & others vs. P. Laxmi Devi (Smt), (2008) 4 SCC 720
Bakhtawar Trust and others v. M.D. Narayan and others, (2003) 5 SCC 298

For the Petitioners	:	Petitioners Mr. Abhimanyu Rathor and Mr. Raghav Goel in person, in CWPs No.612/2017 & 704/2017, respectively. Mr. B.C. Negi, Senior Advocate with Mr. Rohit Chauhan, Advocate, in CWP No.819/2017. Mr. Ramesh Sharma, Advocate, in CWP No.1772/2016
For the Respondents	:	Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma, Additional Advocate General, Mr. J.K. Verma & Mr. Kush Sharma, Deputy Advocates General for the State. Mr. Hamender Chandel, Advocate, for Municipal Corporation. Mr. R.L. Sood, Senior Advocate, with Mr. Arjun Lal, Advocate, as Intervener. Mr. N.K. Sood, Senior Advocate, with Mr. Aman Sood, for applicants in CWP No.819/2017. Mr. Aman Nandrajog, Mr. Arjun Nanda and Ms Vandana Misra, Advocates, for interveners. Mr. Deepak Kaushal, Advocate, for applicant/proposed respondent in CMP Nos.3417 and 3418 of 2017. Mr. Vinay Kuthiala, Senior Advocate, with Ms Vandana Kuthiala, for applicant(s) in CMP Nos.6059, 6060 and 6061of 2017. Mr. Neeraj Kumar Sharma, Advocate in CMP No.6345 of 2017.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

The questions, which arise for consideration in these petitions, are:

i). As to whether insertion of Section 30-B, by virtue of the Himachal Pradesh Town and Country Planning (Amendment) Act, 2016, in the Himachal Pradesh Town & Country Planning Act, 1977, is contrary to the object and purpose of the said Principal Act, as also ultra vires the Constitution of India?

ii). As to whether the constitutional validity of the amending provision is not ultra vires the Constitution, in view of law laid down by the Apex Court in *Consumer Action Group v. State of T.N.,* (2000) 7 SCC 425?

iii). As to whether arbitrariness cannot be a ground for holding the amendment to be ultra vires the Constitution, in view of law laid down by the Apex Court in *Binoy Viswam v. Union of India & others,* (2017) 7 SCC 59?

iv). If not, then as to whether the amendment is violative of Article 14 of the Constitution, being arbitrary, irrational, illogical, capricious and unreasonable, in view of the law laid down by the Apex Court in *Shayra Bano v. Union of India,* (2017) 9 SCC 1?

v). If the amendment is ultra vires, then as to whether it can be saved by adopting the doctrine of severability or not?

2. The impugned amendment carried out in the Statute, which starts with a *non obstante* Clause, confers power upon the Government, empowered Officer or Authority to exempt development of any land or building or class of lands or buildings developed on or before 15.6.2016, from all or any of the provisions of the Act, save and except certain exceptions, on payment of specified regularization fee.

3. Moot issue, as already mentioned, is as to whether it is within the legislative competence of the State to come out with such an amendment and whether the said amendment is violative of the Constitution of India, Part-III or otherwise, as also being inconsistent with the object of the Principal Act.

4. Shri Hitanshu Jistu, petitioner in CWP No.819 of 2017, is an Architect by profession. In this Writ Petition, filed as *pro bono publico*, he lays challenge to the amendment, *inter alia*, on the ground of it being illegal and against the mandate of 'good governance'.

5. Shri Abhimanyu Rathore, a practicing Advocate, petitioner in CWP No.612 of 2017, seeks reliance on a news report (Annexure P-3), published in "Times of India", wherein it is reported that State seeks to regularize 35000 illegal buildings, by way of an Ordinance, which was promulgated immediately prior to the amendment in question. He also seeks reliance on the report of the Committee, headed by Shri Shashi Shekhar, constituted by the National Green Tribunal in *Yogendra Mohan Sengupta v. Union of India* (OA No.121 of 2014), dealing with Shimla City and Shimla Planning Area.

6. To similar effect is CWP No.704 of 2017, filed by Shri Raghav Goel, also a practicing Advocate.

7. Defending the legislation, not being arbitrary or beyond legislative competence, learned Advocate General seeks reliance upon the decisions rendered by the Apex Court in *Consumer Action Group (supra)* (three-Judge Bench) and *Binoy Viswam (supra)* (two-Judge Bench).

8. Opposing these petitions, several owners have filed applications for intervention, who were allowed to make submissions, through their respective counsel. (CMPs No.2727,3416,6059,6060,6061,6345,7297 & 7298 of 2017 in CWP No.612/2017 and 5203 to 5205, 6491&6492 in CWP No.819/2017). Also, learned counsel have cited certain decisions, which we have considered.

9. From the pleadings of the parties, certain undisputed facts have emerged on record. Himachal Pradesh is predominately a hilly State with a total population of 68.56 lakhs (6.85 millions), residing in an area of 55673 sq. km. Urban population of the State is 6.89 Lakhs

(0.69 million) (10.04% of the total population). Within the State of Himachal Pradesh, there are two Municipal Corporations, 31 Municipal Councils and 21 Nagar Panchayats, which govern approximately 9.2% of the total population of the State. Within the State, there has been rampant unauthorized constructions, and all this, *de hors* the provisions of the Himachal Pradesh Town & Country Planning Act, 1977 (referred to as the Planning Act) and other Municipal Laws, i.e. H.P. Municipal Corporation Act, 1994 (hereinafter referred to as Corporation Act); and the Himachal Pradesh Municipal Act, 1994 (hereinafter referred to as the Municipal Act). Despite several judicial pronouncements of this Court and orders dated 30.5.2014, passed by the National Green Tribunal, in case titled as *Yogendra Mohan Sengupta (supra)*, functionaries of the State allowed rampant illegal and/or unauthorized constructions to be raised in a haphazard manner. Between the year 1997 and 2006, Government notified no less than seven policies of retention of unauthorized structures, so raised by people in several areas within the State. Such perpetuation of illegality resulted in the passing of the Himachal Pradesh Town and Country Planning (Amendment) Act, 2016 (hereinafter referred to as the Amending Act), w.e.f. 15.6.2016, whereby constructions raised by anyone, anywhere and in whatever manner and extent, except for few exceptions, are sought to be regularized by the State.

10. With the Bill being introduced in the Legislative Assembly, the Minister Incharge furnished the following 'Objects and Reasons', necessitating the amendment:

> "The Government has tried to address the issue of regularization of un-authorized constructions raised in contravention of the provisions of the Himachal Pradesh Town and Country Planning Act, 1977 (Act No.12 of 1977) by bringing Retention Polices/Guidelines from time to time. However, such Retention Policies/Guidelines have not proved to be an effective mechanism to weed out problem of un-authorized constructions on account of limited extent and scope of such polices in comparison to the magnitude of offences. Under the said Retention Polices/ Guidelines, total 8,198 cases of un-authorized construction were received, out of which 2,108 cases were retained and remaining 6,090 cases are yet to be regularized. At the moment, there are about 13,000 un-authorized buildings upto March, 2016 in the notified Planning and Special Areas. Demolition of such a large number of un-authorized constructions is neither feasible nor desirable as it will result in undue hardship to the owners and occupants. On the other hand, the Hon'ble High Court has taken serious view of this grim situation, and in its judgment/order dated 7-8-2009 in CWP No.673 of 2005 titled as Thakur Singh V/s State of H.P. has directed that the State Government shall desist from making any retention policy permitting the regularization of total unauthorized construction. Considering this and the practice followed in other metropolitan cities of the Country to deal with violated constructions, it has been considered more appropriate to make a special one time provision for composition of offences by charging deterrent composition fee instead of demolition of large scale un-authorized constructions which is neither feasible nor practicable for many reasons. Thus, in view of above stated facts and figures and after taking into consideration measures taken by the other States to deal with this burning problem, it was decided to make a special provision in the Act *ibid.* …
>
> This Bill seeks to replace the aforesaid Ordinance with some modifications." (Emphasis supplied)

11. This led to the insertion of Section 30-B, by way of Amending Act, relevant clause whereof reads as under:

> **"2. Insertion of new section 30-B**.—After section 30-A of the Himachal Pradesh Town and Country Planning Act, 1977 (hereinafter referred to as "the principal Act"), the following section shall be inserted, namely:—

"30-B. Exemption in respect of development of certain lands or buildings.—

(1) Notwithstanding anything contained in the Himachal Pradesh Town and Country Planning Act, 1977 or any other law for the time being in force, the Government or any Officer or Authority, vested with the powers of Director, may, on application, by order, exempt development on any land or building or class of lands or buildings developed on or before the date of commencement of this Act from all or any of the provisions of the Himachal Pradesh Town and Country Planning Act, 1977 or any rules or regulations made thereunder upto such extent and on payment of such regularization fee as specified under sub-section (8).

(2) The application under sub-section (1) shall be made within sixty days from the date of publication of this Act in the Official Gazette in Appendix-I, which can also be downloaded from the official website "www.tcphp.in" of the Department and may be submitted alongwith fee of one thousand rupees which shall be disposed of within a period of one year from the date of publication of this Act.

(3) After passing of order under sub-section (1), permission shall be deemed to have been granted for such development of land or building.

(4) Nothing contained in sub-section (1) shall apply to any application made by any person who does not have any right over the land or building referred to in sub-section (1).

(5) Any person aggrieved by any order passed under sub-section (1) by any Officer or Authority may, prefer an appeal to the Appellate Authority within thirty days from the date of receipt of order. The condition of one year stipulated under sub-section (2) shall not apply in appeals and such appeals shall be decided by the Appellate Authority within a period of six months from the date of filing thereof.

(6) The fee under this section shall be charged and deposited by the Competent Authority through Treasury Challan or e-Challan in the relevant Head of Account, and in case of Urban Local Bodies or Special Area Development Authorities, the fee shall be charged by way of Demand Draft or online payment by such Bodies.

(7) Before grant of exemption under sub-section (1), the following guidelines and principles shall be kept in view to ensure compliance thereof, namely:—

(a) the buildings shall be regularized on the basis of "as is where is" : Provided that a structural stability certificate shall be submitted by the applicant for the building to be regularized from the qualified Structural Engineer;

(b) there shall be no exemption for regularization in respect of deviations and unauthorized constructions in the Green Area and Heritage Area as defined under Interim Development Plans or Development Plans as notified by the State Government from time to time;

(c) deviations and un-authorized constructions falling in Green Area and Heritage Area as delineated in the Interim Development Plans (IDPs) or Development Plans (DPs) shall be regularized which have taken place prior to the notification (s) of delineation of such areas;

(d) the exemptions shall also be granted for such buildings which have been constructed above the road level;

(e) developments carried out in lands or buildings owned by individuals in Himachal Pradesh Housing and Urban Development Authority (HIMUDA) Colonies, where such Colonies are maintained and administered by the Urban Local Bodies (ULBs), shall be considered for exemption;

(f) developments or constructions carried out without permission or in deviation to approved plan, if not exempted under this section, shall face disconnection of services and demolition;

(g) the competent authority shall ensure that the roof of buildings to be exempted and regularized under this section is rendered totally ineffective for further vertical construction in future;

(h) un-authorized constructions carried out on the area and pockets kept for parks, sewerage or any other facility in any approved map of sub-division of land by the competent authorities shall not be regularized;

(i) parking floor(s) as per approved plan, if converted to any other use like residence or shop etc. shall not be regularized but in case, alternative equivalent or more parking space is available then, parking floor(s) so converted into other use(s) shall be considered for regularization : Provided that such cases where existing road level is not abutting from approved parking floor and further there is no feasibility of construction of road leading to approved parking floor may be considered for regularization;

(j) no exemption shall be allowed in case the owner has encroached upon any land owned by the Government or Local Authority or Board or Corporation or Institution or any Authority constituted under the Himachal Pradesh Town and Country Planning Act, 1977 or other person's land;

(k) no exemption shall be allowed on the land lying below Highest Flood Level (HFL) as delineated in the Development Plans;

(l) in case of apartments, flats or slabs, the individual owner may apply for regularization; and

(m) the people residing in the areas where provisions of the Himachal Pradesh Town and Country Planning Act, 1977 or the Himachal Pradesh Municipal Act, 1994 or the Himachal Pradesh Municipal Corporation Act, 1994 were not in force at the time when the buildings were constructed need not to apply : Provided that if there is any ambiguity as to whether any person is exempted or not under this section, he may make an application alongwith documents, if any, to the Competent Authority online or otherwise, who shall pass appropriate order on his application.

(8) The regularization fee for regularization of deviations and un-authorized constructions shall be charged as per TABLE given below:—

TABLE

(A) For Residential buildings:—

Sr. No.	Description	Rates Municipal Area	Outside Municipal Area	Remarks
1.	**Where permission has been taken for development but deviations on set backs or storeys or in both have been made**	@Rs.800/- Per M^2	@Rs.400/- Per M^2	(i) Regularization Fee shall be charged on the deviated area i.e. on set backs and un-authorized storeys which is beyond sanctioned plan; and (ii) For the purpose of calculation of

			deviations, the Regulations i.e. set backs, number of storeys/Floor Area Ratio (FAR) as were applicable at the time of approval of original or revised or retained map shall be taken into consideration.
2.	**Where permission has not been taken**.	@Rs.1000/- Per M^2 @Rs.500/- Per M^2 Area for development i.e. total un-authorized construction.	For the purpose of calculation of deviations, the total built up of the building shall be taken into consideration.

(B) The regularization fee as specified under clause (A) of this sub-section shall be increased by 100% for **Commercial, Hotel, Tourism, Industrial or other Uses**:

Provided that the regularization fee as specified under clause (A) of this sub-section shall be decreased by 75% for the persons falling under the categories of Below Poverty Line (BPL) and Economically Weaker Sections (EWS) of the society :

Provided further that no other fee shall be charged like Development of land, Building Operation, Change of Existing Building Use and Change of Land Use etc.,**....."** (Emphasis supplied)

12. Factum of unauthorized and illegal construction is not disputed by the State. However, justifying the legislation, in the response, State has assigned additional reasons – (i) on account of rapid growth of economic opportunities in and around the major cities/towns of Himachal Pradesh, there has been constant influx of the rural population to the urban areas resulting in steep increase in demand for properties for residential, commercial and other uses in the urban areas, (ii) this has resulted in hectic construction activities and several buildings, so constructed, do not conform to the building regulations, (iii) the owners and occupiers of such buildings have been given notices under the relevant legislations requiring them to remove, pull down or alter the buildings, (iv) however, removal or pulling down large number of buildings is neither feasible nor desirable, and such action if resorted to may give rise to the possibility of creating law and order problems apart from the fact that it would cause hardship to a large number of people who would be rendered homeless and who would have to be provided with housing, (v) the social and economic fabric of the Society would be disturbed leading to a chaotic situation in the society, (vi) to avoid such an eventuality, the intervention of the State Legislature by making an amendment became a compelling necessity, and, therefore, the State Legislature has to come up with the Amending Act.

13. We may only observe that to substantiate these pleas, there is no material on record.

14. Also, it stands admitted that 8782 number of online applications for regularization of unauthorized construction already stood received.

Historical Perspective of Planned Development in India

15. The history of contemporary planning practice in India dates back to the enactment of the Bombay Improvement Trust Act, 1920. Subsequently, similar Acts were enacted in other Presidencies. Visit of Sir Patrick Geddes to India and his propagation of the work home place theory, laid foundation for setting up of Improvement Trusts and subsequent thinking process for enactment of Town and Country Planning Acts in various States and the establishment of State Town and Country Planning Departments. Following this, Urban Department Authorities were set up under the Development Authority Acts for addressing the problems of fast growing town and cities and formulating Master Plans which apart from having strong spatial connotations also had both social and economic aims.

16. Statutory process of master plan formulation in India was also inspired by the erstwhile comprehensive planning system envisaged under the *Town and Country Planning Act, 1947 of United Kingdom.* As most of the Town Improvement Trust Acts then in force in various States did not contain provisions for preparation of Master Plans, a need was felt to have a Comprehensive Town and country Planning Act on the lines of U.K. Accordingly, Central Town and Country Planning Organization or TCPO drafted the Model Town and Regional Planning and Development Law in 1962, which formed the basis for various States to enact Town and Country Planning Acts, with modifications to suit local conditions.

The Three Acts Dealing with Planning & Construction Activity within the State of Himachal Pradesh

17. Within the State of Himachal Pradesh, planning and construction is essentially regulated by the three statutes.

18. The Planning Act came into force w.e.f. 30.9.1977. The object and purpose is evident from its Preamble, which reads as under:

> "THE HIMACHAL PRADESH TOWN AND COUNTRY PLANNING ACT, 1977 AN ACT to make provision for planning and development and use of land; to make better provision for the preparation of development plans and sectoral plans with a view to ensuring that town planning schemes are made in a proper manner and their execution is made effective to constitute the Town and Country Development Authority for proper implementation of town and country development plan, to provide for the development and administration of special areas through the Special Area Development Authority, to make provision for the compulsory acquisition of land required for the purpose of the development plans and to regulate the construction, sale, transfer and management of apartments, to regulate colonies and provide for registration of promoters and estate agents and for enforcement of obligations on them" and for purposes connected with the matters aforesaid." (Emphasis supplied)

19. Undoubtedly, the Planning Act was incorporated for the purpose of planning, development and use of land; and to make better provision for preparation of development plans.

20. This Act, applicable to the whole of Himachal Pradesh, is divided into Nine Chapters, out of which, we are concerned only with Chapters-III, IV, V & VI.

21. Under Chapter-III, the Director is obliged to carry out survey of the regions notified by the State, for the purposes of preparation of Regional Plan, keeping in view the regulation for land use, zoning for "natural hazard prone area" (sub-section (iii) of Section 5). The regional plan shall indicate, inter alia, the phasing of development, the network of communication and transportation, the proposal of conservation and development of natural resources. Such plans are required to be finalized by the State Government. Section 10 provides that notwithstanding anything contained in any other law, pending finalization of the Draft Regional Plan, no person shall (i) change the use of land for any purpose other than agriculture, (ii) without prior approval of the Director, carry out development contrary to the provisions of the draft plan, which "shall not be granted other than in conformity with the provisions of the draft or

final plan". Significantly, no permission, granted contrary to the same "shall be construed to confer any legal right on the person seeking such permission". Not only that, the respective municipal bodies, within which such contravention is noticed, are mandatorily required to take remedial measures against the defaulter for removal/demolition of such structure (Section 39). By virtue of Section 15-A, pending finalization of plans of the planning area, the State Government is empowered to freeze the land use of any area. This can be so done to prevent ecology and environment, ensuring that no building operation renders the proposed plan to be nugatory.

22. Chapter-IV of the Act, inter alia, provides for the planning areas and the development plans. The Director is under an obligation to prepare and finalize the development plans for the areas notified by the State. With the publication of the land use map, all development of the area is frozen, to be carried out, save and except, in accordance with law. Noticeably, by virtue of Section 17, Director is also under an obligation to prepare interim development plan, mandatorily indicating the land use proposed in the planning area, i.e. residential, industrial, commercial and the other uses to which the area can be put. Also, area for public utilities and amenities is to be specified. It is also to provide for guidelines for construction of buildings, with respect to height, size, structure, etc.

23. Chapter-V provides for preparation of sectoral plans.

24. We notice that in terms of Chapter-VI, control of development and use of land vest with the Director and in terms of Section 26, all developmental activities have to be in conformity with the provisions of the development plan. Further, by virtue of Section 27, no person can change the use of any land or carry out any development of land without written permission of the Director. In fact, there is absolute prohibition from doing so. So much so, even the State or local authority has to take such permission (Section 28). However, Section 30-A carves out an exception with regard to development of rural areas, falling within the planning or special areas, but that is where neither the interim nor the development plan stands notified. We are not concerned with such exceptions, for it is not an issue before us. We notice that by virtue of Section 35, Director has got power to make acquisition of land for town expansion/ improvement. This Chapter also provides for penalty for unauthorized development or use other than in conformity with the development plan. The action is penal and the offender can be sentenced to suffer imprisonment upto six months and also pay fine as sentence (Section 38).

25. From the conjoint reading of the provisions of Sections 38 to 39-C, we find that the authorities constituted under the Act can take action to initiate prosecution; seal and/or remove unauthorized development or even compound the offence.

26. Not only that, by virtue of Section 35, if a property is required for the purpose of town expansion or improvement, it can be acquired.

27. It is not in dispute that though various plans under the Act stand prepared, but the draft plan has yet not been finalized and decisions are being taken on the basis of interim/draft development plans. Also, no exceptions are carved out by virtue of Section 30-A.

28. In the State of Himachal Pradesh, there is also in force the Corporation Act. This Act extends to the whole of the State of Himachal Pradesh, excluding the cantonment areas.

29. Presently, in terms of Section 3, besides Municipal Corporation, Shimla, there is also Municipal Corporation, Dharamshala.

30. Here we are concerned with Chapters XIV and XXII, which lay down regulations and bye-laws, respectively, for construction of buildings and Chapter- XIX, which empowers the Commissioner to lay down a scheme for improvement of the area(s).

31. By virtue of Section 242, no person can erect or commence erection of any building or execute work, so specified in Section 244, except with the prior sanction of the

Commissioner, to be accorded by virtue of Section 246. Prior to any construction, being raised, a person is under an obligation to inform the authority/Commissioner about the same.

32. Statutory scheme mandates all constructions are to be raised in accordance with the regulations and plans sanctioned in terms thereof.

33. Section 253 casts a duty upon the Commissioner to not only stop but also demolish the work so commenced in violation of the Corporation Act. Such work(s) can also be sealed and compounded.

34. The Corporation Act also deals with the obligations, which the Corporation has to perform, with regard to cleanliness, sanitation and public health.

35. Even under the Corporation Act, by virtue of Chapter-XIV, the Corporation is under an obligation to prepare a development plan for its area to be submitted to the District Planning Committee, which, in turn, is required to consolidate the development plans prepared and submitted by the municipalities in the Districts to the Government.

36. Chapter-XIX of the Corporation Act empowers the Commissioner to frame a scheme for improvement of an area in accordance with the bye-laws and some of the parameters for doing so, as is evident from sub-section (a) of Section 332, are sanitary defects, fitness for human habitation, or by reason of their bad arrangement of the streets or want of light, air, ventilation or proper conveniences are dangerous or injurious to the health of the inhabitants of the area. The Commissioner has power to frame scheme for distribution of sites belonging to the owners of the property. Of course, such scheme is to be approved and sanctioned by the State Government.

37. There is also in force the Municipal Act, provisions of which are applicable for Municipalities and Nagar Panchayats. Presently, there are 31 Municipal Councils and 21 Nagar Panchayats.

38. Here, Section 203 provides that no person shall erect or re-erect or commence to erect or re-erect any building without sanction of the municipality. Section 204 confers power upon the municipality to make bye-laws for erection or re-erection of the building. Section 206 confers power upon the State Government, in public interest, to regularize buildings in any area whether constructed with or without sanction of the municipality for which no building scheme or town planning scheme stands sanctioned. Section 211 provides for penalty for disobedience, which *inter alia* provides that in the event of construction of a building having begun, erected or re-erected in violation of the provisions of Sub-section (1) and Sub-section (2) of Section 203 or when sanction stands refused, then the municipality may, require the building erected to be either altered or demolished.

39. When it comes to construction/erection/re-erection of the buildings, we find Chapter-II of the Municipal Act to contain similar provisions, as we have noticed *supra*, so contained in Chapters XIV and XXII of the Corporation Act.

40. Thus, we notice that the object, purpose and aim of all these Acts is to ensure planned and regulated activity of construction, with a specified aim of providing good health and promoting cause of public good.

Interplay and Co-relation between the three Acts

41. That in relation to the building activity, the Planning Act and the Corporation Act operate in different fields and are complementary and supplementary to each other, stands settled by the apex Court in *Commissioner of Municipal Corporation, Shimla v. Prem Lata Sood and others,* (2007) 11 SCC 40, in the following terms:

> "13. Section 243 of the 1994 Act provides that every person who intends to erect a building shall apply for sanction by giving notice in writing of his intention to the Commissioner in such form and containing such information as may be prescribed by the bye-laws made in that behalf. Despite the fact that the

> 1977 Act provides for filing of an application for a development plan, when an interim development plan has been made, the 1994 Act also provides for sanction of a building plan, if a person intends to execute any of the works specified under Section 244 of the 1994 Act. The said provision lays down that every person who intends to execute any of the works specified therein shall apply for sanction by giving notice in writing of his intention to the Commissioner in such form and containing such information as may be prescribed by the bye-laws made in that behalf....."
>
> "29. In our opinion, the 1977 Act and the 1994 Act operate in different fields and they are complementary and supplementary to each other. The provisions of both the Acts can be worked out. There is no conflict between the two Acts. The 1977 Act deals with laying down the broad policy. It provides for preparation of development plans including the internal development plans. Indisputably, such development plans when made would be binding upon the local authority. It may, however, be not correct to contend that despite the fact that the operation of the Acts cover two different fields, namely, the 1977 Act deals with laying down the overall policy matter and the 1994 Act deals with the grant of building plans in terms of the provisions thereof by the Commissioner of the Municipal Corporation; only because sanction for development in the Mall area of the town of Shimla was granted by the State in terms of the 1977 Act, the same would mean that the same was binding upon the Municipal Corporation or that the provisions of the 1994 Act or the building bye-laws were not required to be complied with at all." (Emphasis supplied)

42. In our considered view, the position with regard to the Municipal Act has to be similar.

43. Hence, at this juncture, we may clarify that exemption, if any, under the newly inserted Section 30-B has to be read and confined as applicable only to the Planning Act and not the Corporation Act or Municipal Act, for there is no corresponding amendment carried out thereunder. Rigours of the other two Acts would continue to be applicable with full force. Property falling within the territorial limits of the Corporation Act or the Municipal Act, even though, exempted under the Planning Act, would still continue to be regulated by the former Acts.

44. We notice that despite the mechanism for enforcement of the three enactments in place, repeatedly, rather notoriously, all the successive Governments, not only allowed rampant growth of concrete jungle, but relentlessly pursued the policy of appeasement, by promoting and propagating dishonesty, for regulating unauthorized possession (Encroachment Policy) or unauthorized construction (Retention Policy).

45. This now takes us to the point as to how this Court has dealt with such issues.

Consistent View of this Court on Different Encroachment/ Retention Policies

46. In *Society for Preservation of Kasauli v. State of Himachal* Pradesh, 1994 Supp. SLC 450 (DB; 5.7.1994), this Court expressed concern with regard to "concrete structures" "becoming eye-sore in calm and cool atmosphere" of hills of Himachal Pradesh. While noticing that balance must be struck between the environment and human beings, the Court observed that the factum of the beauty of the Himalayan Range is well known and acknowledged. Its preservation is paramount importance and consideration. It is submitted that civilisation must necessarily have its effect on environment as it is an universal truth that no civilisation in the entire world progressed/developed without affecting the environment. 'Progress of civilisation and pollution in environment go side by side' and are supplementary to each other. No civilisation can be conceived without any pollution. Environment necessarily has to be preserved for the benefit of human race, but it cannot be extended whereby the progress of the society is either obliterated or hampered. Military installations, tele-communications, net-works, electrical transmission and

housing with its infrastructure, must necessarily be permitted to mingle with the scenario of modern technologies in the march towards the next century for shelter on every human head is not of lesser importance or significance than the presence of good environment. Therefore, balance must be struck between the environment and the human needs.

47. In CWP No.122 of 1995, titled as *Raj Kumar Singla v. State of H.P. and another* (DB; 16.9.1997), it was observed that:

> "18. It is rather surprising that the State Government should think of legalising an illegal act and part with the Government property or public property in favour of those persons, who are guilty of committing such illegal acts. It is the duty of the Government to prevent encroachment on public property. If the Government decides to make a gift of the public property to those who have encroached thereon it will tantamount to the Government accepting and admitting its inability to prevent the encroachment. In fact, the marginal note in ....."
>
> "20. Though in this case, the State Government has not expressly pleaded its inability to prevent encroachment on Government land and public property, the encroachment policy issued by the State Government would only show that the Government is not in a position to handle the situation. It is a pity that the Government with its powerful machinery is not in a position to protect its property, which is really a property of the people of the State and goes to the extent of making a gift of the property on which unscrupulous people have encroached by violating the provisions of law. We cannot but express our anguish and explain 'woe unto the Government which seeks to legalise an illegality by an executive action'."
>
> "27. The Court reiterated the above propositions and held that a public policy cannot be a camouflage for abuse of the power and trust entrusted with the public authority or public servant for the performance of public duties."
>
> (Emphasis supplied)

48. In CWP No.2697 of 2011, titled as *Budhishwar Gaur v. State of H.P. & others* (SB; 9.1.2012), it was observed that:

> "29. .....The matter is required to be looked into from another angle. The Municipal Council is required to ensure due compliance of the building plans at each and every stage. It need not wait to take action till the completion of the building. The policy of Municipal Corporation to wait till the completion of the building and to forfeit only the security amount, which is deposited, is contrary to the letter and spirit of the H.P. Municipal Act. The Court can take judicial notice of the fact that large scale constructions are being carried out throughout the State of Himachal Pradesh in violation of the approval/sanctions and the Municipal Councils. Once the law has been enacted, it must be scrupulously followed and if there is laxity, it erodes the accountability of the Government. The rule of law is required to be maintained by all the concerned authorities, which are responsible for implementing the law."
>
> (Emphasis supplied)

49. In CWP No.897 of 2004, titled as *Vijay Kumar Aggarwal v. State of H.P. & others* (SB; 31.10.2012), this Court emphasized that the provisions of the Act "provided for regulation and construction of a building in an urban area and the object behind the rules is maintenance of public safety and conveniences". Further, building plans are governed by statutory provisions which are intended to ensure proper administration and provide proper civic amenities and no vested right divorced from public interest or public convenience can be claimed by any person seeking such sanction.

50. In CWPIL No.14 of 2014, titled as *Court on its own motion v. State of H.P. & others* (DB; 22.5.2015), one of us (Tarlok Singh Chauhan, J.) expressed deep concern as to why administration was permitting Shimla town, once considered to be the "Jewel of Orient" and "Town of Dreams", to be converted into a slum. Great concern was expressed of the State not having learnt any lesson from the recent earthquakes, devastating the Himalayan region and the administration not rising out of slumber. The Court took note of the town of Shimla having become concrete jungle and consequences of it being reduced to a "tomb of rubble" in the event of the unfortunate natural calamity, arising as a result of high intensity earthquake, occurring in Seismic Zones 4 & 5. Further that:

> "30. According to the report prepared by the Himachal Pradesh State Disaster Management Authority, seismically, the State lies in the great Alpine-Himalayan seismic belt running from Alps Himalayan through Serbia, Croatia, Turkey, Iran, Afghanistan, Pakistan, India, Nepal, Bhutan and Burma.
>
> 31. On April 4, 1905, an earthquake of 7.8 magnitude hit Kangra killing 20,000 people, 53,000 domestic animals while one lakh houses were destroyed. Economic Cost of recovery was estimated at Rs.29 lakhs during that time. On January 19, 1975, a quake of 6.8 magnitude hit Kinnaur killing 60 people while 100 others were badly injured. About 2,000 dwellings were devastated and more than 2,500 people were rendered homeless. On April 26, 1986 in Dharamshala a tremor of 5.5 magnitude had killed six people and caused extensive damage to buildings and the loss was estimated at Rs.65 crore. In Chamba, on March 24, 1995, an earthquake of 4.9 magnitude had left over 70% houses with cracks. Similarly, on July 29, 1997, a quake of 5.0 magnitude had left around 1,000 houses damaged in Sundernagar.
>
> 32. Once such gruesome realities exist, can the unauthorized structures still be regularized by encouraging violators only to contribute to the rapid haphazard urban growth in the hope that the government will finally regularize the structures? This simply cannot be done. It cannot be denied that haphazard, unplanned and illegal constructions have marred the beauty of hill towns in Himachal Pradesh, more particularly, its capital Shimla. It is high time that the building byelaws are suitably amended by taking into consideration the recent seismic activity that has taken place in the entire Himalayan region."

Eventually, inter alia, following direction was issued:

> "xix) The respondents are further restrained from introducing any retention/regularization policy, guidelines or instructions thereby permitting regularization of unauthorized structures."

51. Prevalent "grim situation" and the serious view taken by the Court, in CWP No.673 of 2005, titled as *Thakur Singh v. State of H.P.* (SB; 7.8.2009), also stands taken note of by the Legislators.

52. Thus since the year 1994, this Court, repeatedly, has not only reprimanded the Government but also directed strict action to be taken against the defaulters, including the corrupt officials.

Disaster Management – Policy of State of Himachal Pradesh

53. On 27.3.2012 the State Government (Cabinet) approved the Himachal Pradesh State Policy on Disaster Management, 2011, so prepared by its Department of Revenue. Well this public document is really an eye opener. It reveals the potential risks to which the State can possibly be exposed in the event of an unfortunate incident of earthquake(s), landslide(s), flash flood(s), snow storm(s) & avalanche(s), drought(s), dam failure(s), fires or other natural calamities. Relevant portion whereof reads as under:

"1.2.1 State of Himachal is prone to various hazards both natural and manmade. Main hazards consist of earthquakes, landslides, flash floods, snow storms and avalanches, droughts, dam failures, fires – domestic and wild, accidents – road, rail, air, stampedes, boat capsizing, biological, industrial and hazardous chemicals etc. The hazard which however, poses biggest threat to the State is the earthquake hazard. The State has been shaken more than 80 times by earthquakes having a magnitude of 4 and above on the Richter Scale as per the recorded history of earthquakes. As per the BIS seismic zoning map five districts of the State, namely Chamba (53.2%) Hamirpur (90.9%), Kangra (98.6%), Kullu (53.1%), Mandi (97.4%) have 53 to 98.6 percent of their area liable to the severest design intensity of MSK IX or more, the remaining area of these districts being liable to the next severe intensity VIII. Two districts, Bilaspur (25.3%) and Una (37.0%) also have substantial area in MSK IX and rest in MSK VIII. The remaining districts also are liable to intensity VIII.

1.2.2 Unfortunately, in spite of the probable maximum seismic intensities being high, the house types mostly fall under Category A, consisting of walls of clay mud, unburnt bricks or random rubble masonry without any earthquake resisting features. Now all such houses are liable to total collapse if intensity IX or more actually occurs in future and will have severe damage called "destruction" with very large cracks and partial collapses even in intensity VIII areas. Also, the burnt-brick houses, classified as Category B, as built in Himachal Pradesh do not have the earthquake resisting features, namely good cement mortar seismic bands and roof typing etc. therefore, they will also be liable to severe damage under intensity IX as well as in VIII when ever such an earthquake would occur. This became quite evident even in M 5.7 Dharamshala earthquake of 1986.

1.2.3 Another form of the natural hazards in the state is the frequent occurrence of landslides. The hills and mountains of Himachal Pradesh are liable to suffer landslides during monsoons and also in high intensity earthquakes. The vulnerability of the geologically young and not so stable steep slopes in various Himalayan ranges, has been increasing at a rapid rate in the recent decade due to inappropriate human activity like deforestation, road cutting, terracing and changes in agriculture crops requiring more intense watering etc. Although widespread floods problems do not exist in the state because of topographical nature, continuing attention is necessary to reduce flood hazards in the state, more particularly the flash flood hazard the incidences of which are increasing causing large scale damage. Besides, with the increase of road connectivity and number of vehicles plying on these roads in the State, the number of road accidents and loss of precious human lives is increasing day by day."

54. It is evident that for more than two decades, repeatedly, this court has deprecated the practice adopted by the State in perpetuating such dishonesty.

55. The Comptroller and Auditor General of India, in Report No. 3 of 2017 – *Social General Economic Sectors (Non PSUs) for the year ended 31st December, 2016,* while commenting upon the Retention Policy of the State, clearly stated that ineffective enforcement of regulations enabled flourishing of unauthorized construction of buildings which were subsequently regularized, violating every conceivable control, check, including approved plan, in violation of the public policy as laid down under the parent Act. Granting of such exemptions was against public interest, safety, health and the environment.

56. The Minister-in-Charge himself noticed the view expressed by this Court in *Thakur Singh (supra)*, pointing out the "grim situation" with regard to unauthorized constructions, coupled with the direction to the State Government to desist from framing Retention Policy, permitting regularization of such constructions.

57. Well, all this was in relation to the exercise of power by the Government or the functionaries/ delegatees and in relation to inaction, non-action or policy matters.

58. Yes, we are conscious of the fact that legislation has to be dealt with differently and that too within the restrictive parameters of law.

59. Before we examine the same, let us also see as to how the Hon'ble Supreme Court has emphasized the need for planned development and dealt with the issue of unauthorized constructions.

Need for Planned Development – Supreme Court of India

60. The Apex court in *Manohar Joshi v. State of Maharashtra,* (2012) 3 SCC 619 (two-Judge Bench), emphasized the need of planned development in the following terms:

> "197. The significance of planning in a developing country cannot be understated ....." ".....The leaders of Indian Freedom Movement and particularly Pandit Jawaharlal Nehru, our first Prime Minister always emphasised democratic planning as a method of nation building and economic and social upliftment of Indian society."
>
> 198. ... Nehru believed in participation of different sections of society in framing of the Plan. The emphasis has always been amongst others to put land to the best use from the point of the requirements of our society, since land is a scarce resource and it has to be used for the optimum benefit of the society.
>
> 199. As stated above, we adopted the model of democratic planning which involves the participation of the citizens, planners, administrators, Municipal bodies and the Government as is also seen throughout the MRTP Act. Thus when it comes to the Development Plan for a city, at the initial stage itself there is the consideration of the present and future requirements of the city. Suggestions and objections of the citizens are invited with respect to the proposed plan, and then the planners apply their mind to arrive at the plan which is prepared after a scientific study, and which will be implemented ...."

61. The Apex Court (two-Judge Bench) in *Pratibha Co-operative Housing Society v. State of Maharashtra,* (1991) 3 SCC 341 (two-Judge Bench), took note of increasing tendency of raising unauthorized constructions and encroachments, throughout the entire country, emphasizing the need to deal with firmly. It further held (i) unlawful constructions are against public interest, (ii) they are hazardous to safety of the occupiers and residents, (iii) it is a bounden duty of the citizen to obey, (iv) follow the rules made for their own benefits and (v) which was in larger public interest.

62. In *Padma v. Hirala Motilal Desarda and others,* (2002) 7 SCC 564, the Apex Court (two-Judge Bench) emphasized that laws dealing with "development planning are indispensable to sanitation and healthy urbanization", which, comprehensively takes care of statutory, manual, administrative and land-use laws hand in hand with architectural creativity. Further, "In the words of a well-known architect, development planning is the DNA of urbanization - the genetic code that determines what will get built. A development plan is essential to aesthetics of urban society. American Jurisprudence 2d (Volume 82, at page 388) states:

> "'Planning', as that term is used in connection with community development, is a generic term, rather than a word of art, and has no fixed meaning. Broadly speaking, however, the term connotes the systematic development of a community or an area with particular reference to the location, character, and extent of streets, squares, and parks, and to kindred mapping and charting. Planning has in view the physical development of the community and its environs in relation to its social and economic well-being for the fulfillment of the rightful common destiny, according to a "master plan" based on careful and comprehensive surveys and studies of present conditions and the prospects of

future growth of the municipality, and embodying scientific teaching and creative experience."

32. The significance of a development planning cannot therefore be denied. Planned development is the crucial zone that strikes a balance between the needs or large-scale urbanization and individual building. It is the science and aesthetics of urbanization as it saves the development from chaos and uglification. A departure from planning may result in disfiguration of the beauty of an upcoming city and may pose a threat for the ecological balance and environmental safeguards." (Emphasis supplied)

63. In *Howrah Municipal Corporation & others v. Ganges of Rope Co. Ltd. & others,* (2004) 1 SCC 663, the Apex Court held that in the matter of sanction of buildings for construction and restricting their height, paramount consideration is public interest and convenience and not the interest of a particular person or a party.

64. In *Friends Colony Development Committee v. State of* Orissa *and others,* (2004) 8 SCC 733, the Apex Court (two-Judge Bench) emphasized the need for regulating construction activity. It observed that:

"24. Structural and lot area regulations authorize the municipal authorities to regulate and restrict the height, number of stories and other structures; the percentage of a plot that may be occupied; the size of yards, courts, and open spaces; the density of population; and the location and use of buildings and structures. All these have in view and do achieve the larger purpose of the public health, safety or general welfare. So are front setback provisions, average alignments and structural alterations. Any violation of zoning and regulation laws takes the toll in terms of public welfare and convenience being sacrificed apart from the risk, inconvenience and hardship which is posed to the occupants of the building. [for a detailed discussion reference may be had to the chapter on "Zoning and Planning" in *American Jurisprudenc*e, 2d, Vol. 82.]

25. Though the municipal laws permit deviations from sanctioned constructions being regularized by compounding but that is by way of exception. Unfortunately, the exception, with the lapse of time and frequent exercise of the discretionary power conferred by such exception, has become the rule. Only such deviations deserve to be condoned as are bona fide or are attributable to some mis-understanding or are such deviations as where the benefit gained by demolition would be far less than the disadvantage suffered. Other than these, deliberate deviations do not deserve to be condoned and compounded. Compounding of deviations ought to be kept at a bare minimum……."

(Emphasis supplied)

65. In *Royal Paradise Hotel (P) Ltd. v. State of Haryana and others,* (2006) 7 SCC 597 (three-Judge Bench), the Apex Court has held that:

"8. ……. Even otherwise, compounding is not to be done when the violations are deliberate, designed, reckless or motivated. Marginal or insignificant accidental violations unconsciously made after trying to comply with all the requirements of the law can alone qualify for regularization which is not the rule, but a rare exception….." (Emphasis supplied)

66. In *Chairman, Indore Vikas Pradhikaran v. Pure Industrial Coke & Chemicals Ltd. and others,* (2007) 8 SCC 705, the Apex Court (two-Judge Bench) held that:

"53. The right of property is now considered to be not only a constitutional right but also a human right."

67. The Apex Court (two-Judge Bench) in *Shanti Sports Club and another v. Union of India and others,* (2009) 15 SCC 705 (two-Judge Bench), has held as under:

> "74. In last four decades, almost all cities, big or small, have seen unplanned growth. In the 21st century, the menace of illegal and unauthorized constructions and encroachments has acquired monstrous proportions and everyone has been paying heavy price for the same. Economically affluent people and those having support of the political and executive apparatus of the State have constructed buildings, commercial complexes, multiplexes, malls etc. in blatant violation of the municipal and town planning laws, master plans, zonal development plans and even the sanctioned building plans. In most of the cases of illegal or unauthorized constructions, the officers of the municipal and other regulatory bodies turn blind eye either due to the influence of higher functionaries of the State or other extraneous reasons. Those who construct buildings in violation of the relevant statutory provisions, master plan etc. and those who directly or indirectly abet such violations are totally unmindful of the grave consequences of their actions and/or omissions on the present as well as future generations of the country which will be forced to live in unplanned cities and urban areas. The people belonging to this class do not realize that the constructions made in violation of the relevant laws, master plan or zonal development plan or sanctioned building plan or the building is used for a purpose other than the one specified in the relevant statute or the master plan etc., such constructions put unbearable burden on the public facilities/amenities like water, electricity, sewerage etc. apart from creating chaos on the roads. The pollution caused due to traffic congestion affects the health of the road users. The pedestrians and people belonging to weaker sections of the society, who cannot afford the luxury of air-conditioned cars, are the worst victims of pollution. They suffer from skin diseases of different types, asthma, allergies and even more dreaded diseases like cancer. It can only be a matter of imagination how much the government has to spend on the treatment of such persons and also for controlling pollution and adverse impact on the environment due to traffic congestion on the roads and chaotic conditions created due to illegal and unauthorized constructions. This Court has, from time to time, taken cognizance of buildings constructed in violation of municipal and other laws and emphasized that no compromise should be made with the town planning scheme and no relief should be given to the violator of the town planning scheme etc. on the ground that he has spent substantial amount on construction of the buildings etc……."
>
> (Emphasis supplied)

68. In *Priyanka Estates International Private Limited & others v. State of Assam & others,* (2010) 2 SCC 27, the Apex Court (two-Judge Bench), held that if unauthorised constructions are allowed to stand or given a seal of approval by court then it is bound to affect the public at large. An individual has a right, including a fundamental right, within a reasonable limit, it inroads the public rights leading to public inconvenience, therefore, it is to be curtailed to that extent.

69. In *M.C. Mehta v. Union of India & others,* (2006) 3 SCC 399 (three-Judge Bench), the Apex Court observed:

> "61. … If the laws are not enforced and the orders of the courts to enforce and implement the laws are ignored, the result can only be total lawlessness. ……. action is also necessary to check corruption, nepotism and total apathy towards the rights of the citizens." (Emphasis supplied)

70. In *Dipak Kumar Mukherjee v. Kolkata Municipal Corporation and others,* (2013) 5 SCC 336, the Apex Court (two-Judge Bench) emphasized the need for checking illegal and unauthorized construction of buildings and other structures for not only it does violence to the Municipal Laws and the concept of planned development of a particular area but "also affects various fundamental and constitutional rights of other persons". The Court further held that the

common man feel cheated when he finds that those making illegal and unauthorized constructions are supported by the people entrusted with the duty of preparing and executing the developmental plans.

71. The Apex Court in *Esha Ekta Apartments Cooperative Housing Society Limited and others v. Municipal Corporation of Mumbai and others,* (2013) 5 SCC 357 (two-Judge Bench), has held that:

> "1. In last five decades, the provisions contained in various municipal laws for planned development of the areas to which such laws are applicable have been violated with impunity in all the cities, big or small, and those entrusted with the task of ensuring implementation of the master plan, etc., have miserably failed to perform their duties. It is highly regrettable that this is so despite the fact that this Court has, keeping in view the imperatives of preserving the ecology and environment of the area and protecting the rights of the citizens, repeatedly cautioned the concerned authorities against arbitrary regularization of illegal constructions by way of compounding and otherwise." (Emphasis supplied)

72. In *M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu,* (1999) 6 SCC 464, the Apex Court, while directing demolition of a shopping complex, which was built in an illegally, arbitrary and unconstitutional manner, held that no "consideration should be shown to the builder or any other person where construction is unauthorized" and "this dicta is now almost bordering the rule of law", in the following terms:

> "73. The High Court has directed dismantling of the whole project and for restoration of the park to its original condition. This Court in numerous decisions has held that no consideration should be shown to the builder or any other person where construction is 517 unauthorized. This dicta is now almost bordering rule of law. Stress was laid by the appellant and the prospective allottees of the shops to exercise judicial discretion in moulding the relief. Such discretion cannot be exercised which encourages illegality or perpetuates an illegality. Unauthorised construction, if it is illegal and cannot be compounded, has to be demolished. There is no way out. Judicial discretion cannot be guided by expediency. Courts are not free from statutory fetters. Justice is to be rendered in accordance with law. Judges are not entitled to exercise discretion wearing robes of judicial discretion and pass orders based solely on their personal predilections and peculiar dispositions. Judicial discretion wherever it is required to be exercised has to be in accordance with law and set legal principles. As will be seen in moulding the relief in the present case and allowing one of the blocks meant for parking to stand we have been guided by the obligatory duties of the Mahapalika to construct and maintain parking lots." (Emphasis supplied)

73. The principles stand reiterated in *Bihar Finance Service House Construction Cooperative Society Ltd. v. Gautam Goswami & others,* (2008) 5 SCC 339, wherein it is further held that planning statutes "subserve promotion and protection of ecology which is one of the foremost needs of society".

74. From the decisions rendered by the Apex Court noticed *supra*, we find following principles can be culled out:

i. Planned development is necessary.

ii. It is indispensible from sanitation and health point of view.

iii. Planning statutes sub serve promotion and protection of ecology, which is the foremost need of the society.

iv. Violation of municipal laws affects fundamental and constitutional rights of the citizens.

v. Right to property is not only a constitutional right but also a human right.

vi. Larger public interest must outweigh private interest.

vii. Illegal and unauthorized construction/non planned construction leads to unbearable burden on public facilities/ amenities.

viii. Non enforcement of law leads to lawlessness.

ix. Unauthorized/illegal construction is definitely a result of collusion, connivance, inaction and/or non-action on the part of the government, its functionaries.

x. Failure on the part of the Government broods corruption and nepotism.

xi. No consideration should be shown to a person carrying out unauthorized construction, which dicta is bordering rule of law.

75. Again, we clarify that the aforesaid discussion is not in the context of challenge to a legislation, but its non-implementation and enforcement. Hence, we now proceed to examine the law on the issue, i.e. scope of judicial review of a legislation.

Scope of Judicial Review of a Legislation

(a) Provisions of the Indian Constitution

76. Articles:

"13. Laws inconsistent with or in derogation of the fundamental rights:-

(1) …

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

"14. Equality before law:- The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.**"**

"47. Duty of the State to raise the level of nutrition and the standard **of living and to improve public health.** – The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health."

"243ZD. Committee for district planning. – (1) …

(2) …..

(3) Every District Planning Committee shall, in preparing the draft development plan, –

(a) have regard to –

(i) matters of common interest between the Panchayats and the Municipalities including spatial planning, sharing of water and other physical and natural resources, the integrated development of infrastructure and environmental conservation;

…

243ZE. Committee of Metropolitan planning. –

(1) & (2) …

(3) Every Metropolitan Planning Committee shall, in preparing the draft development plan, –

(a) have regard to –

(i) the plans prepared by the Municipalities and the Panchayats in the Metropolitan area;

…"

77. By virtue of the 74th Amendment in the Constitution, the concept of "planned development" was specifically introduced with the insertion of Part-IXA in the Constitution. Articles 243-ZD and 243-ZE mandatorily require the District/Metropolitan Committees to prepare a Draft Development Plan, having regard to the plans prepared by the Municipalities and the Panchayats in the Metropolitan areas. What necessarily is required to be kept in mind, *inter alia,* is common interest of "spatial planning" and "integrated development of infrastructure and environmental conservation".

78. Article 243W empowers the State to endow Local Self-Governments with the powers for "Urban Planning including Town Planning" – Twelfth Schedule.

(a) Constitution is Supreme

79. A Constitution Bench of the Apex Court in *Rameshwar Prasad and others (VI) v. Union of India and another,* (2006) 2 SCC 1 (five-Judge Bench), has held:

"244. A Constitution is a unique legal document. It enshrines a special kind of norm and stands at the top of normative pyramid. Difficult to amend, it is designed to direct human behavior for years to come. It shapes the appearance of the State and its aspirations throughout history. It determines the State's fundamental political views. It lays the foundation for its social values. It determines its commitments and orientations. It reflects the events of the past. It lays the foundation for the present. It determines how the future will look. It is philosophy, politics, society, and law all in one. Performance of all these tasks by a Constitution requires a balance of its subjective and objective elements, because "it is a constitution we are expounding." As Chief Justice Dickson of the Supreme Court of Canada noted:

> "The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by it framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.""

80. In *I.R. Coelho (Dead) by LRs v. State of T.N.,* (2007) 2 SCC 1, the Apex Court (nine-Judge Bench) held:

"48. There is a difference between Parliamentary and constitutional sovereignty. Our Constitution is framed by a Constituent Assembly which was not the Parliament. It is in the exercise of law making power by the Constituent Assembly that we have a controlled Constitution. Articles 14, 19, 21 represent the foundational values which form the basis of the rule of law. These are the principles of constitutionality which form the basis of judicial review apart from the rule of law and separation of powers. ……."

"129. Equality, rule of law, judicial review and separation of powers form parts of the basic structure of the Constitution. Each of these concepts are intimately connected. There can be no rule of law, if there is no equality before the law. These would be meaningless if the violation was not subject to the judicial review.

All these would be redundant if the legislative, executive and judicial powers are vested in one organ. Therefore, the duty to decide whether the limits have been transgressed has been placed on the judiciary."

(b) Criteria for Declaring a Legislation Ultra Vires the Constitution

81. We have ourselves researched, minutely examined and found several decisions of the Apex Court, explaining as to what really is the meaning of "equality before law", what are the grounds on which a legislation, primary or delegated, can be assailed; what are the constraints of the Court in holding the same to be ultra vires and what is the approach which the Court must adopt in examining its constitutional validity.

82. To our mind, principle stands best culled out by the Apex Court in *Subramaniam Swamy v. Director, Central Bureau of Investigation and another,* (2014) 8 SCC 682 (five- Judge Bench) and *Shayra Bano (supra)*.

83. Lest we mis-read the same, we deem it appropriate to reproduce the relevant portion of what the Apex Court observed in *Subramaniam (supra)*:

> "41. In *Ram Krishna Dalmia v Justice SR Tendolkar & Ors*, 1959 SCR 279, the Constitution Bench of five Judges further culled out the following principles enunciated in the above cases:
>
> > "11. ... (a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;
> >
> > (b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;
> >
> > (c) that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;
> >
> > (d) that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;
> >
> > (e) that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and
> >
> > (f) that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation."
>
> Further:
>
> "43. .....
>
> > "12. ..... In determining the validity or otherwise of such a statute the court has to examine whether such classification is or can be reasonably regarded as based upon some differentia which distinguishes such persons or things grouped together from those left out of the group and whether such differentia has a reasonable relation to the object

sought to be achieved by the statute, no matter whether the provisions of the statute are intended to apply only to a particular person or thing or only to a certain class of persons or things. Where the court finds that the classification satisfies the tests, the court will uphold the validity of the law.

(ii) A statute may direct its provisions against one individual person or thing or to several individual persons or things but no reasonable basis of classification may appear on the face of it or be deducible from the surrounding circumstances, or matters of common knowledge. In such a case the court will strike down the law as an instance of naked discrimination."

44. *In Nagpur Improvement Trust and Anr v Vithal Rao and Ors*, (1973) 1 SCC 500, the five-Judge Constitution Bench had an occasion to consider the test of reasonableness under Article 14 of the Constitution. It noted that the State can make a reasonable classification for the purpose of legislation and that the classification in order to be reasonable must satisfy two tests: (i) the classification must be founded on intelligible differentia and (ii) the differentia must have a rational relation with the object sought to be achieved by the legislation in question. The Court emphasized that in this regard object itself should be lawful and it cannot be discriminatory. If the object is to discriminate against one section of the minority, the discrimination cannot be justified on the ground that there is a reasonable classification because it has rational relation to the object sought to be achieved.

45. The constitutionality of Special Courts Bill, 1978 came up for consideration in *Special Courts Bill, 1978, In Re: President of India v. The Special Courts Bill, 1978*, (1979) 1 SCC 380 as the President of India made a reference to this Court under Article 143(1) of the Constitution for consideration of the question whether the "Special Courts Bill" or any of its provisions, if enacted would be constitutionally invalid. The seven Judge Constitution Bench dealt with the scope of Article 14 of the Constitution. Noticing the earlier decisions of this Court *in Budhan Choudhry v. State of Bihar,* AIR 1955 SC 191, *Ram Krishna Dalmia v. S.R. Tendolkar,* AIR 1958 SC 538, *CI Emden v State of U.P.*, 1960 2 SCR 592, *Kangsari Haldar & Anr v State of West Bengal*, 1960 2 SCR 646, *Jyoti Pershad v. UT of Delhi,* AIR 1961 SC 457 and *State of Gujarat & Anr v Shri Ambica Mills Ltd*, *Ahmedabad & Anr*, (1974) 3 SCR 760, in the majority judgment the then Chief Justice Y.V. Chandrachud, inter alia, exposited the following propositions relating to Article 14:

"(1) * * *

(2) The State, in the exercise of its governmental power, has of necessity to make laws operating differently on different groups or classes of persons within its territory to attain particular ends in giving effect to its policies, and it must possess for that purpose large powers of distinguishing and classifying persons or things to be subjected to such laws.

(3) * * *

(4) * * *

(5) By the process of classification, the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality; but if a law deals with the liberties of a number of well- defined classes, it is not open to the charge of denial of equal protection on the ground that it has no

application to other persons. Classification thus means segregation in classes which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily.

(6) The law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognise even degree of evil, but the classification should never be arbitrary, artificial or evasive.

(7) The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act."

84. What is "arbitrary" also stands explained by the Apex Court in *Mrs. Maneka Gandhi v. Union of India & another,* (1978) 1 SCC 248, where it held that:

"7. Now, the question immediately arises as to what is the requirement of Article 14 : what is the content and reach of the great equalising principle enunciated in this article ? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach._ No attempt should be made to truncate its all embracing scope and meaning for, to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. We must reiterate here what was pointed out by the majority in E. P. Royappa v. State of Tamil Nadu & Another,1974 2 SCR 348 namely, that "from a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14". ....." (Emphasis supplied)

85. A Constitution Bench of the Apex Court in *State of* Gujarat *v. Mirzapur Moti Kureshi Kassab Jamat & others,* (2005) 8 SCC 534 (seven-Judge Bench), held:

"40. In *State of Kerala v. N. M. Thomas,* (1976) 2 SCC 310, also a seven-Judge bench of this Court culled out and summarized the ratio of this Court in *Kesavananda bharati*. Fazal Ali, J. extracted and set out the relevant extract from the opinion of several Judges in *Kesavananda Bharati* and then opined:

"164. In view of the principles adumbrated by this court it is clear that the directive principles form the fundamental feature and the social conscience of the Constitution and the Constitution enjoins upon the State to implement these directive principles. The directives thus provide the policy, the guidelines and the end of socio-economic freedom and Articles 14 and 16 are the means to implement the policy to achieve the ends sought to be promoted by the directive principles. So far as the courts are concerned where there is no apparent inconsistency between the directive principles contained in Part IV and the fundamental rights mentioned in Part III, which in fact supplement each other, there is no

> difficulty in putting a harmonious construction which advances the object of the Constitution. Once this basic fact is kept in mind, the interpretation of Articles 14 and 16 and their scope and ambit become as clear as day."
>
> 41. ... A restriction placed on any Fundamental right, aimed at securing Directive Principles will be held as reasonable and hence intra vires subject to two limitations: first, that it does not run in clear conflict with the fundamental right, and secondly that it has been enacted within the legislative competence of the enacting legislature under Part xi Chapter I of the Constitution."
>
> (Emphasis supplied)

86. In the present case, respondents made an argument that in exercise of power under judicial review striking down a legislation only on the basis of "arbitrariness" is not permissible in view of *State of Andhra Pradesh v. McDowell & Co.,* (1996) 3 SCC 709 and *Binoy Viswam (supra)*. The submission needs to be rejected in view of authoritative pronouncement of the Constitution Bench (3:2) in *Shayra Bano (supra)*, which states, in no uncertain terms, in Paragraph-99, that both these judgments were in fact *per incurium*, and that laws/legislations can be struck down on the ground of arbitrariness, if found to be violative of Article 14. It held:

> "87. The thread of reasonableness runs through the entire fundamental rights Chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate Article 14. Further, there is an apparent contradiction in the three Judges' Bench decision in *State of A.P. v. McDowell and Co.,* (1996) 3 SCC 709, when it is said that a constitutional challenge can succeed on the ground that a law is "disproportionate, excessive or unreasonable", yet such challenge would fail on the very ground of the law being "unreasonable, unnecessary or unwarranted". The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve a law being disproportionate, excessive or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution."
>
> "99. However, in *State of Bihar v. Bihar Distillery Ltd.*, (1997) 2 SCC 453 at paragraph 22, in *State of M.P. v. Rakesh Kohli*, (2012) 6 SCC 312 at paragraphs 17 to 19, in *Rajbala v. State of Haryana & Ors.*, (2016) 2 SCC 445 at paragraphs 53 to 65 and *Binoy Viswam v. Union of India*, (2017) 7 SCC 59 at paragraphs 80 to 82, McDowell (supra) was read as being an absolute bar to the use of "arbitrariness" as a tool to strike down legislation under Article 14. As has been noted by us earlier in this judgment, *Mcdowell (supra)* itself is per incuriam, not having noticed several judgments of Benches of equal or higher strength, its reasoning even otherwise being flawed. The judgments, following *McDowell (supra)* are, therefore, no longer good law."
>
> 100. .....
>
> 44. Also, in *Sharma Transport v. State of A.P.* [(2002) 2 SCC 188], this Court held: (SCC pp. 203-04, para 25) "25. ... The tests of arbitrary action applicable to executive action do not necessarily apply to delegated legislation. In order to strike down a delegated legislation as arbitrary it has to be established that there is manifest arbitrariness. In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression "arbitrarily" means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of

> things, non-rational, not done or acting according to reason or judgment, depending on the will alone." (at pages 736-737)
>
> 101. It will be noticed that a Constitution Bench of this Court in *Indian Express Newspapers v. Union of India*, (1985) 1 SCC 641, stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such 391 legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14." (Emphasis supplied)

87. The Apex Court in *K.R. Lakshmanan (Dr.) v. State of Tamil Nadu*, (1996) 2 SCC 226 (three-Judge Bench) struck down a 1986 Tamil Nadu Act on the ground that it was arbitrary and, therefore, violative of Article 14. Two separate arguments were addressed under Article 14. One that the Act in question was discriminatory and, therefore, violative of Article 14. The other that in any case the Act was arbitrary and for that reason would also violate the separate facet of Article 14. The issues were decided as under:

> "48. ... We fail to understand how the State Government can acquire and take over the functioning of the race club when it has already enacted the 1974 Act with the avowed object of declaring horse racing as gambling? Having enacted a law to abolish betting on horse racing and stoutly defending the same before this Court in the name of public good and public morality, it is not open to the State Government to acquire the undertaking of horse racing again in the name of public good and public purpose. It is ex-facie irrational to invoke "public good and public purpose" for declaring horse racing as gambling and as such prohibited under law, and at the same time speak of "public purpose and public good" for acquiring the race club and conducting the horse racing by the Government itself. Arbitrariness is writ large on the face of the provisions of the 1985 Act."

88. Article 14 is not meant to perpetuate illegality or fraud. It has a positive concept. Equality is a trite, which cannot be claimed in illegality and therefore, cannot be enforced by a citizen or Court in a negative manner. (*Fuljit Kaur v. State of Punjab and others*, (2010) 11 SCC 455).

Binding Effect of Consumer Action Group (2000) 7 SCC 425

89. Respondents heavily seek reliance on the law laid down by the Apex Court in *Consumer Action Group (supra)*. According to the State, provisions of Section 113-A of the Tamil Nadu Town and Country Planning Act, 1971, subject matter of challenge in the said decision, are similar, if not *para materia,* with the Amending Act (Section 30-B), subject matter of the present petitions.

89.1 Is it, as is so argued by the respondents, that the issues being identical, stood settled by the Apex Court and are thus no long *res integra*. Well, we minutely proceed to examine the provisions, which led to the amendments in the respective statutes.

89.2 The Apex court was seized of three issues, (a) the constitutional validity of Section 113 of the Tamil Nadu Town and Country Planning Act, 1971, (b) the Government Orders (G.O.), 62 in number, issued in terms thereof, and (c) constitutional validity of newly inserted Section 113-A.

89.3 The Court upheld the provisions of Sections 113 and 113-A, as a valid piece of legislation and quashed the Government orders being unsustainable in law.

Issue (a)

89.4. While holding Section 113 not to suffer from the vice of excessive delegation of any essential legislative function, and also not being ultra vires the Constitution, in Para-21 of the Report, the Court elaborately discussed the "Preamble", "Objects and Reasons" and other provisions of the Act, providing a clear cut policy and guidelines to the Government in exercise of its power, and as such held it not to be unbridled or without any guidelines, the ground on which challenge was laid. Para-21 of the Report is clear to such effect.

Issue (b)

89.5. However, while dealing with the 62 Government orders, issued in exercise of power under Section 113, Court clarified that there "is a clear distinction between a provision to be ultra vires as delegation of power being excessive and the exercise of power by such delegatee to be arbitrary or illegal". The orders revealed non-application of mind by giving a total go-by to the very object and purpose of the Act and the Rules framed thereunder.

Issue (c)

89.6. Section 113-A of the T.N. Act reads as under:

"113-A. *Exemption in respect of development of certain lands or buildings*. -

(1) Notwithstanding anything contained in this Act or any other law for the time being in force, the Government or any officer or authority authorised by the Government, by notification, in this behalf may, on application, by order, exempt any land or building or class of lands or buildings developed immediately before the date of commencement of the Tamil Nadu Town and Country Planning (Amendment) Act, 1998 (hereafter in this section referred to as the said date) in the Chennai Metropolitan Planning Area, from all or or any of the provisions of this Act or any rule or regulation made thereunder, by collecting regularisation fee at such rate not exceeding twenty thousand rupees per square metre, as may be prescribed. Different rates may be prescribed for different planning parametres and for different parts of the Chennai Metropolitan Planning Area.

(2) The application under sub-section (1) shall be made within ninety days from the said date in such form containing such particulars and with such documents and such application fee, as may be prescribed.

(3) Upon the issue of the order under sub-section (1), permission shall be deemed to have been granted under this Act for such development of land or building.

(4) Nothing contained in sub-section (1) shall apply to any application made by any person who does not have any right over the land or building referred to in sub-section (1).

(5) Save as otherwise provided in this section, the provisions of this Act, or other laws for the time being in force, and rules or regulations made thereunder, shall apply to the development of land or building referred to in sub-section (1).

(6) Any person aggrieved by any order passed under sub-section (1) by any Officer or authority may prefer an appeal to the Government within thirty days from the date of receipt of the order."

89.7 In Para-34 of the Report, the Court observed that the Section "seeks to legitimize all violations under the Act, Rules and Regulations and condones all executive acts which is the

cause of reaching this situation by not taking appropriate action as against such illegal construction which they were obliged to do under the Act. When the Government and other statutory functionaries failed to work, to promote planned development to this extent, the Legislature has to intervene to bring this amendment".

89.8 In Para-35 of the Report, Court reproduced the 'Objects and Reasons' for incorporating the Section and in Para-36 itself highlighted the same:

(a) aberrations in the urban development were noticed in the Chennai Metropolitan areas, including Chennai;

(b) huge disparities between people's income and property value, together tempt the builders to violate the rules and the buyers to opt for such properties in the city of Chennai;

(c) on a rough estimate three lakh buildings (approximately 50% of the total number of buildings) in Chennai were unauthorized;

(d) statutory period of three years for initiating process of demolition stood expired;

(e) administratively also demolition of such a large number of cases was neither feasible nor desirable, for it could have resulted in undue hardship to the owners and occupants;

(f) and considering the practice followed in other Metropolitan cities of the country, the State took a policy decision to exempt buildings and lands by collecting regularisation fee.

89.9. It is in this backdrop, did the Court uphold the validity of the Act, but with a word of caution, in the following terms:

> "37. Mere reading of this reveals, administrative failure, regulatory inefficiency and laxity on the part of the concerned authorities being conceded which has led to the result, that half of the city buildings are unauthorised, violating the town planning legislation and with staring eyes Government feels helpless to let it pass, as the period of limitation has gone, so no action could be taken. This mess is the creation out of the inefficiency, callousness and the failure of the statutory functionaries to perform their obligation under the Act. Because of the largeness of the illegalities it has placed the Government in a situation of helplessness as knowing illegalities, which is writ large no administratively action of demolition of such a large number of cases is feasible. ……."
>
> "38. We may shortly refer to the possible consequences of the grant of such exemption under Section 113-A by collecting regularisation fees. Regularisation in many cases, for the violation of, front set-back, will not make it easily feasible for the Corporation to widen the abutting road in future and bring the incumbent closer to the danger of the road. The waiver of requirements of side set-back will deprive adjacent buildings and their occupants of light and air and also make it impossible for a fire engine to be used to fight a fire in a high rise building. The violation of floor space index will result in undue strain on the civil amenities such as water, electricity, sewage collection and disposal. The waiver of requirements regarding fire staircase and other fire prevention and fire fighting measures would seriously endanger the occupants resulting in the building becoming a veritable death trap. The waiver of car parking and abutting road width requirements would inevitably lead to congestion on public roads causing severe inconvenience to the public at large. Such grant of exemption and the regularisation is likely to spell ruin of any city as it affects the lives, health, safety and convenience of all its citizens. This provision, as we have said, cannot be held to be invalid as it is within the competence of State Legislature to legislate

based on its policy decision, but it is a matter of concern. ……. When there is any provision to make illegal construction valid on ground of limitation, then it must mean Statutory Authority in spite of knowledge has not taken any action……."

89.10. Can it be said that very same factors, which weighed with the Apex Court, in upholding the legislation, exist in the instant case? In our considered view, no. It is not a onetime measure. For the last more than two decades, functionaries of the State, in collusion or otherwise, have allowed dishonesty to be perpetuated, by bringing in not less than seven policies of retention of unauthorized construction. Well, the legislation may be the first one, but then there is also no similarity of attending factors between the two.

90. Here, there is no statutory limitation in initiating action against the defaulter; no law and order problem; no huge cost is to be incurred by the State for carrying out demolition; expense can be recovered from the violators; administratively demolition is feasible; in the last 17 years much law has changed and evolved, making right to live in a healthy atmosphere, in a planned city/town/area to be a constitutional right; the Planning Act covers the entire State and not a single township or its surrounding areas, unlike Chennai alone.

91. Duty of the State is to govern. Governance includes implementation of the statutes in existence. Failure of the government, in having the provisions of a statute implemented, amounts to failure in governance. This failure in governance by a Government cannot be permitted to be condoned by incorporation of such like amendments, resulting into condoning mis-governance.

92. It promotes dishonesty and encourages violation of law. Significantly, no action stands taken against the erring officials, who, in connivance, allowed such construction to be raised, throughout the State. It is not that thousands of unauthorized structures came up overnight. The officials failed to discharge their duties. The functionaries adopted an ostrich like attitude and approach, violating human and legal rights of an honest resident of the State. Haphazard construction is in fact a threat to life and property. Entire Himalayan region, falling within the territory of Himachal Pradesh, falls within the Seismic Zone Nos.V & VI. Any natural calamity, by way of an earthquake, will pose great threat to life and property of individual and that too only on account of dishonesty allowed to be perpetuated by handful residents of the State, whose functionaries have acted in a most callous manner. Their acts are no less than criminal in nature. They have rendered the provisions of the Planning Act and other municipal laws to be nugatory and otiose.

93. Any indulgence on the part of the State/ Legislators, in protecting such dishonesty, would lead to anarchy and destroy the democratically established institutions, also resulting into indiscrimination. This is what *Shayra Bano (supra)* talks of manifest arbitrariness. Also, it is excessive and capricious.

94. Can a statutory provision, which does violence with the Preamble and aims & objects of the Principal Act, be permitted to remain on the statute book. In our considered view, no. It is destructive of the aim and object of the Parent Statute; it defeats its laudable object; it defies the constitutional provisions; it is demonstratively and excessively contradictory and mutually destructive, similar to the one which the Apex Court found in *K.R. Lakshmanan (Dr.) (supra)*.

95. Evidently, from the perusal of provisions of the Planning Act, the Corporation Act and the Municipal Act, all activities of building (which term used by us includes new construction, re-construction, alteration, modification. Etc.) is controlled and can be carried out after obtaining sanction from the authority concerned. Not only that such construction has to be carried out in consonance with the sanctioned plan and any construction beyond the sanctioned or compoundable limit is illegal. Consequences of carrying out illegal construction are penal. It is a criminal Act. Additionally, it violates a corresponding statutory and a constitutional right of a co-resident. Provision is there for compounding deviation, if any, made from the sanctioned plan.

Even such power is not arbitrary, but regulated and guided by the Statute(s) or Rule(s) and Bye-law(s) framed thereunder.

96. The reason and rationale as to why construction is a controlled activity, is to ensure that planned development is carried out, be it in a Municipal Corporation, Municipal Council, or Nagar Panchayat, etc. It is to enforce Rule of Law. If one violates the terms of sanction or the law or carries out construction without sanction, then penal consequences ensue. This, in our considered view, is what we commonly perceive and is in fact "Rule of Law". And any infringement thereof would result into its violence. This is precisely what the Apex Court said in *M.C. Mehta (supra)* (Para-70), that if laws are not enforced and orders of the courts to enforce and implement the laws are ignored, the result can only be total lawlessness.

97. The Amending Act confers unbridled power upon the Government or any officer or authority vested with the powers of Director, to regularize any construction carried out, i.e. to say "development of any land or building or class of lands or buildings", on "as is where is basis", upto any extent on payment of regularization fee, specified in Sub-section (8) of Section 30-B. There are certain exceptions to the Rule (sub-section (7) of Section 30-B), but limited in nature, only to a certain degree and extent and nothing more.

98. Illustratively, if in a highly Seismic Zone of a hilly terrain, a building like Qutab Minar stood constructed, undoubtedly, it would get regularized. In other words, all illegal acts committed by an owner in violation of statutory provisions, as contemplated in the Planning Act, get condoned by one stroke of pen and that too without any accountability.

99. The object of the Act is not to collect fee or to utilize the same for the purpose of any development. Hence, collection of an amount, being the compounding fee, is not the answer. Nor would it work as a deterrent or make the authorities perform their functions.

100. By virtue of the said Section, an unfettered power is vested upon the Government to regularize all illegal constructions carried out either without any sanction or in excess of the compoundable limits.

101. Article 14 of the Constitution of India envisages equality before law and equal protection of law. Equality before law envisages that equals are to be treated alike and unequals are not to be treated alike. By condoning the illegal acts of the violators, who carry out construction by violating the provisions of the Planning Act, State intends to treat such law breakers equal to those persons who carried out construction by following the law. This, in our considered view, is nothing but arbitrariness, because by treating unequals alike, the State is violating Article 14 of the Constitution of India. The Amending Act is in fact legislation for a class of dishonest persons, which is also prohibited. Also, it defies logic being capricious and unreasonable. As held in *Fuljit Kaur (supra),* equality cannot be claimed in an illegality.

102. Planning Act, as it stood prior to the insertion of the amendment, recognized two classes, i.e. (a) land owners, who after obtaining sanction carry out development activity, strictly as per the development plans; and (b) land owners, who after obtaining the sanctioned plans, deviates from the same but raise constructions within the compoundable limits.

103. Compounding, as per the provisions of the Act, is permissible in those cases, wherein the violator is at least having a valid sanction to carry out construction activity and in the course of construction, may be due to geographical conditions or topographical location, deviated from the sanctioned plan. Not only this, compounding was also permissible to the extent envisaged under the Planning Act.

104. However, by virtue of the impugned amendment, State has created a separate and distinct class, which consists of those persons who may have or may not have any sanction to carry out any development activity and yet would stand regularized.

105. Article 14 of the Constitution of India permits classification, however, the said classification has to be based on an *intelligible differentia* and that *intelligible differentia* ought to

have some nexus with the object to be achieved. In the present case, even if it is said that classification of the persons, so created by way of the impugned amendment, is based on *intelligible differentia,* as it consists of those persons who carried out construction in violation of the statutory provisions, yet this classification, in our considered view, is not a valid classification, as envisaged under Article 14 of the Constitution of India, because regularization of illegal construction cannot be said to have nexus with the object sought to be achieved, which in any case has to be lawful. On the contrary, it negates planned development and defeats its object.

106. The object of the impugned amendment, i.e. to regularize all illegal constructions, in itself is violative of Article 14 of the Constitution of India. Additionally, it violates Articles 21, 243-ZD and 243-ZE, and the object and purpose of the Planning Act.

107. If the impugned amendment is permitted to remain in the Statute, it would defeat the very purpose for which the Statute was created. In other words, the impugned amendment violates the very edifice of the Principal Statute, which is that construction activity has to be carried out in a planned manner strictly in consonance with the provisions made in this regard under the relevant Laws, Rules and Bye-laws. Can the object sought to be achieved be said to be lawful, as was stated in *Subramaniam Swamy (supra)* – reiterating *Nagpur Improvement Trust and Anr v Vithal Rao and Ors*, (1973) 1 SCC 500. In our considered view, no.

108. Also, the impugned amendment does not distinguish between those who carried out unauthorized and illegal construction for residential purposes or personal use, and those who carried out such construction purely with professional motive. In fact, it puts a person who violated the law with impunity on a higher pedestal than the one who made deviations from the sanctioned plan. This we say so for the reason that as per Table-A, for Residential Buildings, where deviation is of set-back and storeys from the sanctioned plan, compounding fee prescribed is Rs.800/- per square metres and in the case where development is totally unauthorized, i.e. without permission, compounding fee prescribed is only Rs.1000/- per square metre, that is to say only Rs.200/- more as compared to a person who was at least having a sanction for raising construction. The position, with regard to the construction outside the municipal areas is no different, for the fee payable is Rs.400/- per square metre and Rs.500/- per square metre, respectively.

109. The Aim and Object of the Planning Act is to make provision for planning and development and use of land; to make provision for the preparation of development plans and sectoral plans with a view to ensure that town planning schemes are made in a proper manner and their execution made effective by constituting the authority.

110. The object of the planning area is *entirely* planned development in a regulated manner. This is totally in consonance with the policy of sustainable development. But then, we find the functionaries of the State to have worked in a manner only to defeat fulfillment of such laudable object. There is no answer, as to why till date, the Draft Plan has yet not been finalized. From the report of the Shashi Shekhar Committee (Annexure P-14), it is also evident that the Municipal Laws are only to promote and propagate as also protect environment.

111. We have already noticed that in the pleadings, the statute is sought to be justified without any tangible or cogent material produced before us.

112. The Apex Court in *Sayyed Ratanbhai Sayeed (Dead) through LRs & others vs. Shirdi Nagar Panchayat & another,* (2016) 4 SCC 631 observed that:

> "58. The emerging situation is one where private interest is pitted against public interest. The notion of public interest synonymises collective welfare of the people and public institutions and is generally informed with the dictates of public trust doctrine – *res communis* i.e. by everyone in common. Perceptionally health, law and order, peace, security and a clean environment are some of the areas of public and collective good where private rights being in conflict therewith

has to take a back seat. In the words of Cicero "the good of the people is the chief law".

59. The Latin maxim *Salus Populi Suprema Lex* connotes that health, safety and welfare of the public is the supreme in law. Herbert Broom, in his celebrated publication, *A Selection of Legal Maxims* has elaborated the essence thereof as hereunder:

> "This phrase is based on the implied agreement of every member of the society that his own individual welfare shall, in cases of necessity, yield to that of the community; and that his property, liberty and life shall, under certain circumstances, be placed in jeopardy or even sacrificed for the public good."

The demand of public interest, in the facts of the instant case, thus deserves precedence."

113. The State owes an obligation and duty to ensure compliance of all laws, more so that of planned development, as it materially affects the rights and enjoyment of property by the persons residing within the State. 'General public good' must overweigh 'private interest of dishonest citizens'. Right of a private person is to be balanced by a welfare State, keeping in view the overall general good, public health, safety and welfare of residents, also weighing ecological considerations. Rather than dealing sternly and demolishing unauthorized structures, defaulters are offered regularization on a platter. The economically affluent and perhaps close to the Executive, political or otherwise, who violated the laws with impunity, alone are going to be the beneficiaries. It is not that the authorities, including the legal bodies, did not have the wherewithal to deal with the menace, but the apathy, lethargy, insensitivity and callousness has only resulted into such a situation. Only the will to do so is lacking. In fact, State could have exercised power under Section 35 of the Planning Act to frame a scheme for better planning of construction activity.

114. The effect of such regularization on safety, in terms of fire and traffic remains ignored. The fragile ecology of the State warrants demolition of all illegal constructions, which are beyond the planning and permissible limits. We repeat, excessive construction in an unplanned manner, only results into depletion of source of civic amenities, burdening the stakeholders for providing the same, beyond their limited resources and capacities. As observed in *Indore Vikas Pradhikaran (supra),* this impinges upon the constitutional right, acknowledged to be a human right. We see that the apprehensions expressed in *Shanti Sports Club (supra)* and *Priyanka Estates (supra)* have turned out to be true.

115. The science behind planning has given way to human greed and not the need, as the Minister wanted the House to believe.

116. The Act does not try to protect the naïve, the innocent and the people belonging to marginal sections of society, who may have raised construction through honest means.

117. The "rule of law" means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule, it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law. The "rule of law" as emerges from the spirit of Article 14 is that if an action is found to be arbitrary and, therefore, unreasonable, it would negate the equal protection of the law contained in Article 14 and would be struck down on this ground.

118. In *Supreme Court Advocates-on-Record v. Union of India,* (2016) 5 SCC 1 (five-Judge Bench) summarizes the facets of 'rule of law' through its earlier pronouncements as herein below. We are conscious that the judgment is in the backdrop of judicial independence, but then the principle of Rule of Law, in any event, would remain the same:

> "292. Before considering these issues, it is necessary to appreciate the role of the Rule of Law in our constitutional history. It has been said:
>
> 'Ultimately, it is the rule of law, not the judges, which provides the foundation for personal freedom and responsible government.' 479
>
> 293. The Rule of Law is recognized as a basic feature of our Constitution. It is in this context that the aphorism, 'Be you ever so high, the law is above you' is acknowledged and implemented by the Judiciary. If the Rule of Law is a basic feature of our Constitution, so must be the independence of the judiciary since the 'enforcement' of the Rule of Law requires an independent judiciary as its integral and critical component.
>
> 294. Justice Mathew concluded in Indira Nehru Gandhi that according to some judges constituting the majority in Kesavananda Bharati the Rule of Law is a basic structure of the Constitution Paragraph 335.
>
> ...
>
> 296. In the Second Judges case Justice Pandian expressed the view that independence of the judiciary is 'inextricably linked and connected with the judicial process.' Paragraph 56 This was also ..... Paragraph 331. Justice J.S. Verma speaking for the majority and relying upon a few decisions held that the Rule of Law is a basic feature of the Constitution Paragraph 421. Similarly, Justice Punchhi (dissent) held that the Rule of Law is a basic feature of the Constitution and the independence of the judiciary is its essential attribute:
>
> > "It is said that Rule of Law is a basic feature the Constitution permeating the whole constitutional fabric. I agree. Independence of the judiciary is an essential attribute of Rule of Law, and is part of the basic structure of the Constitution. To this I also agree."" (Emphasis supplied)

119. In *Indira Nehru Gandhi v. Raj Narain,* AIR 1975 SC 2299 : 1975 (Supp1) SCC 1 (five-Judge Bench), wherein the Apex Court invalidated Clause (4) of Article 329-A, inserted in the Constitution by the Constitution (39th Amendment) Act, 1975, to immunize the election dispute to the office of the Prime Minister from any kind of judicial review, the following facets of "Rule of Law" may be culled out:

> i. that, the Rule of Law postulates the pervasiveness of the spirit of law throughout the whole range of government in the sense of excluding arbitrary official action in any sphere, para 336, per Mathew, J.
>
> ii. that, the jurisdiction of the Supreme Court to try a case on merits cannot be taken away without injury to the basic postulates of "the Rule of Law" and of justice within a politically democratic constitutional structure, para 623, per Beg, J
>
> iii. that, since the validation of the Prime Minister's election was not by applying any law, therefore, clause (4) of Article 329-A, offended the Rule of Law, para 59, per Ray, C.J.

120. As noticed earlier, in *Subramaniam Swamy (supra),* the Apex Court held that "breach of rule of law" amounts to "negation of equality under Article 14", and that "rule of law" is facet of equality under Article 14 and "breach of law" amounts to breach of equality under Article 14, and therefore, breach of rule of law may be a ground for invalidating the legislation being in negation of Article 14 (Para 86 of the Report).

121. The enactment tantamounts to saying that "violation of law is permissible if one has the means required to pay for such violation".

122. Though in a totally different context, but while emphasizing the importance and significance of application of strict adherence and application to the Municipal Laws and its co-relation with the environment, affecting human health, the Apex Court in *Milk Producers*

Association, Orissa & others v. State of Orissa & others, (2006) 3 SCC 229, reiterated its earlier view, holding that several factors, including flora & fauna and water quality maintenance and impact on health and rehabilitation, are relevant factors for the maintenance of ecology. Both, right to development and environment, are fundamental rights. Sustainable development is to be treated as an integral part of "life" under Article 21.

123. The power under the Planning Act is not a power simpliciter, but power coupled with duty. Without strict compliance to the Municipal Laws, Right to Environment, under Article 21, would be negated.

124. Planned development is the "Rule of Law". It is not a judge made law. It is not a common law principle. It emanates only from the Constitution and, thus, any law which impinges or infringes the constitutional mandate under no circumstances can survive the test of reasonableness or arbitrariness. No legislation can be enacted to defeat the constitutional mandate. Planned development is a social justice concept and this is what we understand what the Constitution Framers had envisaged, when the expression "JUSTICE, social, ..." came to he inserted in the Preamble of the Indian Constitution. The constitutional mandate of Planned Development, as we have noticed, is not only in the Preamble, Part-III, Part-IV, but also Part-IXA of the Constitution. To our mind, there is no doubt about the same. Upholding the Constitution is the Rule of Law. This to our mind is constitutionalism.

125. What is 'test of severability' also stands explained by the Constitution Bench of the Hon'ble Supreme Court in *Kihoto Hollohan vs. Zachillhu & others,* 1992 Supp (2) SCC 651 in the following terms:

> "76. The test of severability requires the Court to ascertain whether the legislature would at all have enacted the law if the severed part was not the part of the law and whether after severance what survives can stand independently and is workable." ...

126. Subsequently, in *Suresh Kumar Koushal & another vs. Naz Foundation & others,* (2014) 1 SCC 1, the Hon'ble Supreme Court also observed that the doctrine of severability seeks to ensure that only that portion of the law, which is unconstitutional, is so declared and the remainder saved. This doctrine should be applied, keeping in mind the scheme and purpose of the law and the intention of the legislature and should be avoided where the two portions are inextricably mixed with one another. It further observed that the court can resort to reading down a law in order to save it from being rendered unconstitutional. But while doing so, it cannot change the essence of the law and create a new law which in its opinion is more desirable.

127. In *Delhi Transport Corporation v. D.t.C. Mazdoor Congress & others,* 1991 Supp (1) SCC 600 (five-Judge Bench), the Apex Court held that "it it true that where there are clear, unambiguous and positive terms of a legislation, the court should be loath to read down. It should proceed with a straightforward method of striking down such legislations".

128. We tried examining as to whether the Amending Act would be saved by adopting the principle of severability. Undoubtedly, to our mind, even that is not possible. Provision in its entirety, needs to be struck down for it is clearly ultra vires the Constitution and the laws of the land. As such, we hold it to be ultra vires the Constitution.

129. Based on the decision rendered by the Apex Court (three-Judge Bench) in *Guruvayoor Devaswom Managing Committee and another v. C.K. Rajan and others,* (2003) 7 SCC 546, Mr. R.L. Sood, learned Senior Advocate, contends that constitutional validity of a statute cannot be allowed to be challenged by way of a Public Interest Litigation (PIL). We are unable to persuade ourselves to agree with such a proposition, more so, when it is not the dicta laid down therein.

130. Next he refers to and relies upon *Centre for Public Interest Litigation v. Union of India and others,* (2016) 6 SCC 408. We do not find the decision to be of any assistance, for the Court was dealing with the matters of Economic Policy under challenge (Para-24).

131. In view of our earlier discussion, reliance on judgments rendered by Gujarat High Court, in Special Civil Application No.3927 of 2001, titled as *Pranjivan H. Parmar v. State of Gujarat,* decide don 15.10.2003; High Court of Delhi, in W.P.(C) No.6609/2012, titled as *Manmeet Kaur v. Union of India and another,* decided on 13.12.2012; and Punjab & Haryana High Court in CWP No.4099 of 2004, titled as *Resurgence India v. State of Punjab,* decided on 19.2.2013, is of no consequence.

132. Mr. Vinay Kuthiala, learned Senior Advocate, has referred to and relied upon *R.K. Garg v. Union of India*, (1981) 4 SCC 675. We do not find the decision to be of any help either. The constitutional validity of the enactment of the Special Bearer Bonds (Immunities and Exemptions) Act, 1981 came to be assailed, *inter alia*, on the ground, it being against public morality, arbitrary and irrational. The Apex Court in para-8 of the Report itself clarified that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. Further, the statute in question itself, as was so urged, did not exempt a person seeking benefit under the Act, from any action, be it civil or penal in nature, from other statutes, covering the field of economic offences and taxation laws. The object and the purpose of the Act was to "induce those having black money to convert it into 'white money' by making it available to the State for productive purposes, without granting in return any immunity in respect of such black money".

133. Mr. Aman Nandrajog, learned Counsel has also referred to certain other decisions. Reliance on *Karnataka Bank Ltd. vs. State of Andhra Pradesh & others,* (2008) 2 SCC 254; *State of Madhya Pradesh vs. Rakesh Kohli & another,* (2012) 6 SCC 312; and *Government of Andhra Pradesh & others vs. P. Laxmi Devi (Smt),* (2008) 4 SCC 720, only emphasis on the law making power of the legislature and constitutional limitations. We are not concerned with the power of enactment, for that is not an issue before us. Insofar as constitutional limitation is concerned, as we have already observed, is always open to judicial review within the settled parameters of law.

134. While contending that in view of the amendment in question, this Court is not required to consider earlier decisions rendered by this Court, learned counsel for the respondents seek reliance on a judgment rendered by the Apex Court (two-Judge Bench) in *Bakhtawar Trust and others v. M.D. Narayan and others,* (2003) 5 SCC 298 (two-Judge Bench).

135. We clarify that we have not held the statute to be ultra vires on this count.

136. It is public knowledge that during the pendency of the present petition, vide order dated 16.11.2017, passed in OA No.121 of 2014, titled as *Yogendra Mohan Sengupta (supra)*, the National Green Tribunal, has issued certain directions qua the construction activity to be carried out within Shimla Town, under the Planning and the Corporation Acts. Though the said decision is not on record, but we have ourselves gone through the same. We clarify that we have not gone into the issues adjudicated therein, nor expressed any opinion with regard thereto, for before us the issue is limited and that being the constitutional validity of the Amending Act, which the Tribunal has not dealt with at all.

137. In view of our aforesaid discussion, we hold that:

(i) Insertion of Section 30-B by the Amending Act is contrary to the object and purpose of the Principal Act, as also ultra vires the Constitution of India, as such we strike it down.

(ii) Judgment rendered in *Consumer Action Group (supra)* is clearly distinguishable, having no binding effect on the grounds of assailing the validity of the Amending Act.

(iii)&(iv) In view of specific finding in *Shayra Bano (supra)*, holding the observations made in *Binoy Viswam (supra)* that arbitrariness cannot be a ground for invalidating a legislation, only to be in *per incurium*, as such, we hold the amendment to be violative of Article 14 of the

Constitution, being manifestly arbitrary, irrational, illogical, capricious and unreasonable.

(v). Much, as we had desired, the amendment being totally ultra vires, cannot be saved by adopting the doctrine of severability.

As such, we allow these petitions to the extent aforesaid. Pending application(s), if any, also stand disposed of.

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

Biaso Devi and others .....Appellants/Defendants
Versus
Sadhu Ram .....Respondent/Plaintiff.

RSA No. 4139 of 2013
Reserved on : 16.12.2017
Decided on: 22nd December, 2017

Specific Relief Act, 1963- Section 5- Suit land mortgaged to plaintiff for a sum of Rs.400/- creating usufructory mortgage - possession delivered to the plaintiff - The claim of the plaintiff is that mortgage is more than 35 years old and cannot be redeemed as right stands extinguished by way of limitation- The learned Trial Court dismissed the suit while learned First Appellate Court allowed the suit- **Held**, that right to redeem mortgages other than usufructory mortgage starts from the day the mortgage is created and same has to be redeemed within 30 years, but in case of usufructory mortgage the right to recover possession commences when mortgage money is either paid out from rent and profits or partly by such payments and partly by deposit by the mortgagor - the Learned First Appellate Court did not appreciate the evidence on record properly- Decree of First Appellate Court set aside- Appeal Allowed. (Para-9 and 11)

Cases referred:
Sampuran Singh & Ors. v. Smt. Niranjan Kaur and others, AIR 1999 SC 1047
Bhandaru Ram (deceased) through his L.R. Rattan Lal vs. Sukch Ram & others, AIR 2012 HP 1
Singh Ram (dead) through Legal Representatives v. Sheo Ram and others, (2014)9 SCC 185
Prabhakaran & Ors. v. M. Azhagir Pillai (dead) by L.Rs. & Ors, AIR 2006 SC 1567

For the Appellants: Mr. K.D. Sood, Senior Advocate with Mr. Ankit Aggarwal, Advocate.
For the Respondent: Mr. Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed by the appellants/defendants, against, the verdict recorded by the learned First Appellate Court, whereby, it reversed the judgment and decree rendered by the learned trial Court, whereby, the latter Court, had, dismissed the suit of the plaintiffs.

2. The facts of the case, in brief, are that the suit land was previously owned by one Amin Chand, which was in his possession, who mortgage the same to the plaintiff for a sum of Rs.400/- and also delivered the possession vide mutation No.217 on 26.11.1963. In the year 1971 Amin Chand sold suit land in favour of Bhagat Ram to the extent of two shares, Rumal

Singh to the extent of one share, both sons of Badri, vide mutation No.227 as is clear from the red entry in the remarks column of jamabandi for the year 1970-71. In the year 1981, Bhagto alias Bhagat Ram son of Badri sold Khasra No.283, measuring 14 Kanals 10 Marlas to the extent of 2/3 rd share in favour of Gujjar Singh vide mutation No.297 decided on 22.10.1981. Shri Gujjar Singh sold Khasra No.283 to the extent of 2/3rd share in favour of Jahlu Ram s/o Shri Hira and the mutation No.316 regarding this transfer was sanctioned on 25.08.1984 and in this manner the defendants became the mortgagors in place of original mortgagor as would appear from the copy of jamabandi for the year 1975-76 in the remarks column. The suit land was mortgaged with possession as is clear from the copy of the mutation No.217 and jamabandi for the year 1970-71, but without any order or inquiry in the column of cultivation while preparing the jamabandi the revenue staff wrote "khud Kasht" but omitted the word 'Murthin' from the cultivation column and same entry was repeated in the subsequent jamabandies without any legal authority or ordr o the competent Court. The mortgage is more than 35 years old and the defendants or their predecessor-in-interest did not redeem the same within time and now they have lost their right by limitation and consequently the plaintiff has become owner of the suit land by afflux of time. Hence, the instant suit.

3. The defendants contested the suit of the plaintiff and filed written statement, wherein, they have taken preliminary objections qua maintainability, plaintiff is not in possession of the suit land. The possession of the suit land is with Hiro, who is in cultivating possession of the suit land. On merits, it is admitted that Amin Chand was original owner of the suit land. It is denied that the suit land was mortgaged with possession to the plaintiff by Amin Chand for Rs.400/-. The alleged mutation is false and is correct. The plaintiff never remained in possession of the suit land as mortgagee. The possession remained with Hiro as tenant, who has become owner in possession of this land, by the enforcement of H.P. Tenancy and Land Reforms Act.

4. The plaintiff filed replication to the written statement of the defendants/appellants herein, wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the plaintiff has become the owner of the suit land by afflux of time, as alleged? OPP.

1-A. Whether the suit is bad for non joinder of necessary party? OPD

2. Whether the plaintiff is entitled for the relief of permanent prohibitory injunction, as prayed for? OPP

3. Whether the suit is not maintainable? OPD.

4. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff/respondent herein. In an appeal, preferred therefrom, by, the plaintiff/respondent herein before the learned First Appellate Court, the latter Court allowed the appeal and reversed the findings recorded by the learned trial Court.

7. Now the defendants/appellants herein, have instituted the instant Regular Second Appeal before this Court wherein they assail the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission on 9.9.2013. this Court, admitted the appeal instituted by the defendants/appellants, against, the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

1. Whether the findings of the court below are perverse, based on misreading of oral and documentary evidence, as also, pleadings of the parties and drawing of wrong inferences from the facts proved on record, particularly, the

jamabandis P-1 to P-5, mutation No.217, P-6 and statement of Sadhu Ram and DW Hira Lal?

2. Whether in view of the fact that the plaintiff had set up a case of usufructory mortgage in his favour and no time for redemption having been fixed, the suit of the plaintiff was within limitation and the findings of the District Judge reversing the judgment of the trial Court are sustainable in law?

3. Whether the provisions of Section 58(d) as also Section 62 and Chapter IV of the Transfer of Property Act besides Article 61 of the Limitation Act have been misconstrued which has vitiated the findings in holding that the suit was within limitation and the revenue entries were wrong and the relief of permanent prohibitory injunction wrongly granted?

4. Whether the plaintiff had no locus standi to file the suit in view of the fact that Hira Lal was in possession of the property as tenant earlier under the mortgagor and thereafter under the mortgagee-plaintiff had become the owner of the property?

Substantial questions of Law No.1 to 4.

8. The relevant record, bears out, an unflinching inference, of, a usufructory mortgage being in existence vis-a-vis the suit khasra numbers. The plaintiff mortgagee, had, after the expiry of more than 30 years, since coming into being, of, a usufructory mortgage vis-a-vis the suit khasra numbers, hence, instituted a suit, (i) qua, of, with the defendants, not, begetting its redemption within 30 years, thereupon, his being entitled, for, rendition of a declaratory decree, of his being owner of the suit land. The learned first Appellate Court, in reversing, the judgment of the learned trial Court, whereby, the latter Court dismissed the plaintiff's suit, has meted deference, to the principles propounded by the Hon'ble Apex Court in a case titled as ***Sampuran Singh & Ors. v. Smt. Niranjan Kaur and others, AIR 1999 SC 1047*** and vis-a-vis a judgement rendered by A Full Bench of this Court, in case titled as ***Bhandaru Ram (deceased) through his L.R. Rattan Lal vs. Sukch Ram & others, AIR 2012 HP 1***. The Hon'ble Full Bench of this Court, while relying, upon the judgments of the Hon'ble Apex Court reported in AIR 1999 SC 1047 and in AIR 2006 SC 1567, has declared, as under:-

> "In case no period as such is prescribed in a usufructuary mortgage, the mortgagee is under obligation to put back the mortgagor in possession of the mortgaged property, the moment the mortgage money has been paid back or it has otherwise been settled. If the mortgagee refuses to do so, the only option left to the mortgagor is to institute a Suit for redemption and recovery of possession. Conversely, if the mortgagee wants to institute a Suit for foreclosure, he has to do so within 30 years of the money secured by the mortgage becoming due. It needs no elaborate discussion to hold that as far as a mortgagee is concerned, in the case of usufructuary mortgage which has not fixed any period, the money secured by the mortgage becomes due the moment it has been paid by the mortgagor. As far as the mortgagor is concerned, in the absence of any period fixed in the usufructuary mortgage, he has every right to redeem or recover the possession the moment he executes the deed or the moment parties are in the jural relationship or mortgagor and mortgagee otherwise. On the first principles of Civil law, there is no Civil right establishment of which is not circumscribed or governed by law of limitation. That is the principle behind Section 3, read with Section 27 of the Limitation Act. Section 27 is unambiguously clear that the determination of the period limited to any person for instituting a Suit for possession of any property, his right to such property is extinguished. The said provision is founded on public policy providing for a lifespan for the legal remedy. It is intended to prevent disturbance or deprivation of what has been acquired in equity and justice by long enjoyment or what may have been lost by one's own

inaction, negligence or laches. Thus, in view of the prescription of 30 years, under Article 61 of the Schedule to the Limitation Act, read with Section 60 of the Transfer of Property Act, a mortgagor has to institute a Suit for redemption or recovery of possession within 30 years of the mortgage, since his right to redeem or recover the possession accrues to him the moment the parties are in the jural relationship of mortgagor and mortgagee."

"The expression 'act of parties' as appearing in the Proviso to Section 60 of the Transfer of Property Act on the extinguishment of the mortgagor's right to redeem the mortgage has to be understood in law as the act of inaction on the part of the mortgagor to institute the Suit for redemption of recovery of possession within the prescribed period of 30 years of accrual of the right to redeem or recover the possession."

"For all the above reasons, with great respect, we are unable to be persuaded by the Full Bench Decision of the Punjab and Haryana High Court in **Ram Kishan and ors. v. Sheo Ram and ors.,** AIR 2008 P and H 77. To conclude, the Division Bench decision of this Court in **Jaimal and others v. State of H.P. and others.,** AIR 2010 HP 7, the un-reported decisions in titled **Prakash Chand and others v. Amar Singh and another,** RSA No.378 of 2008, and **Tula Ram and another v. Shanti**, RSA No.271 of 2002, which have taken the view that there is no period of limitation for filing a Suit for redemption or recovery of possession of usufructuary mortgage which has not fixed any time for repayment of mortgaged money do not reflect the correct position of law and hence, they are overruled. Reference is answered as follows:

"The period of limitation for filing a Suit for recovery of possession of immovable property or redemption of usufructuary mortgages which have not fixed any time for repayment of mortgage money is 30 years as prescribed under Article 61 to the Schedule to the Limitation Act, 1963 (60 years under Article 148 as per Indian Limitation Act, 1908)."

9. The aforesaid pronouncement recorded, by the Hon'ble Apex Court, in ***Sampuran Singh & Ors. v. Smt. Niranjan Kaur and others, AIR 1999 SC 1047*** and relied upon by the the Full Bench of this Court, in case titled, as ***Bhandaru Ram (deceased) through his L.R. Rattan Lal vs. Sukch Ram & others, AIR 2012 HP 1,*** was rendered, by a Bench of two Hon'ble Judges, of the Hon'ble Apex Court, apparently, the verdict pronounced, by the learned First Appellate Court falls in tandem, with, the legal expostulations propounded therein, qua (i) upon failure of the mortgagor, to, within 30 years beget redemption, of the suit property, whereon, a usufructuary mortgage, is created, hence, rather empowering the mortgagee, to institute a declaratory suit, claiming, rendition of a declaratory decree, of his, by efflux of time, being declared its owner. However, subsequent thereto, the Hon'ble Apex Court also pronounced a verdict in case titled as ***Singh Ram (dead) through Legal Representatives v. Sheo Ram and others, (2014)9 SCC 185,*** the relevant paragraphs No. 21 and 22 whereof are extracted hereinafter:-

"21. We need not multiply reference to other judgments. Reference to above judgments clearly spell out the reasons for conflicting views. In cases where distinction in usufructuary mortgagor's right under Section 62 of the T.P. Act has been noted, right to redeem has been held to continue till the mortgage money is paid for which there is no time limit while in other cases right to redeem has been held to accrue on the date of mortgage resulting in extinguishment of right of redemption after 30 years.

22. We, thus, hold that special right of usufructuary mortgagor under Section 62 of the T.P. Act to recover possession commences in the manner specified therein, i.e., when mortgage money is paid out of rents and profits or partly out of rents and profits and partly by payment or deposit by mortgagor. Until then, limitation

> does not start for purposes of Article 61 of the Schedule to the Limitation Act. A usufructuary mortgagee is not entitled to file a suit for declaration that he had become an owner merely on the expiry of 30 years from the date of the mortgage. We answer the question accordingly."

Wherein the Hon'ble Apex Court, had, made a firm conclusion, of (a) the special right of a usufructuary mortgagor vested in the latter, under, Section 62 of the Transfer of the Property Act, (b) being in consonance therewith, bestowal(s) of statutory right(s) in him, especially, (i) qua upon mortgage money being evidently paid out of rents or profits or (ii) evidently partly out of rents or profits or (iii) evidently partly by payment(s) or deposit(s) by the mortgagor, (iv) AND besides a clear explicit mandate exists therein, of, till in the aforestated manner(s), appropriations ARE evidently made vis-a-vis the mortgage amount(s) by the mortgagee from, the usufructuary mortgage created upon the suit land, (v) the period of limitation vis-a-vis rights of the mortgagor, to seek redemption of the suit property, rather not commencing. Contrarily, commencement(s) of the apposite period, of limitation vis-a-vis rights of the mortgagagor, to, seek redemption, of the mortgaged property, whereon, a usufructuary mortgage, is created, rather, commencing, as aforestated, upon evident aforesaid mandated appropriation(s), being made by the mortgagee, besides upon payment(s) or deposit(s) being evidently made, of, the mortgage money by the mortgagor vis-a-vis the mortgagee. Apparently, there exists, no, material on record qua the (vi) mortgagee, from, the income of rents or profit, derived by him from the suit khasra numbers, whereon, uncontrovertedly a usufructuary mortgage is in existence, his making appropriations, towards, the mortgage money, nor any evidence, exists, on record in display, of the mortgagor, since, the creation of the usufrutuary mortgage, upon the suit khasra number, upto now, his personally liquidating mortgage money vis-a-vis the mortgagee, by his, making its deposit(s) or payment(s) in the prescribed mode. Consequently, when the aforesaid manner, of discharge of liabilities, by, the mortgagor vis-a-vis, the mortgage money, upon, the mortgagor, has not evidently occurred, (vii) nor when the mandated appropriations vis-a-vis the mortgage money, hence has not been evidently made, by the mortgagee, whereas, the time whereat the mandated discharging of mortgage liability(ies) by the mortgagor vis-a-vis the mortgagee, is the apt reckonable para meter vis-a-vis the commencement(s), of, period of limitation, for leveraging a right in him, to, seek redemption of the usufructuary mortgaged suit property. Consequently, dehors proven occurrence(s), of, the aforesaid apposite appropriations or apposite deposit(s), the mere elapse or efflux of 30 years, since, the creation, of, a usufructuary mortgage, upon, the suit khasra numbers, would not leverage Courts of law, to, pronounce a declaratory decree, of, the mortgagee hence becoming owner thereof.

10. Be that as it may, the judgement pronounced in Sampuran Singh's case, reported in AIR 1999 SC 1047, AND relied upon by the learned first Appellate Court, is rendered by two Hon'ble judges of the Hon'ble Apex Court, whereas, the judgment rendered by the Hon'ble Apex Court in Singh Ram's case(supra), is pronounced by a coram of three Hon'ble judges of the Hon'ble Apex Court, (I) hence, when the Bench strength of Hon'ble judges, which pronounced a decision, in Singh Ram's case (supra), is, higher in numerical strength vis-a-vis the bench strength, of, the Hon'ble judges, of the Hon'ble Apex Court, which pronounced a decision in Sampuran Singh's case (supra). (ii) Thereupon with the aforesaid prior verdict rendered by the Hon'ble Apex Court, in, Sampuran Singh' s case(supra), has also been considered by a Bench, of, three Hon'ble judges of the Hon'ble Apex Court in Singh Ram's case, (iii) thereupon, the verdict rendered by the Hon'ble Apex Court in Singh Ram's Case (supra), holds clout besides sway. Moreover, with the Hon'ble Apex Court also considering in its decision rendered in Singh Ram's case (supra), a prior judgment, of, the Hon'ble Apex Court, reported in a case titled as ***Prabhakaran & Ors. v. M. Azhagir Pillai (dead) by L.Rs. & Ors, AIR 2006 SC 1567,*** besides, its, as borne upon a reading, of the judgment of the Hon'ble Apex Court, rendered in Singh Ram's case (supra), of, its overruling, the judgment recorded, by, a coram of two Hon'ble judges, of the Hon'ble Apex Cout, (iv) thereupon, also renders the verdict pronounced by the Hon'ble Apex Court, in, Singh Ram's case (supra), reported in (2014)9 SCC 185, to, hold the fullest legal might,

in resting, the controversy in question qua commencement (s), of period of limitation, within, which the mortgagor, has a right to redeem a usufructuary mortgage.

11. Be that as it may, the reliance(s) placed by the learned First Appellate Court, in, case titled as ***Sampuran Singh & Ors. v. Smt. Niranjan Kaur and others, AIR 1999 SC 1047*** and upon a judgement, of, the Full Bench of this Court, rendered in case titled as ***Bhandaru Ram (deceased) through his L.R. Rattan Lal vs. Sukch Ram & others, AIR 2012 HP 1,*** *are* respectively inapt, given the verdicts aforesaid being overrulled by the Hon'ble Apex Court, in its decision, rendered in Singh Ram's case (supra), thereupon, the verdict rendered by the learned First Appellate Court, warrants interference AND also its being quashed and set aside.

12. The above discussion, unfolds, of, the conclusion 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, excluding from consideration germane and apposite material. Accordingly, the substantial question of laws are answered in favour of the appellants and against the respondents.

13. In view of the above discussion, the instant appeal is allowed and the impugned judgment and decree rendered on 1.04.2013 by the learned First Appellate Court in RBT Civil Appeal No. 87-N/11/07 is quashed and set aside. In sequel, the suit of the plaintiff is dismissed. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back.

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

Rajkumar .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 663 of 2008
Reserved on : 15.12.2017.
Date of Decision: 22nd December, 2017.

Indian Penal Code, 1860- Section 306- Accused son of deceased lady- relationship was not cordial as accused wanted her to give him the entire property - Deceased committed suicide by jumping into well – Evidence on record establishes that accused used to misbehave with the deceased- she had to leave her house quite often and take shelter in the house of her niece or her sister- local panchyat and SDM tried to resolve the dispute between the son and mother, five days prior to the suicide - accused threatened to compel the deceased to die in the presence of panchyat and SDM- **Held**, that there is clinching evidence that accused was instrumental in constituting mental condition of the deceased to commit suicide- Trial Court properly appreciated the evidence and rightly concluded about the culpability of the accused- No merits in the appeal- Appeal dismissed. (Para-9 to 11)

For the Appellant: Mr. Ramakant Sharma, Sr. Advocate with Mr. Basant Thakur, Advocate.
For the Respondent: Mr. R.S. Thakur, Addl. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The appeal stands directed against the impugned judgment of conviction besides consequent sentence(s) pronounced upon the accused by the learned trial Court, in respect of charges framed against him under Section 306 of the IPC.

2. The case set up by the prosecution in brief is that the husband of deceased Leela Devi, Shri Ram Kishan passed away about five years back. She had three children, Vivek, Arun and accused Raj Kumar. Accused Raj Kumar used to stay at his parental house in village, whereas, two others were living in Delhi. The entire landed property of his father had been bequeathed in the name of deceased Leela Devi. Though, accused and his mother used to reside in the same house but live separately. There were bickerings since the death of Sh. Ram Kishan and the relations between the mother and the son were stated to be sour as the accused used to demand the entire property from the deceased. The deceased was forced to leave the house now and then. So much so hat the deceased was compelled to take refuge in the house of her niece (PW-1) or with her sister Smt. Kalyani Devi (PW-3) or compelled to go to Delhi. The old lady had become helpless. Not only this, the accused used to cast doubts about the maternity of the deceased by proclaiming that he is not her son. About five days prior to the occurrence a Panchayat had been called in he village where even the S.D.M., Amb, had come to resolve the dispute between the son and the mother. Ultimately on 30th of July, 2006, when the deceased had gone to the house of her niece Smt. Raman Kumari (PW-1, she went disappearing at about 5 a.m. A frantic search was made. Smt. Kalyanai Devi and the brother of deceased Sh. Kalyan Singh were informed about her disappearance at village Nangal Jarialan. During the course of search at about 2 P.M., the slippers of the deceased were noticed near the well and on further and close scrutiny the deceased was seen lying in the well. On the statement of PW-1, recorded by the police, under Section 154 Cr.P.C., vide Ex.PW1/A, the criminal law was set into motion and on the basis of which FIR Ex. PW14/A came to be recorded in Police Station, Gagret. Thereafter the police carried out all the formalities with respect to the investigation(s) of the case.

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

4. The accused stood charged by the learned trial Court, for his committing an offence punishable under Section 306 of the IPC. In proof of its case, the prosecution examined 14 witnesses. On conclusion of recording of prosecution 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 the case.

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

6. The appellant/convict stands aggrieved by the judgment of conviction recorded against him by the learned trial Court. The learned counsel appearing for the appellant/convict has concertedly and vigorously contended qua the findings of conviction recorded by the learned trial Court standing, being not, based on a proper appreciation, by it, of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by it, of the material on record. Hence, he contends qua the findings of conviction warranting reversal by this Court in the exercise of its appellate jurisdiction and theirs standing replaced by findings of acquittal.

7. On the other hand, the learned Additional Advocate General has with considerable force and vigour, contended qua the findings of conviction recorded by the learned trial Court 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 is alleged to abet the commission of suicide by his deceased mother, one Leel Devi. Ascription(s) vis-a-vis the accused, of, his abetting the deceased to commit suicide, is comprised in the prosecution witnesses concerned, with mutual concurrence making testifications qua (I) accused misbehaving besdies repeatedly quarreling with his deceased mother; (b) the deceased being hence compelled to leave the house, rather hers being constrained to stay with her niece. The aforesaid echoings, rendered, with harmony by the prosecution

witnesses, in their respective testifications, hence comprises the evidentiary bedrock, for constraining this Court, to conclude, of, hence the accused while carrying the apposite penal *mens rea,* his instigating and actuating the deceased to commit suicide. However, the aforesaid testifications rendered conjointly by the prosecution witnesses concerned are (i) both nebulous besides imprecise vis-a-vis the apposite time of their occurrence, (ii) also hence concomitantly are improximate vis-a-vis the commission of suicide by deceased Leela Devi. Consequently, the nebulous and imprecise, conjointly rendered testifications by the prosecution witnesses concerned, (iii) of the accused quarreling with the deceased and his misbehaving with her, (iv) importantly, when there is no disclosure also in their respective conjoint testifications qua the time of the purported instigations besdies actuations, meted by the accused vis-a-vis the deceased, for constraining the latter to commit suicide, (v) thereupon, the trite legal principle, of, the timing(s) of all purported instigations or actuations being precisely testified by each of the prosecution witnesses concerned, and (vi) timings, of, purported instigatory or actuatory acts, holding, the closest proximity vis-a-vis the commission of suicide by the deceased, (vii) rather remains grossly unsatiated, with the concomitant effect, of the prosecution hence not succeeding in proving the charge against the accused.

10. Be that as it may, the aforesaid infirmity(ies), is cured by each of the prosecution witnesses concerned, in their respectively rendered testifications, making, with utmost unanimity, hence disclosures, qua five days prior to the occurrence, a Panchayat being summoned in the village, during, proceedings whereof, the S.D.M., Amb, also being present, especially for resolving the bickerings erupting inter se the accused and his deceased mother. Each of the prosecution witnesses also testified with unanimity qua the accused, during, the course of the relevant proceedings, rather meteing threatenings vis-a-vis the deceased, besides during the course of the proceedings, which occurred five days, prior, to the deceased committing suicide, his making echoing(s), qua his compelling her to die. The concurrent testifications, made, by each of the prosecution witnesses concerned, qua the aforesaid panchayat proceedings, conducted in the village, five days prior to the occurrence, apparently, stand not concerted to be belied by the defence, by the defence counsel putting apposite suggestion(s) to each of the prosecution witnesses, during, the course of his holding them to cross-examination, with apposite echoings borne therein, of (a) neither five days prior to the occurrence, the Panchayat being summoned, (b) nor during the course of the proceeding(s), the accused meteing grave threatenings vis-a-vis the life of the deceased. The effect(s), of, the learned defence counsel, omitting, to mete vis-a-vis each of the prosecution wittinesses, during, the course of his holding them to cross-examination, any of the aforesaid suggestions, rather garners an inference of (i) the defence acquiescing, to, the relevant Panchayat proceedings being convened five days prior to the occurrence; (ii) of the accused during the course of the Panchayat proceedings, his meteing grave threatenings vis-a-vis the deceased. The further concomitant effect of the aforesaid acquiescences, is (a) of the proceedings which occurred immediately five days prior to the ill fated occurrence, of the deceased committing suicide, visibly hence holding proximity in timing vis-a-vis the deceased committing suicide; (b) it making a loud open candid portrayal of the accused hence pronouncing his entrenched acrimony besides animosity with the deceased, whereupon, it is to be concluded, of the psyche of the deceased, being, entailed with a severe mental turmoil ; (c) hence in the deceased committing suicide, within, five days of occurrence, of, acquiesced panchayat proceedings, thereupon, constraining an inference, of the prosecution succeeding in proving the charge against the accused. Aggravated momentum, to the aforesaid inference, is, also garnered by the learned defence counsel while holding PW-2 to cross-examination, his putting suggestion(s), to him, qua a Panchayat being convened immediately prior to the ill-fated commission, of suicide by the deceased.

11. Be that as it may, the learned counsel appearing for the convict/appellant, has contended with vigour, that the aforesaid acquiescences are belittled of their vigour by PW-2, during the course of (i) his cross-examination, making admissions, to affirmative suggestions put to him thereat, of a Civil Litigation pending inter se the accused and the deceased AND during pendency thereof, the deceased alienating her share in the property received by her, from, her

deceased husband vis-a-vis Bhupesh Kumar and one Bhim Singh, (ii) besides his also admitting suggestion(s), put to him, of the apposite sale deed besides mutation in consequence thereto being quashed and set aside, (iii) thereupon, he contends that, of, the aforesaid events, mounting mental pressure upon the deceased, rather hence theirs constituting the reason for the deceased committing suicide. However, the vigour of the aforesaid espousal, is rendered frail, by one Bhupesh, the alinee, of the deceased, upon his stepping into the witness box, his making disclosure(s), of his making payment of the entire sale consideration vis-a-vis the deceased, also during the course of his cross-examination, his not rendering any echoings, qua his mounting pressure upon the deceased, for the latter returning the sale consideration to him, (iv) contrarily, he has denied the suggestion put to him, of, his pressurizing the deceased for refund of the sale consideration. Consequently, reiteratedly, hence, the purported cancellation of sale deeds executed by the deceased with one Bhim Singh and one Bhupesh Kumar, AND, of, the latters purportedly mounting pressure upon her for refund of the sale consideration AND thereupon, UPON, mental pressure being mounted upon the deceased, hence leading her to commit suicide, cannot, be construed to be constituting either any actuatory or instigatory evidentiary material, for the deceased to commit suicide.

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

13. In view of the above, the instant appeal is dismissed and the impugned judgment is maintained and affirmed. The learned trial Court is directed to forthwith execute the sentence of imprisonment imposed upon the accused. All pending applications also stand disposed of. Records be sent back henceforth.

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

Smt. Sunita Goyal .....Petitioner.

Versus

Shri Chamba Mal Bhagra & another .....Respondents.

Civil Revision No.14 of 2017.
Reserved on: 16.12.2017.
Decided on : 22nd December, 2017.

Code of Civil Procedure, 1908- Order 1 Rule 10- H.P. Urban Rent Control Act, 1987- Section 14- Petitioner, daughter of the original tenant, sought to be impleaded as co-respondent in rent petition along with her brother –learned Trial Court dismissed the application- **Held**, that evidence on record shows that she has not been residing with the original tenant since 1962 - she has not shared any profits with her brother of the business being run in the demised premises- she waived her right qua the demised premises- **Further held**, that her pleadings does not suggest that her brother is not properly watching her interest in the litigation relying upon ***Ashok Chintaman Juker and others v. Kishore Pandurang Mantri and another, AIR 2001 SC 2251*** held that when tenancy is one, all the members of the family of the original tenant residing with him at the time of his death, succeed the tenancy together- in such circumstances, one of the family members impleaded as respondent represents other members also – petition is not bad for non-joining of other members- petitioner has failed to establish that she is either proper or necessary party- No merit in the petition – petition dismissed. (Para-3, 5 and 6)

Cases referred:
Ashok Chintaman Juker and others v. Kishore Pandurang Mantri and another, AIR 2001 SC 2251
Leela Sood and others versus Manohar Lal, 2009(1) RLR 88
Vinod Kumar versus Rajesh Kumar and others, 1995(1)Sim. L. C. 452
Balwant Rai versus Surjit Singh and others, 1996(2) Sim. L.C. 275

For the Petitioner :	Mr. R.K. Bawa, Sr. Advocate with Mr. Ajay Kumar Sharma, Advocate.
For Respondent No.1:	Mr. Ajay Kumar, Sr. Advocate with Mr. Dheeraj K. Vashishat, Advocate.
	Respondent No.2 ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant petition stands directed by the petitioner against the orders recorded, on, 3.12.2016 by the learned Rent Controller (2), Shimla in case No. 167-6 of 16/14, whereby, it dismissed an application instituted therebefore, under the provisions of Order 1, Rule 10 of the CPC.

2. The demised premises is a commercial premises, comprising, of one shop approximately measuring 450 sq. feet, shop whereof exists on the ground floor of the building AND a godown/store, approximately carrying an alike area, godown whereof exists in the first floor, of, building No.48, situated at Ward No.13, Lower Bazar, Shimla. The initially inducted tenant therein, was, one Amar Nath, who, died intestate in the year 1962. Consequently, upon his demise, prima facie his tenancy rights, upon, the demised premises devolved upon his legal heirs, one amongst whom is the applicant/petitioner herein, one Sunita Goyal. However, when the landlord instituted rent petition borne in Annexure P-2, in the year 2012, he omitted, to implead in the array of respondents/tenants, all the legal heirs, of, the initially inducted tenant, in the demised premises, named, one Amar Nath. The aforesaid eviction petition, was, filed on the ground of the demised premises being bonafide required by the petitioner for his personal use and occupation, for, enabling him to establish his business therein. Subsequent to the institution of the rent petition, the applicant/petitioner herein, who admittedly, is the daughter of the initially inducted tenant, named one Amar Nath, filed an application before the learned Rent Controller, application whereof, was cast under the provisions of Order 1, Rule 10 of the CPC, wherein, she sought her impleadment, in the rent petition, as a co-respondent in the apposite array of respondents. However, her application was dismissed. Consequently, she is aggrieved by the dis-affirmative order pronounced by the learned Rent Controller, hence, is driven to institute the instant petition before this Court.

3. The learned Senior Counsel appearing, for, the respondent/landlord, has, made concerted endeavour, to validate the impugned pronouncement by contending that, on the tenant, impleaded as a sole respondent, in the rent petition, making liquidation, of, rent vis-a-vis the landlord, thereupon, his apposite attornments, being construable to be attornments, also on behalf of the applicant. He also proceeds to contend that even if the applicant, is, the legal heir of deceased Amar Nath, yet given the impleaded tenant, in the apposite rent petition, making the apposite attornment vis-a-vis the landlord qua the demised premises,for himself besides on her behalf, (i) hence begetting a further inference, of, the impleaded tenant, in the rent petition, also, representing the interests, of, the applicant herein,in the rent petition also any decree as may come to be pronounced upon the eviction petition and upon the tenant impleaded therein, being irresistible, rather it being executable even against the applicant/petitioner herein. Consequently, he contends that thereupon the impleadment of the applicant/petitioner herein, being, neither just nor essential, (i) nor hers being hence either a necessary or a proper party, in the rent

petition, AND (II) that the dis-affirmative pronouncement recorded by the learned Rent Controller upon her application, warranting vindication. In making the aforesaid submission, he places reliance upon a judgment of the Hon'ble Apex Court rendered in a case titled as ***Ashok Chintaman Juker and others v. Kishore Pandurang Mantri and another, AIR 2001 SC 2251,*** the relevant paragraph No. 16 whereof, is reproduced hereinafter:-

> "16. In the case on hand, as noted earlier, on the death of the original tenant Chintaman the rent bills in respect of the premises in question were issued in the name of his elder son Kesrinath and on his death the rent bills were issued in the name of his widow Smt.Kishori Kesrinath Juker. It is not the case of the appellant no.1 that there was any division of the premises in question or that rent was being paid to the landlord separately by him. Indeed the appellant no.1 took the plea that he was paying the rent through Smt. Kishori Kesrinath Juker. Thus the tenancy being one, all the members of the family of the original tenant residing with him at the time of his death, succeeded to the tenancy together. In the circumstances the conclusion is inescapable that Smt. Kishori Kesrinath Juker who was impleaded as a tenant in the suit filed by the landlord represented all the tenants and the decree passed in the suit is binding on all the members of the family covered by the tenancy. In the circumstances the decree passed in terms of the compromise entered between the landlord and Smt. Kishori Kesrinath Juker can neither be said to be invalid nor inexecutable against any person who claims to be a member of the family residing with the original tenant, and therefore, a tenant as defined in section 5(11)(c). The position that follows is that the appellants have no right to resist on the ground that the decree is not binding on them. Further, the trial court and the appellate court concurrently held that the appellant no.1 has not been residing in the premises since 1962 i.e. when his elder brother Kesrinath was alive. Therefore, when the suit was filed in the year 1992 there was no necessity for the landlord to implead appellant no.1 or members of his family in the suit since he (landlord) had no cause of action for seeking a decree of recovery of possession from them. In that view of the matter the decree under execution does not suffer from any illegality or infirmity. Viewed from any angle the appellants have no justification on the facts as well as in law to resist execution of the decree for possession of the premises by the landlord. The Executing Court rightly rejected the objection filed by the appellants against execution of the decree and the appellate court and the High Court rightly confirmed the said order. This appeal being devoid of merit is dismissed with costs which is assessed at Rs.10,000/-." (p.2254 & 2255)

He has also placed reliance, upon, a judgment of this Court rendered in a case titled as Leela Sood and others versus Manohar Lal, 2009(1) RLR 88, the relevant paragraph No. 26 whereof stands extracted hereinafter:-

> "26. In the present case, Anita Sood is not residing in the premises in question since she is residing abroad. In view of the law laid down by their Lordships, as cited above and by the Delhi High Court and the Kerala High Court, it is held that the petition for eviction against the tenants was maintainable and Anita Sood was not a necessary party, since her interests were being watched by the other tenants, who inherited the tenancy from Joginder Sood." (p....96)

4. Contrarily, the learned counsel appearing for the petitioner, has relied, upon verdicts rendered by this Court, in case titled as ***Vinod Kumar versus Rajesh Kumar and others, 1995(1)Sim. L. C., 452*** and has also placed reliance upon another verdict of this Court rendered in a case titled as ***Balwant Rai versus Surjit Singh and others, 1996(2) Sim. L.C. 275***, to make a vehement address before this Court that (a) when para materia therewith, the extant demised premises are commercial premises and (b) with the original initially inducted tenant in the demised premises, dying *ab intestato, thereupon* as mandated in the aforesaid verdicts, (c) devolution, of, rights of tenancy(ies) vis-a-vis the demised premises, occurring, in consonance with the general law of succession, rather upon all the legal heirs of the deceased

tenant,, (d) thereupon, it was imperative for the landlord, to, also implead in the eviction petition, the applicant/petitioner herein, as a respondent/tenant along with, the already impleaded respondent(s)/tenant(s), besides it was also incumbent upon the learned Rent Controller, to, pronounce an affirmative order upon the extant application.

5. The reliance placed by the learned counsel appearing for the petitioner upon the aforesaid verdicts, (i) is enfeebled by the factum of the aforesaid mandate, rather emanating, upon verdicts recorded by Civil Courts concerned, Courts whereof stood seized with disputes, apertaining to the inheritability of commercial tenancy(ies), besides with respect to devolution of tenancy rights, accruing, in consonance with the general laws of succession, upon, all the legal heirs of deceased/tenant concerned. Given the verdicts, as relied upon the learned counsel appearing for the petitioner, hence being pronounced upon civil suits, wherein, the Civil Courts, were, beset with the aforesaid controversy(ies), apparently, when hence hereat the trite precise factum, appertains, to, executability, of, decree of eviction pronounced, upon, eviction petition(s), against, the legal heir(s) concerned, who, is excluded to be arrayed in the apposite array(s), of , respondents/tenants, in the apposite rent petition, (a) especially given the latter dying *ab intestato,* (b) AND rather were hence along with the impleaded tenant also enjoined to be impleaded, as respondents/tenants, in the apposite array, of, the tenants/respondents, remains not expostulated therein, (c) contrarily, with the factum of exclusion, of, one amongst all the legal heirs of the deceased/tenant, AND its effect, upon, the executability, of, an order of eviction pronounced upon the impleaded tenant, rather stands firmly rested by verdicts relied, upon, by the learned counsel appearing, for the landlord/respondent, (d) besides when the verdicts pronounced in Ashok Chintman's case (supra) AND in Leela Sood's case (supra), apparently with aplomb stand rendered upon, para materia herewith apposite applications cast, during, the pendency of rent petition(s), constituted, before the learned Rent Controller concerned also with the verdict, of, the Hon'ble Apex Court rendered in Ahsok Chitman's case (supra), though, is rendered qua residential premises, yet with its also (e) expostulating the principle of apposite attornments, of rent, by one of the legal heirs of the deceased original tenant, being attornments also on behalf of other legal heirs, of the deceased original tenant, who yet remain unimpleaded in the rent petition, (f) besides of impleadment of one amongst the legal heirs, of, the deceased original tenant, being mandated in Ashok Chintman's case (supra) rendered by the Hon'ble Apex Court, to be construable, to be a valid representation for himself besides on behalf of other unimpleaded legal heirs, of deceased original tenant, (g) AND of the decree pronounced vis-a-vis the demised premises being irresistible, (h) besides being executable upon all of them, does rather efface the vigour of the contention addressed before this Court by the learned counsel appearing for the petitioner.

6. Consequently, the impeladment, of, the applicant/petitioner herein is neither just nor essential, neither she is a proper or a necessary party to the lis, (i) rather when she has not unfolded, in the petition, of her brother derelicting, in watching her interests in litigation, (ii) also when she has not adduced evidence, in respect of, hers, since 1962, when the demise of her father occurred, hence sharing the profits of business with him, (iii) thereupon also rather it is prima facie construed that she has abandoned besides waived her rights over the demised premises, nor hence she can claim for hers being impleaded as a respondent in the array, of, respondent(s), in the rent petition.

7. In view of the above, the instant petition is dismissed and the impugned order is maintained and affirmed. The parties are directed to appear before the learned trial Court on 12.01.2018. All pending applications also stand disposed off. No order as to costs. Records be sent back forthwith.

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

M/s Jai Mata Naina Devi Filling Station. ....Appellant.

Versus

Bharat Petroleum Corporation Ltd. & others. ...Respondents.

RSA No. : 30 of 2017 a/w
CMP No. 8793/2017
Reserved on: 19.12.2017
Date of decision: 27.12.2017

Code of Civil Procedure, 1908- Order 6 Rule 17- Petitioner sought to incorporate amendment to the effect that notification dated 6.9.2006 qua Excise Policy issued by the Government of India may be declared nonest, void and non applicable to the applicant- During the proceedings before the Hon'ble High Court in Regular Second Appeal the reasons given for non-filing of the application for amendment at the earlier stage was that the counsel was appraised of the need of the incorporation of this fact, but he did not do the needful- It was held that from the record it is clear that the present application has been filed with the intention of dragging the proceedings indefinitely for misusing the ex-parte ad interim injunction allowed in favour of the applicant- The applicant has failed to satisfy the requirements of law qua due diligence in pursuing the instant application and same lacks bonafide, hence, dismissed- It is further held that it is bounden duty of the Court to ensure that Court proceedings are not abused resulting into unjust enrichment to unscrupulous litigants and a party should not be allowed to take benefit of its own wrong turning the litigation in to a fruitful industry- Courts can check such frivolous litigations by imposing appropriate costs- Appeal dismissed with cost of Rs.50,000/- Possession of the demised premise was directed to be taken over from the petitioner within 48 hours.

(Para-37, 38 and 41)

Cases referred:

M/s Ganesh Trading Co., vs. Moji Ram, AIR 1978 SC 484

Salem Advocate Bar Association versus Union of India AIR 2005 SC 3353

Revajeetu Builders and Developers vs. Narayanaswamy and sons and others, (2009) 10 SCC 84

Chander Kanta Bansal vs Rajinder Singh Anand, (2008) 5 SCC 177

South Eastern Coalfields Ltd. Vs. State of M.P, 2003 8 SCC 648

Arulvelu and another vs. State Represented by the Public Prosecutor and another (2009) 10 SCC 206

Rubi Sood and another vs. Major (Retd.) Vijay Kumar Sud and others, I L R 2015 (III) HP 771

Damodar Lal vs.Sohan Devi and others (2016) 3 SCC 78

Vitrelli vs. Satun, 359 US 535

Akhil Bhartiya Upbhokta Congress vs State of Madhya Pradesh and others, (2011) 5 SCC 29

Indian Oil Corporation Ltd & Ors vs. Shashi Prabha Shukla & anr., Civil Appeal No. 5565 of 2009

Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria, 2012 5 SCC 370

Dalip Singh v. State of U.P., 2010 2 SCC 114

Satyender Singh v. Gulab Singh, 2012 129 DRJ 128

Sky Land International Pvt. Ltd. v. Kavita P. Lalwani, 2012 191 DLT 594

K.K.Modi vs K.N.Modi and others, reported in (1998) 3 SCC 573

Indian Council for Enviro-Legal Action vs. Union of India and others, 2011 8 SCC 161

Ramrameshwari Devi and others Vs. Nirmala Devi and others, 2011 8 SCC 249

For the Appellant Mr. B.S. Chauhan, Sr. Advocate with Mr. Munish Datwalia, Advocate.
For the respondents Mr. B.N. Misra, Advocate with Ms. Vandana Misra, Advocate.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, J.

CMP No. 8793/2017

By medium of this application, the applicant has sought an amendment of the plaint on the ground that it gathered knowledge of the fact that the policy dated 6.9.2009 had not been challenged in the suit, reference/observation whereof finds mention in the judgment under challenge passed by the first appellate court while deciding the appeal. It is further averred that the applicant had given complete narration with respect to the matter in controversy to its counsel and being not well conversant with the intricacies/nitty gritty of the pleadings, in good faith, relied on the expertise of its counsel that its case has been properly drafted. However, fact of not challenging the policy dated 6.9.2006 has adversely effected the interest of the plaintiff which has come to its knowledge only after passing of the judgment by the first appellate court. It is further pleaded that the notification dated 6.9.2006 goes to the root of the *lis* and its impleadment in the pleading before the trial court was necessary to determine the real controversy in issue. The lapse on the part of the learned counsel has prejudiced the interest of the applicant materially and for this lapse the applicant cannot be made to suffer. It is in this background that the applicant intends to add paras 7 (A) and 7 (B) after para 7 of the plaint and in the relief clause para (iii) intends to be added as under:

> "7-A. That the instructions/letter/guidelines dated 6.9.2006 and advertisement dated 30.4.2010 issued by the Government of India superseding the earlier instructions/letters vide which the petrol pump was allotted to the applicant and continued till date may be declared to be nonest, void and not applicable qua the applicant as these instructions would have become inoperative prospectively in view of the clause 22 of the agreement.
>
> 7-B. That since the applicant had already applied for approval to carry on the business before the expiry of agreement dated 4.3.2004 and also before the instructions/letter dated 6.9.2006 and the respondents did not pass any order on the application till date, therefore, the applicant/plaintiff has reason to believe that contention of the applicant has been accepted/conceded.
>
> (iii) Declaration to the effect that the instructions/letter dated 6.9.2006 and advertisement dated 30.4.2010 may be declared nonest, void and not applicable qua the rights of the applicant."

2. The respondents have opposed the application by filing reply wherein preliminary objection has been raised that after the amendment of the Code of Civil Procedure, there is a clear mandate against entertaining of the application unless the Court comes to the conclusion that despite due diligence, the party could not raise the matter before the commencement of the trial. The applicant herein has neither pleaded nor proved due diligence and, therefore, the amendment application is liable to be dismissed. It is further averred that the application to challenge the policy has been filed after 11 long years of its formulation on 6.9.2006 and, therefore, the present application is nothing but abuse and misuse of judicial process primarily with the motive to delay the final decision of the

matter. It is further averred that even if it is assumed, though not admitted, that the counsel of the applicant had failed to challenge the policy dated 6.9.2006 despite the instructions of the applicant, it would be impossible to believe that the fact came to the attention of the applicant only when the judgment was passed by the first appellate court in 2017. This averment is misleading because the suit was filed before the trial court in the year 2010 and even the trial court had clearly noted in its judgment dated 16.11.2016 that the applicant had not challenged the policy dated 6.9.2006. It has been averred that the application has been filed with ulterior motive of delaying the litigation on one pretext or the other primarily with the intention to deprive the selected scheduled caste candidate, who was given the dealership of retail outlet as per roster as well as per advertisement dated 30.4.2010.

3. I have heard the learned counsel for the parties and have perused the record of the case.

4. At the outset it may be observed that though the applicant has levelled allegations against its counsel but has failed to name the said counsel(s). A perusal of the records of the case would show that before the trial court the applicant was represented by Sh. Neelam Sharma, Advocate while in the first appellate court he came to be represented by Sh. K.S. Kaundal, Advocate, whereas before this Court, he was initially represented by Sh. Neeraj K. Sharma, Advocate who even appeared when the appeal was heard in part on 5.9.2017. However, having sensed that the Court is not inclined to interfere in the appeal, the applicant thereafter changed his counsel and appointed Sh. Munish Datwalia, Advocate and at the same time engaged the services of Sh. B.S. Chauhan, Senior Advocate. It is at the instance of Mr. Munish Datwalia, this application has been moved.

5. Sh. B.S. Chauhan, Senior Advocate on instructions of Sh. Munish Datwalia, Advocate has not been able to point out the negligence of any one of the counsels and would claim that all the counsel(s) engaged by the applicant had been negligent and would further claim that only on account of the negligence of its lawyer, the applicant should not suffer. In support of such contention, he has placed reliance upon the judgment of the Hon'ble Supreme Court in ***M/s Ganesh Trading Co.***, vs. ***Moji Ram***, AIR 1978 SC 484, more particularly, the observations made in para 4, which read thus:

> "[4] It is clear from the foregoing summary of the main rules of pleadings that provisions for the amendment of pleadings, subject to such terms as to costs and giving of all parties concerned necessary opportunities to meet exact situations resulting from amendments, are intended for promoting the ends of justice and not for defeating them. Even if party or its counsel is inefficient in setting out its case initially the shortcoming can certainly be removed generally by appropriate steps taken by a party which must no doubt pay costs for the inconvenience or expense caused to the other side from its omissions. The error is not incapable of being rectified so long as remedial steps do not unjustifiably injure rights accrued."

6. What probably has been ignored by Mr. Chauhan, learned senior counsel while placing reliance on this judgment is that the judgment relied upon was based on the provisions of the Code as prevailing on the said date, whereas it cannot be disputed that the amendment brought about in the Code of Civil Procedure by amendment Act 22 of 2002 with effect from 1.7.2002, more particularly, the provisions of rule 17 of order 6 have brought about far reaching changes in the position of law and the same reads thus:

> "Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of

due diligence, the party could not have raised the matter before the commencement of trial."

7. The proviso appended to order 6 rule 17 of the Code now restricts the fetter of the Court. This would be embargo on the exercise of the jurisdiction. Now the discretion to grant permission to a party to amend its pleadings lies on two conditions, firstly no injustice must be done to either side and secondly, the amendment must be necessary for the purpose of determining the real question in controversy between the parties. However, to save the interest of the parties in a suit, the provision has been added which clearly states that "*no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial*". Therefore, the decision in ***M/s Ganesh Trading Co***. case (supra) would hardly be of any assistance.

8. It is evident from the bare perusal of the proviso that ordinarily amendment in pleadings is not allowed after the trial has commenced unless the Court is satisfied that the party concerned could not apply even after exercise of due diligence for such amendment before the commencement of trial. In other words, it was incumbent upon the applicant to have specifically pleaded that inspite of due diligence they could not raise the matter now sought to be raised. After all, right to amend is not an absolute right but depends on various principles. Concededly, there is not even a whisper regarding this fact in the entire application.

9. The Hon'ble Supreme Court has interpreted the proviso to be a requirement mandated to prevent frivolous applications for amendment intended, only to delay the trial. In ***Salem Advocate Bar Association*** versus ***Union of India*** AIR 2005 SC 3353, it was held as under:-

> "27. Order VI Rule 17 of the Code deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being allowed after the trial has commenced, unless court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it has to be shown that in spite of due diligence, such amendment could not have been sought earlier. The object is to prevent frivolous applications which are filed to delay the trial. There is no illegality in the provision."

10. The Hon'ble Supreme Court in ***Revajeetu Builders and Developers*** vs. ***Narayanaswamy and sons and others***, (2009) 10 SCC 84, after in depth and critical analysis of the entire law of both the Indian and English cases, laid down some basic principles which ought to be taken into consideration while allowing or rejecting the application for amendment and the same read thus:

> "[63] On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment.
>
> (1) Whether the amendment sought is imperative for proper and effective adjudication of the case?
>
> (2) Whether the application for amendment is bona fide or mala fide?

> (3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
>
> (4) Refusing amendment would in fact lead to injustice or lead to multi- ple litigation;
>
> (5) Whether the proposed amendment con- stitutionally or fundamentally changes the nature and character of the case? and
>
> (6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application."

11. It also needs to be noticed that the Hon'ble Supreme Court has thereafter categorically held that an application made under order 6 rule 17 of the Code is very serious judicial exercise and such exercise should not be undertaken in a casual manner and further observed that while deciding an application for amendment the court must not refuse bona fide, legitimate, honest and necessary amendments and should not permit mala fide, worthless and/or dishonest amendments.

12. Earlier to that the Hon'ble Supreme Court observed that even though order 6 rule 17 was one of the important provisions of the CPC, but the Hon'ble Supreme Court had no hesitation in observing that this was one of the most misused provision of the Code for dragging the proceedings indefinitely, particularly in the Indian courts which are otherwise heavily overburdened with the pending cases. It is apposite to reproduce relevant observations and the same read thus:

> "[29] In our considered view, Order VI Rule 17 is one of the important provisions of the CPC, but we have no hesitation in also observing that this is one of the most misused provision of the Code for dragging the proceedings indefinitely, particularly in the Indian courts which are otherwise heavily overburdened with the pending cases. All Civil Courts ordinarily have a long list of cases, therefore, the Courts are compelled to grant long dates which causes delay in disposal of the cases. The applications for amendment lead to further delay in disposal of the cases."

13. Having set out the legal parameters, it would be noticed that the only ground taken by the applicant for amendment of the plaint is negligence of its counsel, whereas to my mind this application has been filed with the sole intention of dragging on these proceedings indefinitely as the applicant has *ex parte ad interim injunction* in its favour whereby it has been permitted to run the retail outlet despite having lost before both the courts below. The applicant has failed to satisfy the requirement of law that the matter now sought to be introduced by the amendment could not have been raised earlier in spite of the due diligence.

14. What is due diligence has not been defined in the Code but has been explained by the Hon'ble Supreme Court in ***Chander Kanta Bansal*** vs ***Rajinder Singh Anand***, (2008) 5 SCC 177 in the following terms:

> "16. The words "due diligence" has not been defined in the Code. According to Oxford Dictionary (Edition 2006), the word "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort. As per Black's Law Dictionary (Eighth Edition), "diligence" means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. "Due diligence" means the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a

legal requirement or to discharge an obligation. According to Words and Phrases by Drain-Dyspnea (Permanent Edition 13A) "due diligence", in law, means doing everything reasonable, not everything possible. "Due diligence" means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs."

15. In view of the aforesaid discussion, not only do I find no merit in this application but I am of the considered view that the application is *mala fide* and has been filed with the sole motive of delaying decision in the appeal. That being so, the same is dismissed.

RSA No. 30/2017

1. "Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the Courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the Court withholding the release of money had remained in operation". (Refer: ***South Eastern Coalfields Ltd.*** Vs. ***State of M.P***, 2003 8 SCC 648).

2. The instant case is a classical example of litigation being turned into a fruitful industry by the unscrupulous appellant, who have been encouraging the Courts, persuading them to pass interlocutory orders in its favour and may have made huge profits although it has eventually lost at the end.

3. This Regular Second Appeal under section 100 of the Code of Civil Procedure is directed against the judgment and decree dated 9.1.2017, passed by the learned Additional District Judge-I, Solan, District Solan camp at Nalagarh in Civil Appeal No. 28-NL/13 of 2016, whereby he affirmed the judgment and decree dated 16.11.2016, passed by the learned Civil Judge (Junior Divison), Court No.2, Nalagarh, District Solan in Civil Suit No.85/1 of 2010.

The parties shall be referred to as the "plaintiff" and "defendant".

4. The plaintiff is a partnership firm duly registered under the Registration Act and is represented by its three partners. The plaintiff filed a suit for permanent prohibitory injunction on the ground that the family members of the partners of the plaintiff, who were already in the petroleum business and were running various petroleum pumps efficiently and diligently and pleased with the performance and services rendered by them, the defendants with a view to enhance its sale and image and also to counter the expansion efforts of other oil corporations, persuaded the plaintiff to provide suitable place situated either at commercially viable location or at vintage point so as to attract the customers. Accordingly, land comprising Khewat No. 314 min, Khatauni No. 328 min, Khasra No. 1178/886/1 (1-10) was identified at village Baddi Sitalpur, Tehsil Baddi, District Solan for setting up a retail outlet. It was averred that the defendants agreed that the arrangement of *ad hoc* dealership would continue till the time regular dealership is granted to the plaintiff firm or its nominee. In pursuance to such understanding, 'No Objection Certificates' were applied from various departments of the Government by spending huge money, energy and time and thereafter retail outlet/petrol pump was given to the plaintiff firm on *ad hoc* basis

by the defendants with the understanding in the guise of explicit undertaking that it shall be regularized. The outlet commenced its operation with effect from 4.3.2004. The plaintiff spent huge amount in setting up of the retail outlet and developing the site only with the hope as he was given to understand that the dealership in its favour would be regularized even though the *ad hoc* dealership agreement was only for one year with effect from 4.3.2004 to 31.3.2005, as would be evident from stipulation No. 22, which reads thus:

> "22. Notwithstanding anything contained hereinabove, this agreement unless terminated prior to 31.3.2005, will come to an end on 31.3.2005, and you will be liable to deliver vacant possession of the retail outlet with all the facilities mentioned hereunder alongwith any other assets of the corporation, which may be added to the said retail outlet and/or handed over to you, to the representative of the corporation unless the validity period of this agreement is extended by us in writing before expiry of the aforesaid date. If you are interested to carry on the business even after the expiry of the date mentioned above, you will have to make a formal application to the company and obtain its approval before 31.3.2005 and in case of your failure to do so, you will be treated as trespasser and will be liable to pay damage thereof and will also be liable for criminal breach of trust."

5. It was in pursuance to the above stipulation that the plaintiff sent a representation to the defendants on 11.3.2005 wherein a formal request to carry out business even after 31.3.2005 was made. It was averred that on receipt of the above said application, the defendants on their part continued supplying the requisite petroleum products to the plaintiff without any break or interruption and, therefore, the firm's request application dated 11.3.2005 stands accepted and allowed. It was averred that on the date of filing of the suit, the plaintiff was still getting regular supply from the defendants. It was further averred that the defendants have not issued any termination letter to the plaintiff nor the formal request application dated 11.3.2005 had been rejected or dismissed. However, despite this, the defendants went ahead with an advertisement on 30.4.2010 in Hindustan Times (Chandigarh) for regularization of retail out in question, which was already reserved to the S.C. category and letter/order had been issued by the defendant-company to the plaintiff for termination of the dealership. It was averred that since the publication of advertisement cast a cloud over the title and interest of plaintiff, therefore, it approached the defendants and on failure to even take any remedial measure, plaintiff filed the instant suit for perpetual injunction and mandatory injunction.

6. The defendants contested the suit by filing written statement wherein objections regarding the maintainability, cause of action, the plaintiff having not approached the court with clean hands were taken. On merits, it was averred that the plaintiff never approached the defendants even though they were already trying to enhance their sale and image every where in India and also selected the spot at Baddi Sitalpur, Tehsil Baddi. It was averred that the defendants applied to the State of H.P. for the procurement of Government land on lease and it was due to the tireless efforts of the defendants that they were able to get Government land in village Sitalpur, Tehsil Baddi, District Solan on a nominal rent of Rs. 5,432/- per annum for a period of ten years as per office order dated 21.8.2003 and the lease for the land was registered on 6.9.2003 at Tehsil Nalagarh. It was thereafter that the 'No Objection Certificate' was granted by the District Magistrate and the defendants made a proposal for conducting interviews towards selection of *ad hoc* dealers. Four dealers were considered in the selection process and the interviews were conducted on 2.10.2003. Based on the assessment made by the panel, M/s Jai Mata Naina Devi Filling Station was selected as the most suitable candidate for running the petrol outlet of *ad hoc* dealership and the defendants never agreed to convert *ad hoc* dealership into regular/permanent dealership in

favour of the plaintiff. It was further averred that these were the defendants who set up the retail outlet/petrol pump at village Sitalpur and nothing in fact was done by the plaintiff for setting up the petrol pump/retail outlet as alleged. The dealership granted to the plaintiff was purely temporary in nature and the same was governed by letter dated 4.3.2004 issued by the authorized officer of the corporation to the plaintiff. As per the terms and conditions of the said letter, the appointment of *ad hoc* dealer was a temporary agreement and, therefore, the plaintiff could not claim any right or title on the basis of such letter. It is further averred that no doubt the representation of the plaintiff dated 11.3.2005 was received but keeping in view the guidelines issued by the Government of India dated 9.6.2006, the defendants published advertisement in the daily news paper to allot the dealership of the retail outlet/petrol pump in favour of the person, who falls under the category of Corpus Fund Scheme (SC/ST category of dealership/widow and women above 40 years of age without earning parents).

7. Replication to the written statement was filed wherein the contents of the plaint were reiterated and reaffirmed and those of the written statement had been denied.

8. Learned trial court on 13.9.2012 framed the following issues:

1. Whether the plaintiff is entitled for the relief of perpetual permanent injunction, as prayed for? OPP

2. Whether the plaintiff is entitled for the relief of mandatory injunction, as prayed for? OPP

3. Whether the suit is not maintainable in the present form? OPD

4. Whether the plaintiff has no cause of action and locus standi to file the present suit? OPD

5. Whether the plaintiff has not come to the court with clean hands and suppressed the material facts from this court? OPD.

6. Relief.

9. After recording the evidence and evaluating the same, learned trial court dismissed the suit. Aggrieved thereby the plaintiff filed an appeal before the first appellate court, however, the same was also dismissed with costs of Rs. 2,000/- vide judgment and decree dated 9.1.2017. Undeterred the plaintiff has filed the instant appeal by claiming that the judgments rendered by the courts below are perverse being based on complete misreading and misinterpretation of the pleadings and evidence on record.

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

11. What is 'perverse' was considered by the Hon'ble Supreme Court in a detailed judgment in ***Arulvelu and another*** *vs.* ***State Represented by the Public Prosecutor and another (2009) 10 SCC 206*** wherein it was held as under:-

> "26. In M. S. Narayanagouda v. Girijamma & Another AIR 1977 Kar. 58, the Court observed that any order made in conscious violation of pleading and law is a perverse order. In Moffett v. Gough, (1878) 1 LR 1r 331 the Court observed that a perverse verdict may probably be defined as one that is not only against the weight of evidence but is altogether against the evidence. In Godfrey v. Godfrey 106 NW 814, the Court defined `perverse' as turned the wrong way, not right; distorted from the right; turned away or deviating from what is right, proper, correct etc.
>
> 27. The expression "perverse" has been defined by various dictionaries in the following manner:

1. Oxford Advanced Learner's Dictionary of Current English Sixth Edition

PERVERSE:- Showing deliberate determination to behave in a way that most people think is wrong, unacceptable or unreasonable.

2. Longman Dictionary of Contemporary English - International Edition

PERVERSE: Deliberately departing from what is normal and reasonable.

3. The New Oxford Dictionary of English - 1998 Edition

PERVERSE: Law (of a verdict) against the weight of evidence or the direction of the judge on a point of law.

4. New Webster's Dictionary of the English Language (Deluxe Encyclopedic Edition)

PERVERSE: Purposely deviating from accepted or expected behavior or opinion; wicked or wayward; stubborn; cross or petulant.

5. Stroud's Judicial Dictionary of Words & Phrases, Fourth Edition

PERVERSE: A perverse verdict may probably be defined as one that is not only against the weight of evidence but is altogether against the evidence.

28. In Shailendra Pratap & Another v. State of U.P. (2003) 1 SCC 761, the Court observed thus: (SCC p.766, para 8

"8...We are of the opinion that the trial court was quite justified in acquitting the appellants of the charges as the view taken by it was reasonable one and the order of acquittal cannot be said to be perverse. It is well settled that appellate court would not be justified in interfering with the order of acquittal unless the same is found to be perverse. In the present case, the High Court has committed an error in interfering with the order of acquittal of the appellants recorded by the trial court as the same did not suffer from the vice of perversity."

29. In Kuldeep Singh v. The Commissioner of Police & Others (1999) 2 SCC 10, the Court while dealing with the scope of Articles 32 and 226 of the Constitution observed as under: (SCC p.14, paras 9-10)

"9. Normally the High Court and this Court would not interfere with the findings of fact recorded at the domestic enquiry but if the finding of "guilt" is based on no evidence, it would be a perverse finding and would be amenable to judicial scrutiny.

10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

30. The meaning of `perverse' has been examined in H. B. Gandhi, Excise and Taxation Officer-cum- Assessing Authority, Karnal & Others v. Gopi Nath & Sons & Others 1992 Supp (2) SCC 312, this Court observed as under: (SCC pp. 316-17, para 7)

> "7. In the present case, the stage at and the points on which the challenge to the assessment in judicial review was raised and entertained was not appropriate. In our opinion, the High Court was in error in constituting itself into a court of appeal against the assessment. While it was open to the respondent to have raised and for the High Court to have considered whether the denial of relief under the proviso to Section 39(5) was proper or not, it was not open to the High Court re-appreciate the primary or perceptive facts which were otherwise within the domain of the fact-finding authority under the statute. The question whether the transactions were or were not sales exigible to sales tax constituted an exercise in recording secondary or inferential facts based on primary facts found by the statutory authorities. But what was assailed in review was, in substance, the correctness - as distinguished from the legal permissibility - of the primary or perceptive facts themselves. It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

12. What is 'perverse' has further been considered by this Court in ***RSA No.436 of 2000***, titled ***'Rubi Sood and another*** *vs.* ***Major (Retd.) Vijay Kumar Sud and others***, decided on 28.05.2015 in the following manner:-

> "25..... A finding of fact recorded by the learned Courts below can only be said to be perverse, which has been arrived at without consideration of material evidence or such finding is based on no evidence or misreading of evidence or is grossly erroneous that, if allowed to stand, it would result in miscarriage of justice, is open to correction, because it is not treated as a finding according to law.
>
> 26. If a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or even the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then the finding is rendered infirm in the eye of the law.
>
> 27. If the findings of the Court are based on no evidence or evidence, which is thoroughly unreliable or evidence that suffers from vice of procedural irregularity or the findings are such that no reasonable persons would have arrived at those findings, then the findings may be said to be perverse.
>
> 28. Further if the findings are either ipse dixit of the Court or based on conjectures and surmises, the judgment suffers from the additional infirmity of non application of mind and thus, stands vitiated."

13. What is 'perversity' recently came up for consideration before the Hon'ble Supreme Court in ***Damodar Lal*** *vs.****Sohan Devi and others (2016) 3 SCC 78*** wherein it was held as under:-

"8. "Perversity" has been the subject matter of umpteen number of decisions of this Court. It has also been settled by several decisions of this Court that the first appellate court, under Section 96 of The Civil Procedure Code, 1908, is the last court of facts unless the findings are based on evidence or are perverse.

9. In Krishnan v. Backiam (2007) 12 SCC 190, it has been held at paragraph-11 that: (SCC pp. 192-93)

> "11. It may be mentioned that the first appellate court under Section 96 CPC is the last court of facts. The High Court in second appeal under Section 100 CPC cannot interfere with the findings of fact recorded by the first appellate court under Section 96 CPC. No doubt the findings of fact of the first appellate court can be challenged in second appeal on the ground that the said findings are based on no evidence or are perverse, but even in that case a question of law has to be formulated and framed by the High Court to that effect."

10. In Gurvachan Kaur v. Salikram (2010) 15 SCC 530, at para 10, this principle has been reiterated: (SCC p. 532)

> "10. It is settled law that in exercise of power under Section 100 of the Code of Civil Procedure, the High Court cannot interfere with the finding of fact recorded by the first appellate court which is the final court of fact, unless the same is found to be perverse. This being the position, it must be held that the High Court was not justified in reversing the finding of fact recorded by the first appellate court on the issues of existence of landlord-tenant relationship between the plaintiff and the defendant and default committed by the latter in payment of rent."

11. In the case before us, there is clear and cogent evidence on the side of the plaintiff/appellant that there has been structural alteration in the premises rented out to the respondents without his consent. Attempt by the respondent-defendants to establish otherwise has been found to be totally non-acceptable to the trial court as well as the first appellate court. Material alteration of a property is not a fact confined to the exclusive/and personal knowledge of the owner. It is a matter of evidence, be it from the owner himself or any other witness speaking on behalf of the plaintiff who is conversant with the facts and the situation. PW-1 is the vendor of the plaintiff, who is also his power of attorney. He has stated in unmistakable terms that there was structural alteration in violation of the rent agreement. PW-2 has also supported the case of the plaintiff. Even the witnesses on behalf of the defendant, partially admitted that the defendants had effected some structural changes.

12. Be that as it may, the question whether there is a structural alteration in a tenanted premises is not a fact limited to the personal knowledge of the owner. It can be proved by any admissible and reliable evidence. That burden has been successfully discharged by the plaintiff by examining PWs-1 and 2. The defendants could not shake that evidence. In fact, that fact is proved partially from the evidence of the defendants themselves, as an admitted fact. Hence, only the trial court came to the definite finding on structural alteration. That finding has been endorsed by the first appellate court on re-appreciation of the evidence, and therefore, the High Court in second appeal was not justified in upsetting the finding which is a pure

question of fact. We have no hesitation to note that both the questions of law framed by the High Court are not substantial questions of law. Even if the finding of fact is wrong, that by itself will not constitute a question of law. The wrong finding should stem out on a complete misreading of evidence or it should be based only on conjectures and surmises. Safest approach on perversity is the classic approach on the reasonable man's inference on the facts. To him, if the conclusion on the facts in evidence made by the court below is possible, there is no perversity. If not, the finding is perverse. Inadequacy of evidence or a different reading of evidence is not perversity.

13. In Kulwant Kaur v. Gurdial Singh Mann (2001) 4 SCC 262, this Court has dealt with the limited leeway available to the High Court in second appeal. To quote para 34: (SCC pp.278-79)

> "34. Admittedly, Section 100 has introduced a definite restriction on to the exercise of jurisdiction in a second appeal so far as the High Court is concerned. Needless to record that the Code of Civil Procedure (Amendment) Act, 1976 introduced such an embargo for such definite objectives and since we are not required to further probe on that score, we are not detailing out, but the fact remains that while it is true that in a second appeal a finding of fact, even if erroneous, will generally not be disturbed but where it is found that the findings stand vitiated on wrong test and on the basis of assumptions and conjectures and resultantly there is an element of perversity involved therein, the High Court in our view will be within its jurisdiction to deal with the issue. This is, however, only in the event such a fact is brought to light by the High Court explicitly and the judgment should also be categorical as to the issue of perversity vis-à-vis the concept of justice. Needless to say however, that perversity itself is a substantial question worth adjudication — what is required is a categorical finding on the part of the High Court as to perversity. In this context reference be had to Section 103 of the Code which reads as below:
>
> **'103. Power of High Court to determine issues of fact.-** In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal,—
>
> (a) which has not been determined by the lower appellate court or by both the court of first instance and the lower appellate court, or
>
> (b) which has been wrongly determined by such court or courts by reason of a decision on such question of law as is referred to in Section 100."
>
> The requirements stand specified in Section 103 and nothing short of it will bring it within the ambit of Section 100 since the issue of perversity will also come within the ambit of substantial question of law as noticed above. The legality of finding of fact cannot but be termed to be a question of law. We reiterate however, that there must be a definite finding to that effect in the judgment of the High Court so as to make it evident that Section 100 of the Code stands complied with."

> 14. In S.R. Tiwari v. Union of India (2013) 6 SCC 602, after referring to the decisions of this Court, starting with Rajinder Kumar Kindra v. Delhi Administration, (1984) 4 SCC 635, it was held at para 30: (S.R.Tewari case[6], SCC p. 615)
>
> > "30. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. If a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with. (Vide Rajinder Kumar Kindra v. Delhi Admn. [(1984) 4 SCC 635 : 1985 SCC (L&S) 131 : AIR 1984 SC 1805] , Kuldeep Singh v. Commr. of Police [(1999) 2 SCC 10 : 1999 SCC (L&S) 429 : AIR 1999 SC 677] , Gamini Bala Koteswara Rao v. State of A.P. [(2009) 10 SCC 636 : (2010) 1 SCC (Cri) 372 : AIR 2010 SC 589] and Babu v. State of Kerala[(2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179] .)"
> >
> > This Court has also dealt with other aspects of perversity.
>
> 15. We do not propose to discuss other judgments, though there is plethora of settled case law on this issue. Suffice to say that the approach made by the High Court has been wholly wrong, if not, perverse. It should not have interfered with concurrent findings of the trial court and first appellate court on a pure question of fact. Their inference on facts is certainly reasonable. The strained effort made by the High Court in second appeal to arrive at a different finding is wholly unwarranted apart from being impermissible under law. Therefore, we have no hesitation to allow the appeal and set aside the impugned judgment of the High Court and restore that of the trial court as confirmed by the appellate court."

14. Thus, it can be taken to be settled that a judgment can be said to be perverse if the conclusions arrived at by the learned Courts below are contrary in evidence on record, or if the Court's entire approach with respect to dealing with the evidence or the pleadings is found to be patently illegal, leading to the miscarriage of justice, or if its judgment is unreasonable and is based on erroneous understanding of law and of the facts of the case. A perverse finding is one which is based on no evidence or one that no reasonable person would have arrived at. Therefore, unless it is found that some relevant evidence has not been considered or that certain inadmissible material has been taken into consideration, the findings cannot be said to be perverse.

15. Having noticed the pleadings, which have been set out in detail above, now I would proceed to evaluate the oral as well as documentary evidence led by the parties.

16. One of the partners of the plaintiff Rajesh Verma stepped into the witness box and tendered in examination-in-chief his affidavit Ex.PW-1/A wherein he reiterated the contents of the plaint and tendered the documents, i.e. Form-C Ex.P-1, appointment letter Ex.P-2, invoice Ex.P-3, Form No. 26 Ex.P-4, invoices Ex.P-5 and P-6, Tatima Ex.P-7,

Jamabandi Ex.P-8, limit certificate Ex.P-9, letter Ex.P-10, postal receipt Ex.P-11 and partnership deed Ex.P-12.

17. However, when put to cross-examination, the plaintiff clearly admitted that the dealership of petrol pump was given to him on *ad hoc* basis. He volunteered to state that it was mentioned in the appointment letter that if plaintiff makes representation before 31.3.2005, then the retail outlet would be allowed to continue. He denied that *ad hoc* dealership is temporary dealership. He further denied that *ad hoc* dealership had been terminated by the company. He further denied that the defendant-company had never promised to regularize the dealership. He even denied the issuance of instructions of Government of India vide letter dated 6.9.2006 whereby the petrol pumps on *ad hoc* basis were reserved for SC/ST category.

18. Now, adverting to the evidence led by the defendants, it would be noticed that they examined one Achman Treha, who tendered in his examination-in-chief his affidavit Ex.DW-1/A wherein he reiterated the contents of written statement and tendered the documents, i.e. POA Ex.D-1, letter of Ministry of Petroleum and Natural Gas Ex. D-2 and Corporate Broadcast Ex.D-3. This witness is the Territory Manager in Noida and joined at Ambala on 1.4.2014. He stated that he was authorized to depose on behalf of defendants vide power of attorney Ex.D-1. He feigned ignorance who had made efforts to procure the land from the Government of Himachal Pradesh on lease. However, volunteered that the person authorized by the company might have made efforts at such time. He feigned ignorance regarding ignorance letter dated 11.3.2005 Ex. P-10. He, however, admitted that the defendant-company was regularly supplying petroleum product to the plaintiff since March, 2005. He denied that the expenditure of the petrol outlet was incurred by the plaintiff. He further denied that as per Ex.P-2 (appointment letter), the defendant company was bound to regularize the outlet.

This in entirety is the evidence led by the parties.

19. On the basis of aforesaid evidence there can be no dispute that the plaintiff vide letter dated 4.3.2004 was in fact appointed as *ad hoc* dealer for the petrol outlet at Baddi. However, this outlet was to be governed by stipulation 22 of the letter dated 4.3.2004, as reproduced hereinabove.

20. A perusal of the aforesaid letter clearly goes to show that no promise has been held out to the plaintiff so as to even remotely indicate that his dealership would continue even after 31.3.2005. The letter, in fact, is only for a period of one year with the provision of extension that too in writing, which clearly not only indicates but proves that such dealership was of temporary nature and, therefore, no claim for regular dealership on the basis of aforesaid agreement could have been claimed. Yet the plaintiff is operating the outlet after obtaining *ex parte* order from this Court.

21. It would be noticed that there were no factual or legal basis upon which the plaintiff could have filed the suit, yet he managed to linger on it before the trial court itself for nearly 6½ years with effect from 28.5.2010 up till 16.11.2016 and during this time, he enjoyed an order of injunction in its favour. Even after the dismissal of the suit, it promptly filed an appeal before the first appellate court on 5.12.2016 and obtained *ex parte* stay and when the appeal itself was dismissed on 9.1.2017, it promptly filed an appeal before this Court on 18.1.2017 and obtained *ex parte ad interim order* of *status quo* from the learned Vacation Judge.

22. It would also be noticed that the plaintiff had not claimed any right to run the outlet on the basis of any of the species of estoppel like acquiescence, waiver, promissory estoppel etc. and, therefore, I really wonder as to how the suit itself was maintainable. The

plaintiff even did not raise the legal pleas including legitimate expectation because such pleas obviously were not available to it, yet under the garb of having simply instituted the litigation, it has continued to reap the benefit of the litigation in the Courts itself for over a period of 6½ years.

23. What is more amazing is the fact that despite period of the agreement having come to an end on 31.3.2005, plaintiff without intervention of the Court, enjoyed supplies of petroleum products till the time of the institution of the suit, i.e. 28.5.2010 without any right. This obviously could not have been possible without the active connivance and support from the officials of the defendants.

24. There can be no doubt that offices being held by the defendants are held by them as sacred trust and, therefore, meant for use and not abuse and in case they would surpass the rules, then law is not that powerless and would step to quash such arbitrary orders.

25. In a welfare State the Government and its authorities have to act in fair, transparent and reasonable manner. It must as said by Mr. Justice Frankfurther in ***Vitrelli*** vs. ***Satun***, 359 US 535 rigorously hold to the standard by which it professes its action to be judged, no action of the Government or its functionaries can be founded on the arbitrary exercise of power, nor can any individual be chosen for distribution of State largesse or benefits on its liking. The Government cannot be permitted to exercise its action in favour of any person on the basis of its discretion to do so unless such exercise of discretion is founded on clear cut guidelines and the policy bereft of unreasonableness or arbitrariness.

26. Admittedly the defendants are a State within the meaning of Article 12 of the Constitution of India and therefore cannot act like a private individual, who is free to act in a manner whatsoever he likes, unless it is interdicted or prohibited by law. It is settled that the State and its instrumentalities have to act strictly within the four corners of law and all its activities are governed by Rules, regulations and instructions. In addition, the defendants are bound to act in a fair and transparent manner so as to dispel all fears that its action is, in fact, activated by extraneous consideration.

27. The role of the Government and its authorities as provider of services and benefits to the people has been considered in detail by the Hon'ble Supreme Court in ***Akhil Bhartiya Upbhokta Congress*** vs ***State of Madhya Pradesh and others***, (2011) 5 SCC 29, wherein it was observed as under:

> "[46] The concept of 'State' has changed in recent years. In all democratic dispensations the State has assumed the role of a regulator and provider of different kinds of services and benefits to the people like jobs, contracts, licences, plots of land, mineral rights and social security benefits. In his work "The Modern State" MacIver (1964 Paperback Edition) advocated that the State should be viewed mainly as a service corporation. He highlighted difference in perception about the theory of State in the following words:
>
> > "To some people State is essentially a class-structure, "an organization of one class dominating over the other classes"; others regard it as an organisation that transcends all classes and stands for the whole community. They regard it as a power- system. Some view it entirely as a legal structure, either in the old Austinian sense which made it a relationship of governors and governed, or, in the language of modern jurisprudence, as a community "organised for action under legal rules". Some regard it as no more than a mutual insurance society, others as the very texture of all our life. Some class the

State as a great "corporation" and others consider it as indistinguishable from society itself."

[47] When the Constitution was adopted, people of India resolved to constitute India into a Sovereign Democratic Republic. The words 'Socialist' and 'Secular' were added by the Constitution (Forty-second Amendment) Act, 1976 and also to secure to all its citizens Justice - social, economic and political, Liberty of thought, expression, belief, faith and worship; Equality of status and/or opportunity and to promote among them all Fraternity assuring the dignity of the individual and the unity and integrity of the Nation. The expression 'unity of the Nation' was also added by the Constitution (Forty-second Amendment) Act, 1976. The idea of welfare State is ingrained in the Preamble of the Constitution. Part III of the Constitution enumerates fundamental rights, many of which are akin to the basic rights of every human being. This part also contains various positive and negative mandates which are necessary for ensuring protection of the Fundamental Rights and making them real and meaningful.

(48) Part IV contains 'Directive Principles of State Policy' which are fundamental in the governance of the country and it is the duty of the State to apply these principles in making laws. Article 39 specifies certain principles of policy which are required to be followed by the State. Clause (b) thereof provides that the State shall, in particular, direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to sub-serve the common good. Parliament and Legislatures of the States have enacted several laws and the governments have, from time to time, framed policies so that the national wealth and natural resources are equitably distributed among all sections of people so that have-nots of the society can aspire to compete with haves.

[49] The role of the Government as provider of services and benefits to the people was noticed in R.D. Shetty v. International Airport Authority of India, 1979 3 SCC 489 in the following words:

> "Today the Government in a welfare State, is the regulator and dispenser of special services and provider of a large number of benefits, including jobs, contracts, licences, quotas, mineral rights, etc. The Government pours forth wealth, money, benefits, services, contracts, quotas and licences. The valuables dispensed by Government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth. These valuables which derive from relationships to Government are of many kinds. They comprise social security benefits, cash grants for political sufferers and the whole scheme of State and local welfare. Then again, thousands of people are employed in the State and the Central Governments and local authorities. Licences are required before one can engage in many kinds of businesses or work. The power of giving licences means power to withhold them and this gives control to the Government or to the agents of Government on the lives of many people. Many individuals and many more businesses enjoy largesse in the form of Government contracts. These contracts often resemble subsidies. It is virtually impossible to lose money on them and many enterprises are set up primarily to do business with Government. Government owns and controls hundreds of acres of public land valuable for mining and other purposes. These resources are available for utilisation by private corporations and individuals by way of lease or licence. All these mean growth in the Government largesse and with the increasing magnitude and range of governmental functions as we move

> closer to a welfare State, more and more of our wealth consists of these new forms. Some of these forms of wealth may be in the nature of legal rights but the large majority of them are in the nature of privileges....."

[50] For achieving the goals of Justice and Equality set out in the Preamble, the State and its agencies/instrumentalities have to function through political entities and officers/officials at different levels. The laws enacted by Parliament and State Legislatures bestow upon them powers for effective implementation of the laws enacted for creation of an egalitarian society. The exercise of power by political entities and officers/officials for providing different kinds of services and benefits to the people always has an element of discretion, which is required to be used in larger public interest and for public good. In principle, no exception can be taken to the use of discretion by the political functionaries and officers of the State and/or its agencies/instrumentalities provided that this is done in a rational and judicious manner without any discrimination against anyone. In our constitutional structure, no functionary of the State or public authority has an absolute or unfettered discretion. The very idea of unfettered discretion is totally incompatible with the doctrine of equality enshrined in the Constitution and is an antithesis to the concept of rule of law.

[51] In his work 'Administrative Law' (6th) Edition, Prof. H.W.R. Wade, highlighted distinction between powers of public authorities and those of private persons in the following words:

> "... The common theme of all the authorities so far mentioned is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust, no absolutely - that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms."

Prof. Wade went on to say:

> "..... The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good.

There is nothing paradoxical in the imposition of such legal limits. It would indeed be paradoxical if they were not imposed.

Nor is this principle an oddity of British or American law; it is equally prominent in French law. Nor is it a special restriction which fetters only local authorities: it applies no less to ministers of the Crown. Nor is it confined to the sphere of administration: it operates wherever discretion is given for some public purpose, for example where a judge has a discretion to order jury trial. It is only where powers are given for the personal benefit of the person empowered that the discretion is absolute. Plainly this can have no application in public law.

For the same reasons there should in principle be no such thing as unreviewable administrative discretion, which should be just as much a contradiction in terms as unfettered discretion. The question which has to be asked is what is the scope of judicial review, and in a few special cases the scope for the review of discretionary decisions may be minimal. It remains axiomatic that all

discretion is capable of abuse, and that legal limits to every power are to be found somewhere."

[52] Padfield v. Minister of Agriculture, Fishery and Food, 1968 AC 997, is an important decision in the area of administrative law. In that case the Minister had refused to appoint a committee to investigate the complaint made by the members of the Milk Marketing Board that majority of the Board had fixed milk prices in a way that was unduly unfavourable to the complainants. The Minister's decision was founded on the reason that it would be politically embarrassing for him if he decided not to implement the committee's decision.

[53] While rejecting the theory of absolute discretion, Lord Reid observed:

> "Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reasons, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court."

[54] In Breen v. Amalgamated Engineering Union, 1971 2 QB 175, Lord Denning MR said:

> "The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevantly. It its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside. That is established by Padfield v. Minister of Agriculture, Fisheries and Food which is a landmark in modern administrative law."

[55] In Laker Airways Ltd. v. Department of Trade,1977 QB 643, Lord Denning discussed prerogative of the Minister to give directions to Civil Aviation Authorities overruling the specific provisions in the statute in the time of war and said:

> "Seeing that prerogative is a discretion power to be exercised for the public good, it follows that its exercise can be examined by the Courts just as in other discretionary power which is vested in the executive."

[56] This Court has long ago discarded the theory of unfettered discretion. In S.G. Jaisinghani v. Union of India, 1967 AIR(SC) 1427, Ramaswami, J. emphasised that absence of arbitrary power is the foundation of a system governed by rule of law and observed:

> "In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or

without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law. (See Dicey-"Law of the Constitution" - Tenth Edn., Introduction ex.). 'Law has reached its finest moments', stated Douglas, J. in United States v. Underlick,1951 342 US 98, "when it has freed man from the unlimited discretion of some ruler..... Where discretion is absolute, man has always suffered'. It is in this sense that the rule of law maybe said to be the sworn enemy of caprice. Discretion, as Lord Mansfield stated it in classic terms in the case of John Wilkes (1770 98 ER 327),'means sound discretion guided by law. It must be governed by rule, not humour it must not be arbitrary, vague and fanciful"

[57] In Ramana Dayaram Shetty v. International Airport Authority of India (supra), Bhagwati, J. referred to an article by Prof. Reich "The New Property" which was published in 73 Yale Law Journal. In the article, the learned author said, "that the Government action be based on standard that are not arbitrary or unauthorized." The learned Judge then quoted with approval the following observations made by Mathew, J. (as he then was) in V. Punnen Thomas v. State of Kerala, 1969 AIR(Ker) 81 (Full Bench):

"The Government is not and should not be as free as an individual in selecting recipients for its largesses. Whatever its activities, the Government is still the Government and will be subject to the restraints inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal."

[58] Bhagwati, J. also noticed some of the observations made by Ray, C.J. in Eursian Equipments and Chemicals Ltd. v. State of West Bengal, 1975 1 SCC 70 who emphasized that when the Government is trading with public the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions and held:

".....This proposition would hold good in all cases of dealing by the Government with the public, where the interest sought to be protected is a privilege. It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesse including award of jobs, contracts, quotas, licences, etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory."

[59] In Kasturi Lal Lakshmi Reddy v. State of J And K, 1980 4 SCC 1, Bhagwati J. speaking for the Court observed:

"Where any governmental action fails to satisfy the test of reasonableness and public interest discussed above and is found to be wanting in the quality of reasonableness or lacking in the element of public interest, it would be liable to be struck down as invalid. It must follow as a necessary corollary

from this proposition that the Government cannot act in a manner which would benefit a private party at the cost of the State; such an action would be both unreasonable and contrary to public interest. The Government, therefore, cannot, for example, give a contract or sell or lease out its property for a consideration less than the highest that can be obtained for it, unless of course there are other considerations which render it reasonable and in public interest to do so. Such considerations may be that some directive principle is sought to be advanced or implemented or that the contract or the property is given not with a view to earning revenue but for the purpose of carrying out a welfare scheme for the benefit of a particular group or section of people deserving it or that the person who has offered a higher consideration is not otherwise fit to be given the contract or the property. We have referred to these considerations only illustratively, for there may be an infinite variety of considerations which may have to be taken into account by the Government in formulating its policies and it is on a total evaluation of various considerations which have weighed with the Government in taking a particular action, that the court would have to decide whether the action of the Government is reasonable and in public interest. But one basic principle which must guide the court in arriving at its determination on this question is that there is always a presumption that the governmental action is reasonable and in public interest and it is for the party challenging its validity to show that it is wanting in reasonableness or is not informed with public interest. This burden is a heavy one and it has to be discharged to the satisfaction of the court by proper and adequate material. The court cannot lightly assume that the action taken by the Government is unreasonable or without public interest because, as we said above, there are a large number of policy considerations which must necessarily weigh with the Government in taking action and therefore the court would not strike down governmental action as invalid on this ground, unless it is clearly satisfied that the action is unreasonable or not in public interest. But where it is so satisfied, it would be the plainest duty of the court under the Constitution to invalidate the governmental action. This is one of the most important functions of the court and also one of the most essential for preservation of the rule of law. It is imperative in a democracy governed by the rule of law that governmental action must be kept within the limits of the law and if there is any transgression, the court must be ready to condemn it. It is a matter of historical experience that there is a tendency in every Government to assume more and more powers and since it is not an uncommon phenomenon in some countries that the legislative check is getting diluted, it is left to the court as the only other reviewing authority under the Constitution to be increasingly vigilant to ensure observance with the rule of law and in this task, the court must not flinch or falter. It may be pointed out that this ground of invalidity, namely, that the governmental action is unreasonable or lacking in the quality of public interest, is different from that of mala fides though it may, in a given case, furnish evidence of mala fides."

[60] In Common Cause, A Registered Society v. Union of India, 1996 6 SCC 530 the two Judge Bench considered the legality of discretionary powers exercised by the then Minister of State for Petroleum and Natural Gas in the matter of allotment of petrol pumps and gas agencies. While declaring that allotments made by the Minister were wholly arbitrary, nepotistic and motivated by extraneous considerations the Court said:

> "The Government today -- in a welfare State -- provides large number of benefits to the citizens. It distributes wealth in the form of allotment of plots, houses, petrol pumps, gas agencies, mineral leases, contracts, quotas and licences etc. Government distributes largesses in various forms. A Minister who is the executive head of the department concerned distributes these benefits and largesses. He is elected by the people and is elevated to a position where he holds a trust on behalf of the people. He has to deal with the people's property in a fair and just manner. He cannot commit breach of the trust reposed in him by the people."

[61] The Court also referred to the reasons recorded in the orders passed by the Minister for award of dealership of petrol pumps and gas agencies and observed:

> "24.....While Article 14 permits a reasonable classification having a rational nexus to the objective sought to be achieved, it does not permit the power to pick and choose arbitrarily out of several persons falling in the same category. A transparent and objective criteria/procedure has to be evolved so that the choice among the members belonging to the same class or category is based on reason, fair play and non-arbitrariness. It is essential to lay down as a matter of policy as to how preferences would be assigned between two persons falling in the same category. If there are two eminent sportsmen in distress and only one petrol pump is available, there should be clear, transparent and objective criteria/procedure to indicate who out of the two is to be preferred. Lack of transparency in the system promotes nepotism and arbitrariness. It is absolutely essential that the entire system should be transparent right from the stage of calling for the applications up to the stage of passing the orders of allotment."

[62] In Shrilekha Vidyarthi v. State of U.P., 1991 1 SCC 212, the Court unequivocally rejected the argument based on the theory of absolute discretion of the administrative authorities and immunity of their action from judicial review and observed:

> ".... We have no doubt that the Constitution does not envisage or permit unfairness or unreasonableness in State actions in any sphere of its activity contrary to the professed ideals in the Preamble. In our opinion, it would be alien to the Constitutional Scheme to accept the argument of exclusion of Article 14 in contractual matters. The scope and permissible grounds of judicial review in such matters and the relief which may be available are different matters but that does not justify the view of its total exclusion. This is more so when the modern trend is also to examine the unreasonableness of a term in such contracts where the bargaining power is unequal so that these are not negotiated contracts but standard form contracts between unequals.....
>
> Even assuming that it is necessary to import the concept of presence of some public element in a State action to attract Article 14 and permit judicial review, we have no hesitation in saying that the ultimate impact of all actions of the State or a public body being undoubtedly on public interest, the requisite public element for this purpose is present also in contractual matters. We, therefore, find it difficult and unrealistic to exclude the State actions in contractual matters, after the contract has been made, from the purview of judicial review to test its validity on the anvil of Article 14.
>
> It can no longer be doubted at this point of time that Article of the Constitution of India applies also to matters of governmental policy and if the policy or any action of the Government, even in contractual matters, fails to satisfy the test

of reasonableness, it would be unconstitutional. (See Ramana Dayaram Shetty v. The International Airport Authority of India, 1979 AIR(SC) 1628] and Kasturi Lal Lakshmi Reddy v. State of Jammu and Kashmir, 1980 AIR(SC) 1992], In Col. A.S. Sangwan v. Union of India, 1981 AIR(SC) 1545], while the discretion to change the policy in exercise of the executive power, when not trammelledly the statute or rule, was held to be wide, it was emphasised as imperative and implicit in Article 14 of the Constitution that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touch-stone, irrespective of the field of activity of the State, has long been settled. Later decisions of this Court have reinforced the foundation of this tenet and it would be sufficient to refer only to two recent decisions of this Court for this purpose."

[63] Similarly, in L.I.C. of India v. Consumer Education & Research Centre, 1995 5 SCC 482, the Court negatived the argument that exercise of executive power of the State was immune from judicial review and observed:

> ".... Every action of the public authority or the person acting in public interest or its acts give rise to public element, should be guided by public interest. It is the exercise of the public power or action hedged with public element becomes open to challenge. If it is shown that the exercise of the power is arbitrary, unjust and unfair it should be no answer for the State, its instrumentality, public authority or person whose acts have the insignia of public element to say that their actions are in the field of private law and they are free to prescribe any conditions or limitations in their actions as private citizens, similicitor, do in the field of private law. Its actions must be based on some rational and relevant principles. It must not be guided by traditional or irrelevant considerations.....
>
> This Court has rejected the contention of an instrumentality or the State that its action is in the private law field and would be immune from satisfying the tests laid under Article 14. The dichotomy between public law and private law rights and remedies, though may not be obliterated by any straight jacket formula, it would depend upon the factual matrix. The adjudication of the dispute arising out of a contract would, therefore, depend upon facts and circumstances in a given case.
>
> The distinction between public law remedy and private law filed cannot be demarcated with precision. Each case will be examined on its facts and circumstances to find out the nature of the activity, scope and nature of the controversy. The distinction between public law and private law remedy has now become too thin and practicably obliterated.....
>
> In the sphere of contractual relations the State, its instrumentality, public authorities or those whose acts bear insignia of public element, action to public duty or obligation are enjoined to act in a manner i.e. fair, just and equitable, after taking objectively all the relevant options into consideration and in a manner that is reasonable, relevant and germane to effectuate the purpose for public good and in general public interest and it must not take any irrelevant or irrational factors into consideration or arbitrary in its decision. Duty to act fairly is part of fair procedure envisaged under Articles 14 and 21. Every activity of the public authority or those under public duty or obligation must be informed by reason and guided by the public interest."

[64] In New India Public School v. HUDA, 1996 5 SCC 510, this Court approved the judgment of the Division Bench of the Punjab and Haryana High Court in Seven Seas Educational Society v. HUDA,1996 AIR(P&H) 229, whereby allotment of land in favour of the appellants was quashed and observed:

> ".... A reading thereof, in particular Section 15(3) read with Regulation 3(c) does indicate that there are several modes of disposal of the property acquired by HUDA for public purpose. One of the modes of transfer of property as indicated in Sub- section (3) of Section 15 read with sub-regulation (c) of Regulation 5 is public auction, allotment or otherwise. When public authority discharges its public duty the word "otherwise" would be construed to be consistent with the public purpose and clear and unequivocal guidelines or rules are necessary and not at the whim and fancy of the public authorities or under their garb or cloak for any extraneous consideration. It would depend upon the nature of the scheme and object of public purpose sought to be achieved. In all cases relevant criterion should be pre-determined by specific rules or regulations and published for the public. Therefore, the public authorities are required to make necessary specific regulations or valid guidelines to exercise their discretionary powers, otherwise, the salutory procedure would be by public auction. The Division Bench, therefore, has rightly pointed out that in the absence of such statutory regulations exercise of discretionary power to allot sites to private institutions or persons was not correct in law."

[65] What needs to be emphasized is that the State and/or its agencies/instrumentalities cannot give largesse to any person according to the sweet will and whims of the political entities and/or officers of the State. Every action/decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well defined policy, which shall be made known to the public by publication in the Official Gazette and other recognized modes of publicity and such policy must be implemented/executed by adopting a non- discriminatory or non-arbitrary method irrespective of the class or category of persons proposed to be benefitted by the policy. The distribution of largesse like allotment of land, grant of quota, permit licence etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favoritism or nepotism shall not influence the exercise of discretion, if any, conferred upon the particular functionary or officer of the State.

[66] We may add that there cannot be any policy, much less, a rational policy of allotting land on the basis of applications made by individuals, bodies, organizations or institutions de hors an invitation or advertisement by the State or its agency/instrumentality. By entertaining applications made by individuals, organisations or institutions for allotment of land or for grant of any other type of largesse the State cannot exclude other eligible persons from lodging competing claim. Any allotment of land or grant of other form of largesse by the State or its agencies/instrumentalities by treating the exercise as a private venture is liable to be treated as arbitrary, discriminatory and an act of favoritism and nepotism violating the soul of the equality clause embodied in Article 14 of the Constitution."

28. What are the duties, responsibilities and obligations of public authority in a system based on rule of law has been subject matter of a very recent decision of the Hon'ble Supreme Court in ***Indian Oil Corporation Ltd & Ors*** vs. ***Shashi Prabha Shukla & anr.,*** Civil Appeal No. 5565 of 2009 decided on 15.12.2017, wherein it was observed as under:

"[23] It is no longer res integra that a public authority, be a person or an administrative body is entrusted with the role to perform for the benefit of the public and not for private profit and when a prima facie case of misuse of power is made out, it is open to a court to draw the inference that unauthorized purposes have been pursued, if the competent authority fails to adduce any ground supporting the validity of its conduct.

[24] The following extract from the Halsbury's Laws of England, Fourth Edition, Vol.1(1) Administrative Law provide the foundation of these observations:

> "A public authority may be described as a person or administrative body entrusted with functions to perform for the benefit of the public and not for private profit. Not every such person or body is expressly defined as public authority or body, and the meaning of a public authority or body may vary according to the statutory context."

[25] In re, the duties, responsibilities and obligations of a public authority in a system based on rule of law, unfettered discretion or power is an anathema as every public authority is a trustee of public faith and is under a duty to hold public property in trust for the benefit of the laity and not for any individual in particular. The following excerpts from the Foulkes Administrative Law, 7th Edition at page 174 provide the elaborate insight:

> "A true trust exists when one person, the trustee, is under a duty to hold the trust property vested in him for the benefit of other persons, the beneficiaries. The term 'trust' is, however, used in a much wider sense. We may speak of government being 'entrusted' with power, of Parliament as the trustee which the nation has authorized to act on its behalf. The purpose of the use of the concept in such contexts is of course to emphasize that the powers and duties of such bodies should be exercised not for the advancement of their own interest, but that of the others, to underline their obligation to others.

[26] The distinction between the power of a public authority and a private person has since been succinctly brought about in the following quote from the celebrated work "Administrative Law", Tenth Edition by H.W.R. Wade and C.F. Forsyth:

> "The common theme of all the authorities so far mentioned is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust not absolutely that is to say, it can validly be used only in the right and proper way which parliament when conferring if is presumed to have intended. In a system based on rule of law, unfettered governmental discretion is contradictory in terms ....
>
> The powers of public authorities are therefore essentially different from those of private persons. A man making his will may, subject to any rights of his dependants, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land, to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest."

[27] In Akhil Bhartiya Upbhokta Congress vs. State of M.P., 2011 5 SCC 29 , this Court was seised as well with the nature of the norms to be adhered to for allotment of land, grant of quotas, permits, licenses etc. by way of distribution thereof as State largesse. The following observations provide the guiding comprehension:

> 65. What needs to be emphasised is that the State and/or its agencies/instrumentalities cannot give largesse to any person according to the sweet will and whims of the political entities and/or officers of the State. Every action/decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well-defined policy, which shall be made known to the public by publication in the Official Gazette and other recognised modes of publicity and such policy must be implemented/executed by adopting a non-discriminatory and non-arbitrary method irrespective of the class or category of persons proposed to be benefited by the policy. The distribution of largesse like allotment of land, grant of quota, permit licence, etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favouritism or nepotism shall not influence the exercise of discretion, if any, conferred upon the particular functionary or officer of the State.
>
> 66. We may add that there cannot be any policy, much less, a rational policy of allotting land on the basis of applications made by individuals, bodies, organisations or institutions dehors an invitation or advertisement by the State or its agency/instrumentality. By entertaining applications made by individuals, organisations or institutions for allotment of land or for grant of any other type of largesse the State cannot exclude other eligible persons from lodging competing claim. Any allotment of land or grant of other form of largesse by the State or its agencies/instrumentalities by treating the exercise as a private venture is liable to be treated as arbitrary, discriminatory and an act of favouritism and/or nepotism violating the soul of the equality clause embodied in Article 14 of the Constitution.

[28] In his work Administrative Law (6th Edn.) Prof. H.W.R. Wade highlighted the distinction between powers of public authorities and those of private persons in the following words:

> "The common theme of all the authorities so far mentioned is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust, no absolutely —that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms."

29. While rejecting the theory of absolute discretion, Lord Reid observed in Padfield v. Minister of Agriculture, Fisheries and Food2 :

> "… Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be 2 [1968] AC 997 34 determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the

Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court."

[30] The role of the Government as provider of services and benefits to the people was noticed in Ramana Dayaram Shetty v. International Airport Authority of India, 1979 3 SCC 489 in the following words:

"11. Today the Government in a welfare State, is the regulator and dispenser of special services and provider of a large number of benefits, including jobs, contracts, licences, quotas, mineral rights, etc. The Government pours forth wealth, money, benefits, services, contracts, quotas and licences. The valuables dispensed by Government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth. These valuables which derive from relationships to Government are of many kinds. They comprise social security benefits, cash grants for political sufferers and the whole scheme of State and local welfare. Then again, thousands of people are employed in the State and the Central Governments and local authorities. Licences are required before one can engage in many kinds of businesses or work. The power of giving licences means power to withhold them and this gives control to the Government or to the agents of Government on the lives of many people. Many individuals and many more businesses enjoy largesse in the form of government contracts. These contracts often resemble subsidies. It is virtually impossible to lose money on them and many enterprises are set up primarily to do business with the Government. The Government owns and controls hundreds of acres of public land valuable for mining and other purposes. These resources are available for utilisation by private corporations and individuals by way of lease or licence. All these mean growth in the Government largesse and with the increasing magnitude and range of governmental functions as we move closer to a welfare State, more and more of our wealth consists of these new forms. Some of these forms of wealth may be in the nature of legal rights but the large majority of them are in the nature of privileges."

[31] In the same vein, in Natural Resources Allocation, In Re, Special Reference No.1 of 2012 , this Court summed up the long line of judicial enunciations on this theme thus:

"107. From a scrutiny of the trend of decisions it is clearly perceivable that the action of the State, whether it relates to distribution of largesse, grant of contracts or allotment of land, is to be tested on the touchstone of Article 14 of the Constitution. A law may not be struck down for being arbitrary without the pointing out of a constitutional infirmity as McDowell case has said. Therefore, a State action has to be tested for constitutional infirmities qua Article 14 of the Constitution. The action has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. It should conform to the norms which are rational, informed with reasons and guided by public interest, etc. All these principles are inherent in the fundamental conception of Article 14. This is the mandate of Article 14 of the Constitution of India."

[32] This Court in Center for Public Interest Litigation and others Vs. Union of India and others,2012 3 SCC 2 , while examining the challenge to the allocation of 2G Telecom Services, reflected on the considerations that should inform the process thereof and observed thus:

> "95. This Court has repeatedly held that wherever a contract is to be awarded or a licence is to be given, the public authority must adopt a transparent and fair method for making selections so that all eligible persons get a fair opportunity of competition. To put it differently, the State and its agencies/instrumentalities must always adopt a rational method for disposal of public property and no attempt should be made to scuttle the claim of worthy applicants. When it comes to alienation of scarce natural resources like spectrum, etc. it is the burden of the State to ensure that a non-discriminatory method is adopted for distribution and alienation, which would necessarily result in protection of national/public interest.
>
> [33] Jurisprudentially thus, as could be gleaned from the above legal enunciations, a public authority in its dealings has to be fair, objective, non-arbitrary, transparent and non-discriminatory. The discretion vested in such an authority, which is a concomitant of its power is coupled with duty and can never be unregulated or unbridled. Any decision or action contrary to these functional precepts would be at the pain of invalidation thereof. The State and its instrumentalities, be it a public authority, either as an individual or a collective has to essentially abide by this inalienable and non-negotiable prescriptions and cannot act in breach of the trust reposed by the polity and on extraneous considerations. In exercise of uncontrolled discretion and power, it cannot resort to any act to fritter, squander and emasculate any public property, be it by way of State largesse or contracts etc. Such outrages would clearly be unconstitutional and extinctive of the rule of law which forms the bedrock of the constitutional order."

29. After making the observations and after having found the complexity of the offices of the Indian Oil Corporation, the Hon'ble Supreme Court passed the following orders:

> "35.....In this view of the matter, we direct the Corporation to cause an in-house inquiry to be made to fix the liability of the errant officials on the issue and decide appropriate action(s) against them in accordance with law within a period of two months herefrom. The Corporation after completing this exercise would submit a report before this Court for further orders, if necessary. We make it clear that any breach or non-compliance of this direction would be per se construed to be a contempt of this Court with penal consequences as contemplated in law."

30. What, therefore, can be deduced from the law expounded by the Hon'ble Supreme Court is that the State and/or its agencies/instrumentalities cannot give largesse to any person according to the sweet will and whims of their entities. Every action/decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well defined policy, which shall be made known to the public by publication in the official Gazette and other recognized modes of publicity and such policy must be implemented/executed by adopting a non- discriminatory or non-arbitrary method irrespective of the class or category of persons proposed to be benefitted by the policy. The distribution of largesse like allotment of land, grant of quota, permit licence, retail outlets etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favoritism or nepotism is

not to influence the exercise of such discretion, if any, conferred upon the particular functionary or officer of the State.

31. It is proved on record that the claim set up by the plaintiff was absolutely false. In ***Maria Margarida Sequeria Fernandes*** v. ***Erasmo Jack de Sequeria***, 2012 5 SCC 370, the Supreme Court held that false claims and defences are serious problems with the litigation. The Supreme Court held as under:-

> "False claims and false defences
>
> 84. False claim s and defences are really serious problems with real estate litigation, predominantly because of ever escalating prices of the real estate. Litigation pertaining to valuable real estate properties is dragged on by unscrupulous litigants in the hope that the other party will tire out and ultimately would settle with them by paying a huge amount. This happens because of the enormous delay in adjudication of cases in our Courts. If pragmatic approach is adopted, then this problem can be minimized to a large extent."

32. In ***Dalip Singh*** v. ***State of U.P.***, 2010 2 SCC 114, the Supreme Court observed that a new creed of litigants have cropped up in the last 40 years who do not have any respect for truth and shamelessly resort to falsehood and unethical means for achieving their goals. The observations of the Supreme Court are as under:-

> "1. For many centuries, Indian society cherished two basic values of life i.e., 'Satya' (truth) and 'Ahimsa' (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in the pre-Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, postIndependence period has seen drastic changes in our value system. The materialism has over shadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings.
>
> 2. In last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."

33. In ***Satyender Singh*** v. ***Gulab Singh***, 2012 129 DRJ 128, the Division Bench of Delhi High Court following Dalip Singh v. State of U.P. observed that the Courts are flooded with litigation with false and incoherent pleas and tainted evidence led by the parties due to which the judicial system in the country is choked and such litigants are consuming Courts? time for a wrong cause."

> The observations of Court are as under:-
>
> "2. As rightly observed by the Supreme Court, Satya is a basic value of life which was required to be followed by everybody and is recognized since many centuries. In spite of caution, courts are continued to be flooded with litigation with false and incoherent pleas and tainted evidence led by the

parties. The judicial system in the country is choked and such litigants are consuming courts" time for a wrong cause. Efforts are made by the parties to steal a march over their rivals by resorting to false and incoherent statements made before the Court. Indeed, it is a nightmare faced by a Trier of Facts; required to stitch a garment, when confronted with a fabric where the weft, shuttling back and forth across the warp in weaving, is nothing but lies. As the threads of the weft fall, the yarn of the warp also collapses; and there is no fabric left."

34. In ***Sky Land International Pvt. Ltd***. v. ***Kavita P. Lalwani,*** 2012 191 DLT 594, Delhi High Court held as under:-

"26.20 Dishonest and unnecessary litigations are a huge strain on the judicial system. The Courts are continued to be flooded with litigation with false and incoherent pleas and tainted evidence led by the parties. The judicial system in the country is choked and such litigants are consuming courts" time for a wrong cause. Efforts are made by the parties to steal a march over their rivals by resorting to false and incoherent statements made before the Court.

26.22 Unless the Courts ensure that wrongdoers are denied profit or undue benefit from the frivolous litigation, it would be difficult to control frivolous and uncalled for litigations. In order to curb uncalled for and frivolous litigation, the Courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that the Courts? scarce and valuable time is consumed or more appropriately wasted in a large number of uncalled for cases. It becomes the duty of the Courts to see that such wrong doers are discouraged at every step and even if they succeed in prolonging the litigation, ultimately they must suffer the costs. Despite settled legal positions, the obvious wrong doers, use one after another tier of judicial review mechanism as a gamble, knowing fully well that the dice is always loaded in their favour, since even if they lose, the time gained is the real gain. This situation must be redeemed by the Courts."

35. The judicial system has been abused and virtually brought to its knees by unscrupulous litigants like the plaintiff in this case. It has to be remembered that Court's proceedings are sacrosanct and should not be polluted by unscrupulous litigants. The defendant/appellant has abused the process of the Court.

36. The Hon'ble Supreme Court in ***K.K.Modi*** vs ***K.N.Modi and others***, reported in (1998) 3 SCC 573 has dealt in detail with the proposition as to what would constitute an abuse of the process of the Court, one of which pertains to re-litigation. It has been held at paragraphs 43 to 46 as follows:

"43. The Supreme Court Practice 1995 published by Sweet & Maxwell in paragraph 18/19/33 (page 344) explains the phrase "abuse of the process of the Court" thus: "This terms connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent improper use of its machinery and will in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation. . . . . .

The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances. And for this purpose considerations of public policy and the interests of justice may be very material."

44. One of the examples cited as an abuse of the process of Court is re-litigation. It is an abuse of the process of the Court and contrary to justice and

public policy for a party to re-litigate the same issue which has already been tried and decided earlier against him. The re-agitation may or may not be barred as res judicata. But if the same issue is sought to be re-agitated, it also amounts to an abuse of the process of the Court. A proceeding being filed for a collateral purpose, or a spurious claim being made in litigation may also in a given set of facts amount to an abuse of the process of the Court. Frivolous or vexatious proceedings may also amount to an abuse of the process of Court especially where the proceedings are absolutely groundless. The Court then has the power to stop such proceedings summarily and prevent the time of the public and the Court from being wasted. Undoubtedly, it is a matter of Courts' discretion whether such proceedings should be stopped or not; and this discretion has to be exercised with circumspection. It is a jurisdiction which should be sparingly exercised, and exercised only in special cases. The Court should also be satisfied that there is no chance of the suit succeeding.

45. In the case of Greenhalgh v. Mallard,1947 2 AllER 255, the Court had to consider different proceedings on the same cause of action for conspiracy, but supported by different averments.

The Court held that if the plaintiff has chosen to put his case in one way, he cannot thereafter bring the same transaction before the Court, put his case in another way and say that he is relying on a new cause of action. In such circumstances he can be met with the plea of res judicata or the statement or plaint may be struck out on the ground that the action is frivolous and vexatious and an abuse of the process of the Court.

46. In Mcllkenny v. Chief Constable of West Midlands Police Force, 1980 2 AllER 227, the Court of Appeal in England struck out the pleading on the ground that the action was an abuse of the process of the Court since it raised an issue identical to that which had been finally determined at the plaintiffs ' earlier criminal trial. The Court said even when it is not possible to strike out the plaint on the ground of issue estoppel, the action can be struck out as an abuse of the process of the Court because it is an abuse for a party to re-litigate a question or issue which has already been decided against him even though the other party cannot satisfy the strict rule of res judicata or the requirement of issue estoppels."

37. The plaintiff by keeping these proceedings alive has gained an undeserved and unfair advantage. The plaintiff has successful in dragging the proceedings for a very long time on one count or the other and because of his wrongful possession he has drawn delight in delay in disposal of the cases by taking undue advantage of procedural complications. The case at hand shows that frivolous defences and frivolous litigation is a calculated venture involving no risks situation. One has only to engage professionals to prolong the litigation so as to deprive the rights of a person and enjoy the fruits of illegalities. The Court has been used as a tool by the plaintiff to perpetuate illegalities and has perpetuated an illegal possession. It is on account of such frivolous litigation that the court dockets are overflowing. Here it is apt to reproduce the observations made by the Hon'ble Supreme Court in paras 174, 175 and 197 of the judgment in ***Indian Council for Enviro-Legal Action*** vs. ***Union of India and others***, 2011 8 SCC 161 which are as under:

"174. In Padmawati vs Harijan Sewak Sangh, 2008 154 DLT 411 decided by the Delhi high Court on 6.11.2008, the court held as under: (DLT p.413, para 6)

"6. The case at hand shows that frivolous defences and frivolous litigation is a calculated venture involving no risks situation. You have only to engage professionals to prolong the litigation so as to deprive the rights of a person and enjoy the fruits of illegalities. I consider that in such cases where Court

finds that using the Courts as a tool, a litigant has perpetuated illegalities or has perpetuated an illegal possession, the Court must impose costs on such litigants which should be equal to the benefits derived by the litigant and harm and deprivation suffered by the rightful person so as to check the frivolous litigation and prevent the people from reaping a rich harvest of illegal acts through the Court. One of the aims of every judicial system has to be to discourage unjust enrichment using Courts as a tool. The costs imposed by the Courts must in all cases should be the real costs equal to deprivation suffered by the rightful person."

We approve the findings of the High Court of Delhi in the aforementioned case.

175. The Court also stated: (Padmawati case, DLT pp. 414- 15, para 9)

"Before parting with this case, we consider it necessary to observe that one of the main reasons for over-flowing of court dockets is the frivolous litigation in which the Courts are engaged by the litigants and which is dragged as long as possible. Even if these litigants ultimately loose the lis, they become the real victors and have the last laugh. This class of people who perpetuate illegal acts by obtaining stays and injunctions from the Courts must be made to pay the sufferer not only the entire illegal gains made by them as costs to the person deprived of his right and also must be burdened with exemplary costs. Faith of people in judiciary can only be sustained if the persons on the right side of the law do not feel that even if they keep fighting for justice in the Court and ultimately win, they would turn out to be a fool since winning a case after 20 or 30 years would make wrongdoer as real gainer, who had reaped the benefits for all those years. Thus, it becomes the duty of the Courts to see that such wrongdoers are discouraged at every step and even if they succeed in prolonging the litigation due to their money power, ultimately they must suffer the costs of all these years long litigation. Despite settled legal positions, the obvious wrong doers, use one after another tier of judicial review mechanism as a gamble, knowing fully well that dice is always loaded in their favour, since even if they lose, the time gained is the real gain. This situation must be redeemed by the Courts."

197. The other aspect which has been dealt with in great details is to neutralize any unjust enrichment and undeserved gain made by the litigants. While adjudicating, the courts must keep the following principles in view.

1. It is the bounden duty and obligation of the court to neutralize any unjust enrichment and undeserved gain made by any party by invoking the jurisdiction of the court.

2. When a party applies and gets a stay or injunction from the court, it is always at the risk and responsibility of the party applying. An order of stay cannot be presumed to be conferment of additional right upon the litigating party.

3. Unscrupulous litigants be prevented from taking undue advantage by invoking jurisdiction of the Court.

4. A person in wrongful possession should not only be removed from that place as early as possible but be compelled to pay for wrongful use of that premises fine, penalty and costs. Any leniency would seriously affect the credibility of the judicial system.

5. No litigant can derive benefit from the mere pendency of a case in a court of law.

6. A party cannot be allowed to take any benefit of his own wrongs.

7. Litigation should not be permitted to turn into a fruitful industry so that the unscrupulous litigants are encouraged to invoke the jurisdiction of the court.

8. The institution of litigation cannot be permitted to confer any advantage on a party by delayed action of courts."

38. The further question which now arises is as to how to curb this tendency of abuse of process of court. As suggested in Kishore Samrita, one of the ways to curb this tendency is to impose realistic or punitive costs. The Hon'ble Supreme Court in ***Ramrameshwari Devi and others*** Vs. ***Nirmala Devi and others***, 2011 8 SCC 249 took judicial notice of the fact that the courts are flooded with these kinds of cases because there is an inherent profit for the wrongdoers and stressed for imposition of actual, realistic or proper costs and it was held:-

"52. The main question which arises for our consideration is whether the prevailing delay in civil litigation can be curbed? In our considered opinion the existing system can be drastically changed or improved if the following steps are taken by the trial courts while dealing with the civil trials:

A. Pleadings are the foundation of the claims of parties. Civil litigation is largely based on documents. It is the bounden duty and obligation of the trial Judge to carefully scrutinize, check and verify the pleadings and the documents filed by the parties. This must be done immediately after civil suits are filed.

B. The court should resort to discovery and production of documents and interrogatories at the earliest according to the object of the Act. If this exercise is carefully carried out, it would focus the controversies involved in the case and help the court in arriving at the truth of the matter and doing substantial justice.

C. Imposition of actual, realistic or proper costs and/or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases the courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.

D. The court must adopt realistic and pragmatic approach in granting mesne profits. The court must carefully keep in view the ground realities while granting mesne profits.

E. The courts should be extremely careful and cautious in granting ex parte ad interim injunctions or stay orders. Ordinarily short notice should be issued to the defendants or respondents and only after hearing the parties concerned appropriate orders should be passed.

F. Litigants who obtained ex parte ad interim injunction on the strength of false pleadings and forged documents should be adequately punished. No one should be allowed to abuse the process of the court.

G. The principle of restitution be fully applied in a pragmatic manner in order to do real and substantial justice.

H. Every case emanates from a human or a commercial problem and the court must make serious endeavour to resolve the problem within the framework of law and in accordance with the well-settled principles of law and justice.

I. If in a given case, ex parte injunction is granted, then the said application for grant of injunction should be disposed of on merits, after hearing both sides as expeditiously as may be possible on a priority basis and undue adjournments should be avoided.

J. At the time of filing of the plaint, the trial court should prepare a complete schedule and fix dates for all the stages of the suit, right form filing of the written statement till pronouncement of the judgment and the courts should strictly adhere to the said dates and the said timetable as far as possible. If any interlocutory application is filed then the same be disposed of in between the said dates of hearing fixed in the said suit itself so that the date fixed for the main suit may not be disturbed."

39. The Hon'ble Supreme Court in ***Indian Council for Envirolegal Action*** Vs. ***Union of India and others***, (2011) 8 SCC 161 observed:-

"191. In consonance with the principles of equity, justice and good conscience Judges should ensure that the legal process is not abused by the litigants in any manner. The court should never permit a litigant to perpetuate illegality by abusing the legal process. It is the bounden duty of the court to ensure that dishonesty and any attempt to abuse the legal process must be effectively curbed and the court must ensure that there is no wrongful, unauthorized or unjust gain for anyone by the abuse of the process of the court. One way to curb this tendency is to impose realistic costs, which the respondent or the defendant has in fact incurred in order to defend himself in the legal proceedings. The courts would be fully justified even imposing punitive costs where legal process has been abused. No one should be permitted to use the judicial process for earning undeserved gains or unjust profits. The court must effectively discourage fraudulent, unscrupulous and dishonest litigation.

192. The court's constant endeavour must be ensure that everyone gets just and fair treatment. The court while rendering justice must adopt a pragmatic approach and in appropriate cases realistic costs and compensation be ordered in order to discourage dishonest litigation. The object and true meaning of the concept of restitution cannot be achieved or accomplished unless the courts adopt a pragmatic approach in dealing with the cases.

193. This Court in a very recent case Ramrameshwari Devi v. Nirmala Devi had an occasion to deal with similar questions of law regarding imposition of realistic costs and restitution. One of us (Bhandari, J.) was the author of the judgment. It was observed in that case as under: (SCC pp. 268-69, paras 54-55)

"54. While imposing costs we have to take into consideration pragmatic realities and be realistic as to what the defendants or the respondents had to actually incur in contesting the litigation before different courts. We have to also broadly take into consideration the prevalent fee structure of the lawyers and other miscellaneous expenses which have to be incurred towards drafting and filing of the counter-

affidavit, miscellaneous charges towards typing, photocopying, court fee, etc.

55. The other factor which should not be forgotten while imposing costs is for how long the defendants or respondents were compelled to contest and defend the litigation in various courts. The appellants in the instant case have harassed the respondents to the hilt for four decades in a totally frivolous and dishonest litigation in various courts. The appellants have also wasted judicial time of the various courts for the last 40 years."

40. The answer to the question as to why the plaintiff kept the instant litigation alive is not difficult to find. The Court can take judicial notice that Baddi is probably the only developed and still rapidly developing industrial area in the whole of Himachal Pradesh and, therefore, there was and still a great demand of fuel. It was for this sole reason that this litigation has been kept alive knowing fully well that there was no substance in the same.

41. Accordingly, the appeal is dismissed with costs of Rs. 50,000/- to be paid by the plaintiff to the defendants. The defendants are directed to take over the possession of the retail out within 48 hours of receipt of certified copy of this judgment and thereafter to handover the same to the eligible candidate.

42. In addition to above, the Corporation is directed to cause an in-house inquiry to be made to fix the liability of the errant officials on the issue and decide appropriate action(s) against them in accordance with law within a period of two months irrespective of the fact whether such officials are still serving or have retired. The Corporation after completing this exercise shall submit a report before this Court for further orders and for this purpose the case be listed before this Court on 28.2.2018. That apart, the defendants shall claim damages from the plaintiff and also register a case of criminal breach of trust.

43. The appeal is disposed of as aforesaid, so also the pending application, if any.

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

Sh. Pavel Garg. ...Plaintiff

Versus

Sh. Sunil Sood. ...Defendant

OMP No. 48 of 2017 in
Civil Suit No. 77 of 2016
Order Reserved on: 8.12.2017
Date of decision: 28.12.2017

Arbitration and Conciliation Act, 1996- Section 8- Suit for recovery of Rs. 2,31,34,553/- on the basis of Commercial Buyers Agreement- Defendant moved an application for referring the matter to the Arbitrator pleading therein that there is an arbitration clause in original terms and conditions for allotment and sale of the subject matter – **Held**, that terms and conditions for allotment and sale have merged into the Commercial Buyers Agreement- Section 8 of the Arbitration and Conciliation Act, 1996 can only be pressed into service, if there is Arbitration clause in the agreement governing the transaction - No arbitration clause in the buyers agreement- Section 8 cannot be invoked- Further held, when it is not the intention of the parties

that arbitration would be the sole remedy as happens when parties keep option either to refer the dispute to the Arbitrator or get it adjudicated in the Civil Court, then it is not binding to refer the matter to Arbitrator - No merit in the instant application- Application stands dismissed.

(Para-8 and 24 to 26)

Cases referred:

Wellington Associates Ltd. Vs. Kirti Mehta (2000) 4 SCC 272

Hindustan Petroleum Corporation Ltd. Vs. Pinkcity Midway Petroleums, (2003) 6 SCC 503

Branch Manager, M/s Magma Leasing & Finance Ltd. & Anr. Vs. Potluri Madhavilata & Another AIR 2010 SC 488

M/s Chaitanya Builders & Leasing (P) Ltd., Chennai Vs. Dr. Tulsi Ram and another, 2014 (11) R.C.R. (Civil) 2680

For the Plaintiff: Ms.Kiran Dhiman, Advocate.

For the Defendant: Mr.Dibender Ghosh, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

Plaintiff has filed a suit for recovery of Rs.2,31,34,553/- for payment made to defendant in pursuance to the Commercial Buyers Agreement (herein after referred to as Buyer's Agreement) dated 23.11.2007 on account of failure of defendant to handover the possession of shop in question booked by the plaintiff and execution of the title deed thereof.

2. On receiving notice, defendant, before filing written statement, has moved present application for referring the parties to arbitration on the basis of arbitration clause in terms and conditions for allotment and sale of a shop/showroom/anchor store/multiplex/food court/hotel/restaurant etc. in the proposed shopping-cum-multiplex named as 'Home Land City Mall' at village Kalyanpur, Sai Chakkan Road, Baddi (Himachal Pradesh) (herein after referred as terms and conditions for allotment and sale), annexed to the application form submitted by the applicant at the time of applying for allotment of shop on 10.11.2006, claiming that the said terms and conditions stand incorporated in buyers agreement, as agreed by the parties in the said agreement.

3. Plaintiff has objected referring the dispute to the arbitrator on the ground that Buyer's Agreement is independent of terms and conditions for allotment and sale and there is no arbitration agreement existing between the parties after execution of Buyer's Agreement, as the terms and conditions for allotment and sale has lost their force after allotment of shop, more particularly after execution of Buyer's Agreement, comprehensively dealing with all issues between the parties.

4. I have heard learned counsel for the parties and have also gone through the terms and conditions for allotment and sale and contents of Buyer's Agreement.

5. It is undisputed in present case that the space has been allotted to the applicant and Buyer's Agreement has been executed between the parties on making of payment of earnest money as required according to terms and conditions for allotment and sale. In operative portion of Buyer's Agreement before terms and conditions agreed by and between the parties, it has been agreed as under:-

> *"And Whereas a Proper Agreement of Sale on standard format of the Promoter, is being executed now incorporating all the details embodied in the application and terms and conditions of sale, which shall form part and parcel of this Commercial Premises Buyer's Agreement."*

6. Contention of plaintiff is that the terms and conditions which have been incorporated in Buyer's Agreement are only to be considered as part and parcel of this agreement and it was never intention of the parties to have arbitration clause in this agreement and therefore, deliberately arbitration clause was not incorporated in this agreement and only clause 53 providing the jurisdiction of Himachal Pradesh High Court at Shimla and its subordinate Courts in Himachal Pradesh to resolve the dispute arising out of concerning this transaction and/or touching such transaction, has been incorporated, which reads as under:-

> *"53. That the Himachal Pradesh High Court at Shimla and Courts in Himachal Pradesh subordinate to it, alone shall have jurisdiction in all matters arising out of, touching and/or concerning this transaction."*

7. It is stand of defendant that by virtue of operative part referred herein above, all the details embodied in the application and terms and conditions of allotment and sale are part and parcel of the Buyer's Agreement. Defendant has also relied upon clause 27 of the terms and conditions for allotment and sale, which provides merger of the terms and conditions into the Buyer's Agreement upon the execution of the same.

8. In alternative, it is contended on behalf of plaintiff that even if terms and conditions for allotment and sale are considered to be part and parcel of Buyer's Agreement, then also it was never intention of parties to refer the dispute solely to the arbitration for its resolution, but there was an option available to the parties to refer the dispute either to arbitration or to adjudicate it in the Civil Court, competent to adjudicate, within the territorial jurisdiction of High Court of Himachal Pradesh. Reliance has been put by plaintiff on pronouncement of the Apex Court in case ***Wellington Associates Ltd. Vs. Kirti Mehta*** reported in ***(2000) 4 SCC 272***, wherein it has been held that where it is not the intention of parties that arbitration is to be sole remedy and it appears that parties agreed that they can also go to arbitration in case the agreed party does not wish to go to Civil Court by way of suit, in that eventuality, fresh consent to go to arbitration is necessary and therefore, it is contended that even if arbitration clause 28 is considered to be part and parcel of the Buyer's Agreement, then also, in view of clause 29, fresh consent of parties to refer the dispute to arbitration is necessary and as the plaintiff has chosen to file Civil Suit, the said clause cannot be invoked.

9. After giving thoughtful consideration to the contention of parties and having gone through the record, for the reasons embodied hereinafter, I am of the considered opinion that in the present case arbitration agreement does not exist between the parties and therefore, for want of pre-requisite conditions for invoking Section 8 of the Arbitration and Conciliation Act, 1996 (in short the Act, 1996) application of defendant must fail.

10. Section 7 of the Act says that arbitration agreement means an agreement by the parties to submit all or certain dispute to arbitration which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not and the said agreement shall be in writing and may be in the form of arbitration clause in a contract or in the form of a separate agreement signed by the parties.

11. Section 8 of the Act 1996 reads as under:-

> ***"Power to refer parties to arbitration where there is an arbitration agreement****.—(1) A judicial authority, before which an action is brought in a matter which is the subject of a arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds the prima facie no valid arbitration agreement exists.*
>
> *(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof:*

Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

12. There is no quarrel on the settled position of law that where arbitration clause exists in the agreement, therefore, Court has a mandatory duty to refer dispute arising between the contacting parties to arbitration and Civil Court has no jurisdiction to continue with the suit, once an application under Section 8 of the Act, 1996 has been filed. (See ***Hindustan Petroleum Corporation Ltd. Vs. Pinkcity Midway Petroleums, (2003) 6 SCC 503***).

13. The Apex Court in case ***Branch Manager, M/s Magma Leasing & Finance Ltd. & Anr. Vs. Potluri Madhavilata & Another*** reported in ***AIR 2010 SC 488*** has held that Section 8 of the Act is in the form of legislative command to the Court and once the prerequisite conditions are satisfied, the Court must refer the parties to arbitration and as a matter of fact on fulfillment of conditions of Section 8 of the Act, no option is left to the Court and the Court has to refer the parties to arbitration. In this judgment, the Apex Court has enumerated the prerequisite conditions in para 22 as under:-

"22. An analysis of Section 8 would show that for its applicability, the following conditions must be satisfied: (a) that there exists an arbitration agreement; (b) that action has been brought to the court by one party to the arbitration agreement against the other party; (c) that the subject-matter of the suit is same as the subject-matter of the arbitration agreement; (d) that the other party before he submits his first statement of the substance of the dispute, moves the court for referring the parties to arbitration; and (e) that along with the application the other party tenders the original arbitration agreement or duly certified copy thereof."

14. In present case, clauses 28 and 29 of terms and conditions for allotment and sale, providing forum for resolution of dispute, read as under:-

"28. In case of any dispute the matter shall be referred to Arbitration. Arbitrator shall be appointed by Promoter. Arbitration proceedings shall be conducted at Panchkula and English shall be the language.

29. Any dispute arising out between the Applicant and the Promoter regarding the said allotment, the Himachal Pradesh High Court of Shimla or any court in Himachal Pradesh subordinate to it alone shall have jurisdiction to adjudicate the same."

15. Clause 27 provides merger of terms in terms and conditions of allotment and sale in the Buyer Agreement upon execution of Commercial Premises Buyer's Agreement, which reads as under:-

"27. The term herein shall merge into the Buyer Agreement upon the execution of Commercial Premises Buyer's Agreement."

16. Clauses 1 and 2 of these terms and conditions indicate that it is an application for allotment of space, allotment whereof is entirely at the discretion of Promoter with right to the Promoter to reject any offer without assigning any reason therefor. According to clause 5, applicant shall have to sign and execute the letter of allotment of space or the Commercial Premises Buyer's Agreement, as and when desired by the Promoter, sent to the applicant for his signature after making full payment of earnest money by the applicant to the extent of 25% of

total sale consideration, as may be due from the applicant to the Promoter as provided therein and failure to sign and execute the Commercial Premises Buyer's Agreement within the stipulated period shall entail cancellation of allotment.

17. Bare reading of operative portion reproduced supra wherein incorporation of all details embodied in the application and terms and conditions of sale in Buyer's Agreement has been referred, indicates that on execution of Buyer's Agreement, all the details embodied in the application and terms and conditions for allotment and sale, which are being incorporated now in Buyer's agreement, shall form part and parcel of this Commercial Premises Buyer's Agreement.

18. Clause 27 of terms and conditions for allotment and sale provides merger of these terms into Buyer's Agreement upon execution of the same and as noticed supra, Buyer's Agreement provides that terms and conditions for allotment and sale, incorporated in Buyer's Agreement shall be part and parcel of it. There are certain clauses of terms and conditions for allotment and sale, which have been reproduced, rewritten or redrafted and have been incorporated in the Buyer's Agreement and there are others which have not been incorporated. The said fact coupled with clause 27 of terms and conditions for allotment and sale indicates that after execution of Buyer's Agreement, terms and conditions for allotment and sale will lost their separate entity and the Buyer's Agreement shall replace these terms and conditions for allotment and sale. Had the intention of parties been to keep terms and conditions for allotment and sale alive in addition to Buyer's Agreement, there would have no repetition or reproduction or reconstruction and incorporation of large number of terms and conditions for allotment and sale in the Buyer's Agreement and in such eventuality, there was no occasion for specific clause 53 of the Buyer's Agreement providing the High Court of Himachal Pradesh or subordinate Courts to it as a forum having jurisdiction for resolution of dispute and omitting to incorporate arbitration clause in this Agreement, in contrast to clauses 28 and 29 of the terms and conditions for allotment and sale.

19. In view of above discussion in preceding para, contention of defendant to consider clause 28 of terms and conditions for allotment and sale as part and parcel of Buyer's Agreement on the basis of clause 27 of the terms and conditions for allotment and sale, is also misconceived for the reasons that operative portion of Buyer's Agreement, as discussed above, specifically provides that details of terms and conditions for allotment and sale, being incorporated now, shall form part and parcel of Buyer's Agreement and therefore, non-incorporation of terms of clause 28 in Buyer's agreement amounts exclusion of the said clause. Merger clause 27 denotes that after execution of Buyer's Agreement, the terms and conditions for allotment and sale shall lose its entity and relevance and the terms and conditions of Buyer's Agreement shall prevail and such interpretation of clause 27 find support from the various clauses of Buyer's Agreement, wherein terms and conditions for allotment and sale which have been intended to be part and parcel of Buyer's Agreement, have been rewritten or re-iterated specifically.

20. In Buyer's Agreement, it is specifically stated that *proper* agreement of sale on standard format of Promoter is being executed now incorporating all the details embodied in the application and terms and conditions for allotment and sale which shall form part and parcel of this Commercial Premises Buyer's Agreement and thereafter terms and conditions agreed by and between the parties have been embodied. Contention of defendant that by virtue of this operative clause, all terms and conditions for allotment and sale have automatically become the part of the Buyer's Agreement, even without having specific reference a formal incorporation is not sustainable as language of relevant operative part of Buyer's agreement is unambiguously making it clear that only those details, embodied in the application and terms and conditions of sale, shall form part and parcel of the Buyer's Agreement, which are now being incorporated by executing this proper agreement of sale on standard format of promoter. For this interpretation of this clause, I find support on comparison of terms and conditions of Buyer's Agreement and terms and conditions for allotment and sale. Had it been intention of parties to make all terms and conditions for allotment and sale as part and parcel of Buyer's Agreement, there would have no necessity to reiterate the terms and conditions for allotment and sale again in Buyer's

Agreement. Certain terms and conditions for allotment and sale have been incorporated specifically by rewriting or reproducing those terms and conditions in the Buyer's Agreement.

21. Clause 29 of terms and conditions for allotment and sale provides jurisdiction of High Court of Himachal Pradesh or Courts subordinate to it, a forum for resolution of dispute. Same terms and conditions have been provided in clause 53 of the Buyer's Agreement, whereas arbitration clause 28 of terms and conditions for allotment and sale has not been re-iterated in the Buyer's Agreement.

22. Apart from specific incorporation of clause 29 of terms and conditions of allotment and sale, providing High Court of Himachal Pradesh and its subordinate Courts as forum to resolve dispute, in clause 53 of Buyer's Agreement, clause 6 of terms and conditions for allotment and sale which provides that rates charged are for the area which is commonly known as Super Area including the area of the Space being sold plus proportionate share of area under common passages, staircase, wares services, open areas etc. i.e. super area basis has been incorporated in Buyer's Agreement and corresponding clause is 3(a), which reads as under:-

> *"3(a) That the Allottee agrees that for the purpose of calculating the sale price in respect of the said Space, the super area shall be the covered area, inclusive of the area under the periphery walls, area under columns and walls within the said Space, half of the area of the wall common with other Space adjoining the said Space plus proportionate share of the service areas to be utilized for common use and facilities viz areas under staircases, circulation areas, walls, lifts, shafts, passage, corridors, lobbies, refuge areas, stilts and the like."*

23. Without reproducing other terms and conditions reiterated specifically in Buyer's Agreement, it would be suffice to refer some of corresponding clauses of both i.e. application for allotment and sale and Buyer's Agreement summarily. Clause 7 and some part of Clause 8 of terms and conditions for allotment and sale has been rewritten in clause 4 of the Buyer's Agreement. Clause 9 of terms and conditions for allotment and sale has been rewritten in clause 2(b), 12, 13 and 14 of the Buyer's Agreement. Clause 11 of terms and conditions for allotment and sale has been referred in clause 41 of the Buyer's Agreement. Contents of clause 12 of terms and conditions for allotment and sale have been reiterated in clause 38 of Buyer's Agreement and clauses 14 and 15 of terms and conditions for allotment and sale have been rewritten in clauses 22 and 40 of Buyer's Agreement. Contents corresponding to clause 17 of terms and conditions for allotment and sale find mention in clauses 31 and 33 of Buyer's Agreement. Provisions of clauses 18 and 19 of terms and conditions for allotment and sale have been dealt with in clauses 26 and 6 of Buyer's Agreement, respectively. Perusal of terms and conditions for allotment and sale and Buyer's Agreement reflects that there are several other clauses which have been incorporated by rewriting or redrafting in the Buyer's Agreement.

24. In the facts and circumstances of the case, terms and conditions for allotment and sale were alive and applicable till the allotment made by the promoter/defendant and execution of Buyer's Agreement between the parties, thereafter it is the Buyer's Agreement which is in existence after merging the terms and conditions for allotment and sale in it, as agreed upon between the parties in the Buyer's Agreement. Therefore, arbitration clause of terms and conditions for allotment and sale shall not become part and parcel of the Buyer's Agreement automatically. I also draw support from the pronouncement of High Court of Calcutta in AP No. 9 of 2015, titled ***Ambuja Neotia Holidings Private Limited Vs. M/s Planet M Retail Limited***, decided on 7th August, 2015, relied upon by the plaintiff, wherein it has been observed as under:-

> *"22….. Except in certain specified cases, like a charter-party, when an agreement refers to a previous agreement and incorporates the clauses thereof in the subsequent agreement by the mere reference, only the commercial clauses get incorporated and an arbitration clause cannot be deemed to have been incorporated by implication in the subsequent agreement unless it is specifically referred to and included. Similarly, when two parties enter into an agreement and the same is governed by an arbitration clause, the arbitration clause has to*

be regarded as personal to the parties and the assignees of the rights of the parties to the matrix contract do not necessarily inherit the arbitration clause unless it is demonstrated that they had agreed to adhere to the same in addition to the substantive terms of the matrix contract."

25. Judgment of Madras High Court in ***M/s Chaitanya Builders & Leasing (P) Ltd., Chennai Vs. Dr. Tulsi Ram and another,*** reported in ***2014 (11) R.C.R. (Civil) 2680***, relied upon by defendant, is not applicable in the facts and circumstances of the present case, as in the said case it was admitted fact between the parties that arbitration clause mentioned in the earlier agreement dated 27.3.2006 stood specifically incorporated by virtue of clause 11 of the supplementary agreement dated 17.2.2009, which is not the case in the matter in hand at present.

26. The effect of pronouncement of the Apex Court in *Kirti Mehta's case* supra is not necessary to be discussed, as in that case there were two options available to the parties for resolution of their dispute, either approaching the Civil Court or referring the matter to the arbitration with consent. In present case before execution of Buyer's Agreement, similar two options were available to the parties, however, as discussed herein before after execution of Buyer's Agreement, there is only one clause in existence providing High Court or its subordinate Courts as a forum for adjudication of dispute, omitting the arbitration clause in subsequent Buyer's Agreement which was there in earlier terms and conditions for allotment and sale.

27. Therefore, I find that in the Buyer's Agreement, arbitration clause, which is prerequisite condition for invoking the provisions of Section 8 of the Act, does not exist, therefore, present application filed by defendant is devoid of merit. In any case, if plea of incorporation of arbitration clause 28 of terms and conditions for allotment and sale is accepted, then also on applying ratio of law propounded in *Kirti Mehta's case*, as there will be two options available for resolution of dispute, unless consented by another party (herein plaintiff), the dispute cannot be referred for arbitration.

28. In view of above discussion, this application is dismissed.

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